Political Jaywalking and Legal Jiggery-Pokery in the Governance of Nigeria: Wherein Lies the Rule of Law? Prof. GOS Amadi - 2011

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1. Introduction

The Vice-Chancellor, Professor Bartho Okolo, the Chairman of the occasion, Fellow Academics and Members of the Academia, Members of the Learned Profession – the Bench and the Bar, the Clergy, Members of the Fourth Estate of the Realm, Distinguished Ladies and Gentlemen, Lions and Lionesses.

Let me state straightaway that I very much appreciate feminist jurisprudence, that is the science of law which examines the relationship between women and law, including why in interpretation of statutes in some jurisdictions like Nigeria, "he" is construed to include "she", but not vice-versa. The reason for this is perhaps to avoid the humdrum use of "he" or "she," "his" or her," thereby saving time and space in statutory provisions. In this lecture, I shall employ, unless otherwise necessary, the masculine gender to represent both sexes.

Mr. Chairman, sir, it is with deepest humility and joy that I salute everyone present at this inaugural lecture. I also salute my distinguished predecessors-in-intellectualism, who over the years, begining from 1976, did what I am doing today. Then in 1976, when the erudite Professor Ikenna Nzimiro delivered the First Inaugural Lecture, I was a second year law student of this great university.

Interestingly, yet regrettably, the Faculty of Law seems to have waited for me to deliver its first inaugural lecture. It is on record that since the Faculty came into being 50 years before, producing its first set of law professors in the 1970s, when I was a student, no inaugural lectures have been delivered. That I

am the trailblazer in this regard at the golden jubilee of the first Law Faculty in Nigeria is neither by accident nor by design. It is simply an ordainment of God, who has made this beautiful day possible. To Him, therefore, be the glory!

The essence of inaugural lecture is trite amongst academics the world over. But it is always refreshing to repeat what inaugural lecture entails, at least for the benefit of our younger colleagues at the lower rung of the academic ladder.

An inaugural lecture is an omen of intellectual goodness, enabling the academic, after many years of painstaking research and teaching, resulting in numerous learned publications, introduces himself to the academia as a professor of his chosen field of knowledge. At the inaugural lecture the professor is, for once, permitted to blow his own trumpet, albeit with dignity and decorum. In delivering the lecture, the professor is in the category of the preacher-from-the-pulpit and the football referee, whose audience and spectators respectively are only required to listen and watch without question.

The listener or the spectator may, in his wisdom, consider nonsensical certain statements of the preacher or decisions of the referee. But no matter the gravity of the perceived nonsense, the listener or spectator is hamstrung in the circumstance to protest. Similarly, as you sit back to enjoy this lecture, my professorial nonsense, remember that a sensible way of becoming sensible is to distil sense from nonsense and add sense to another sense extracted from another nonsense. This is a recurring decimal which confronts us in the struggle to make sense out of our existence.

Therefore, a professor is that person who, through his research, knows the sense in nonsense, and the more he knows about nonsense, the more he distils sense from the nonsense and the aggregate of the varied sense extracted from diverse nonsense makes cumulative sense. The professor's research on nonsense, since the remotest of antiquity, tends to make sense of the world. This is perhaps why it is said that no nation can rise above the sense (standard) of its universities.

Mr. Vice-Chancellor, ladies and gentlemen, I hope I am thus far making sense. This brings to mind the import of "inaugural". This is a derivative from "inaugurate," and its Latin origin *inaugurat*. This is interpreted as omens, from the flight of birds, based on the Latin *augurare*, i.e. to augur[1], which etymologically means "diviner"[2]. The adjective, "inaugural" and the noun "inauguration" means marking the begining of an institution, activity, or period of office.[3] Legally speaking, it is a formal ceremony inducting someone into office.[4]

Today, I am being, so to speak, inducted into the chair of law. One unique nature about this induction is that it is self-driven. It is not the academia that would admit the academic by insisting under any binding rule that the latter delivers his inaugural lecture. Once an academic is adjudged intellectually competent, by virtue of his learned publications, to become a professor of his university, that is an inauguration. The *inauguree* is expected, however, to deliver his or her

[1] *Concise Oxford English Dictionary*, 11th ed., p. 718
[2] *Ibid.,* p. 86
[3] *Ibid.,* p. 718
[4] *Black's Law Dictionary,* 8th ed., p.775

acceptance speech, otherwise known as inaugural address or lecture as the case may be.

Naturally, any person who is inducted into a new post – an enviable post- is usually full of excitement, a great enthusiasm that underlies his desire to address an expectant assembly as to his vision and mission while he occupies that position. This is similarly so with the academic who attains the chair of his chosen field of learning. However, academics, and I mean academics of this university, tend to display little or no excitement when they *eventually* become professors. The reason for this lethargy is not far to seek: it hinges on the regrettable and notorious delay in promoting academics who merit to be so promoted to the rank of professor. Several factors contribute to this employment anomaly; but discussing them here is beyond this discourse. In any case, suffice it to say that at a certain occasion in the Faculty of Law, I told my colleagues who cared to listen that once you attain the rank of senior lecturer in this university, politics apparently determines whether you stew in the juice of senior lectureship or dance in the open but jealously guarded space of professorship!

My inaugural lecture is belated in coming because my promotion that enables it was six years belated. Even so, I am very lucky, comparatively speaking, because there were (and are) colleagues whose promotion was ten or more years retrospective! And most appallingly, there were those who attained their chair posthumously, e.g., Professor H.M.G. Ezenwaji. May his noble soul rest in peace.

Notwithstanding the undue delay in professorial promotion, it is never too late to give an inaugural lecture, even if delivered

on the verge of retirement. It is the desire of every academic to give his inaugural lecture. This formally announces his attainment to that enviable office of professor. It gives him the opportunity to profess his learning before a critical and discerning audience on any choice topic, usually within the discipline of the professor.

I am greatly humbled and happy to deliver this inaugural lecture. The merciful and wondrous Good Lord, who miraculously saved me from certain death from colon cancer in 2007, makes my being here today possible. In that year, on December 10th to be precise, I underwent a major radical operation at St. Thomas' Hospital, London. But for the Almighty Creator, my promotion, which was announced in September 2009, with effect from October 2003, would have been a posthumous exercise. I indeed lack adequate words to express my sincere gratitude to God who prevented death from denying me this privilege to stand before this beautiful gathering to deliver my inaugural lecture. Please help me to say a heartfelt **"THANK YOU"** to the Giver and Taker of life.

2. The Challenge

Mr. Vice-Chancellor, sir, ladies and gentlemen, as a child who spent the early formative years of his life in colonial police barracks in the then Western Region of Nigeria; I never had any challenge, let alone ambition. My world revolved on eating, playing, and sleeping. But much later, in the last years of my primary education at the St. John's School, Umukoroshe (now Rumukoroshe), Port-Harcourt, I began to develop some ambition, but without any challenge. I began to appreciate the importance of newspapers in my education. Then I began to diarize. Reading newspapers and diarizing became my ardent

hobbies. This was my new world, made possible by the persistent encouragement of my best teacher in life, Mr. Alban (or Anslem)?[5] Okonkwo. Mr. Okonkwo was a wonderfully devoted teacher. He was the person who shaped my infantile mind to appreciate and discuss current affairs as well as historical events. By and by, I became fascinated with newspapers and journalists, for Mr. Okonkwo occasionally brought such printed publications to the class to read and explain the contents to us. He would regale his pupils with stories, ancient and modern, and in the process gesticulate impressively and simultaneously release infectious throaty laughter, frown or sigh, depending on the nature of the contents of the newspaper and the stories he told in support of or against the news. For me, Mr. Okonkwo was a teacher *per excellence.*[6]

His romantic description of newspapers and columnists was so infectious that it stirred my childish imagination, and I developed the ambition to be a journalist. I believed that every content in the newspaper was correct, indeed the Gospel truth. My ambition was to write in newspapers, to be quoted and discussed by readers, as Mr. Okonkwo usually did.

Then came the challenge. This was in 1966, when I was in form two at the Ascension High School, Eleme. In that year, my late father, a lawyer, was defamed by a strongman of pre-war politics in my locality. The strongman was removed from office as the President-General of the town union. He believed

[5] I regret that am not now sure of his first name.

[6] It is my eternal wish to again see and talk with my great teacher who taught me in standard four in 1963 and primary six in 1964. I dedicate my Distinction, the grade I obtained in the First School Leaving Certificate Examinations in 1964, to him. Thank you, great teacher!

that my father, the legal adviser to the town union, *pro bono*, was instrumental to his ignominious dismissal from office. He published defamatory matter against my father and one scurrilous written remark he made was this: "Barrister Amadi plus seven Barrister Amadis can never remove me as the President-General of the...Town Union."

That was the challenge, Mr. Chairman, which made me to change course from journalistic destination to the domain of law. I felt that the strongman challenged my siblings and me, since my father was already a lawyer. In 1968, in the heat of the gory civil war, I informed my father that I would be a lawyer if I survived the Nigeria-Biafra conflict. I did not tell my father the reason for the choice of the legal profession and he did not ask me why I nursed the ambition to take to his calling; but I noticed that he was happy. Assuring me of his support, he said I should not only aim to be a lawyer, I should aim higher to be a teacher of lawyers. This was an additional challenge, but I did not know why my father so challenged me until many years later.

After the war (1967 – 1970), I was admitted into the Holy Ghost College, Owerri, to complete my secondary education. I finished in 1971, obtaining a First Division in that year's West African School Certificate Examinations. In 1972, my father was appointed a magistrate in the then South-Eastern State (now Cross-River and Akwa-Ibom), and posted to Obubra. I taught at St. John's Primary School, Obubra in the last seven months of 1972. In 1973, I entered the Hope Waddell Training Institute, Calabar, for my post-secondary education, graduating in 1974 with a Higher School Certificate (HSC).

Mr. Chairman, sir, throughout my secondary school years, the challenge of the strongman throbbed my mind, and the greater challenge of my father stared me in the face. It was such a tremendous excitement for me when I was admitted to read law at both the Universities of Nigeria and Lagos. The former for a four-year programme and the latter, for a three-year study based on my HSC results. However, I was already two months old at the University of Nigeria before I was offered admission at the University of Lagos. I was prepared to leave for Lagos, but my father objected. The reasons for his objection await my memoirs in the fullness of time.

On my call to the Nigerian Bar in 1979, I wanted to begin legal practice immediately after my National Youth Service year in 1980. However, my father reminded me of his challenge, and insisted that I pursue a post-graduate law programme. I was admitted into the University of London; King's College in 1980 and bagged a master's degree in law in 1981. Thereafter, I moved to the London school of Economics for a research programme in criminology. In 1983, I returned to my Alma Mater to teach law.

The foregoing is the brief odyssey of my academic life, a journey that prepared me for this day. When I obtained the University of Nigeria Ph.D in law in 1994, my father, then alive, who actually encouraged me to do the doctorate, was so joyful that he discussed the issue with his friends and well-wishers for weeks on end. One of his friends told me that my father was a fulfilled man. He revealed to me that my father told the strongman in 1966 in response to his vulgar abuse earlier quoted, that George would not only be a lawyer, but also a teacher of lawyers! Mr. Chairman, sir, here I am today, a

fulfilment of my father's prophecy, a professor of law! Thanks to the strongman, but to God be the glory!

3. Explanation of the Topic

Mr. Vice-Chancellor, sir, ladies and gentlemen, the subject matter of this lecture involves two disciplines, namely, law and political science. I am not a political scientist and, as such, I do not pretend to be one. But, I pride myself as a student of political science. My little knowledge of the subject garnered from some of its literature[7] emboldened me to embark on this interdisciplinary approach.

I consider law and political science as uterine brothers destined to govern any sphere of human endeavour. By their nature they are twins, but not identical since in practice their behaviours are different. What informed this hypothesis is founded on genetic criminology.[8] This suggests that identical twins tend to behave alike since they "result from the fertilization of a single egg cell that subsequently divides to give two separate foetuses."[9] Fraternal twins result from simultaneous fertilization of two egg cells. They may be of different sexes, but identical twins are of the same sex.[10] This bio-medical

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[7] See, e.g. Okechukwu Ibeanu; *Affluence and Affliction: The Niger Delta as a Critique of Political Science in Nigeria,* 27th Inaugural Lecture of the University of Nigeria, 2008; *Humphrey Assisi Asobie, Re-inventing the Study of International Relations; From State and State Power to Man and Social Forces,* 21st Inaugural Lecture of the University of Nigeria, 2007.

[8] For further reading, see, e.g. Sue Titus Reid, *Crime and Criminology*, 7th ed. 2000; Mike Magure, Rod Morgan and Robert Reiner eds., *The Oxford Handbook of Criminology*, 2nd ed; J.E. Hall Williams, *Criminology and Criminal Justice* 1982.

[9] *Oxford Concise Medical Dictionary,* 6th ed., pg. 712

[10] *Loc. cit.*

explanation is necessary in order to help identify and understand the behaviour of legal and political practitioners in the governance of a state.

Do not ask me which of the two disciplines is the older of the fraternal twins. Of course, law is older. Indeed, law is the second oldest profession after Divinity, i.e. priesthood. God is the First and Eternal Priest. His creation of the world is based on law. And everything created, whether or not living, exists under (natural) legal principles.[11] Politics emerged when Lucifer rebelled against the rule of Divine law.[12] His rebellion was the progenitor of negative politics on earth.

Politics is the practical aspect of political science. Unlike legal practice, which is embarked upon after a formal training of the lawyer, political practice does not require any such formal training of the politician.[13] Political and legal practices combine to bring about governance. But the nature of governance depends on the state of the combination of the practice of law and political science.

Legal and political practices have their individual rules. I call them "rules of the game." The rules of the game usually should be enabled by the rule of law. In other words, both legal and political practices should bring about governance built on the rule of law.

Interestingly, sometimes, if not often in countries like Nigeria, the rule of law may seem to be interchangeable with the rules

[11] *See Ben Okwu Eboh, Even The Angels Eat Beans,* 1999, Chap. 5
[12] The Holy Bible, Rev. 12:7-12
[13] See Humphrey Assisi Asobie, *op. cit*., p.1

of the game. The latter is the standards of behaviour that most people accept or that actually operate in an area of life or business.[14] The former, which shall be explained in details later, is the condition in which all members of society, including rulers accept the authority of the law.[15] But this is not always so, because different areas of life or businesses have different rules of the game. And the nature of the area of life or business determines the nature of the rules of the game. For instance, criminologically speaking, thieving is an area of life or "business," and thievery is an acceptable standard rule of the game amongst thieves. Yet thievish behaviour is a crime against the rule of law.

Similarly, lawyers and politicians have acceptable standards of behaviour in the practice of law and politics respectively. I know that lawyers have legal ethics enabled by an Act of Parliament.[16] But I am not aware yet of any politicians' ethics that even have statutory flavour, let alone created by legislation. Assuming, however, that politicians have any recognizable ethics, what is in issue here is that professional ethics of whatever discipline is subject to the rule of law.[17]

Interestingly, besides professional ethics, lawyers and politicians have unwritten rules of the game in the practice of law and politics respectively. These rules may seem not to

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[14] *Oxford Advanced Learner's Dictionary,* 7th ed., p.1281.

[15] *Loc. cit.*

[16] Legal Practitioners' Act, Cap. L11, Laws of the Federation of Nigeria, 2004. For further reading, see Sonia Akinbiyi, *Elements of Civil Procedure and Professor Ethics in Nigerian Law,* 2000, Chap. 16.

[17] See *Magna Maritime v. Oleju* (2005) 22 NSCQR 295; *Dr. Alakija v. Medical Disciplinary Council* (1959) 4FSC 38; *Medical and Dental Practitioners Disciplinary Tribunal v. Dr. Okonkwo* [2001] 2 MJ.S.C. 67.

offend the rule of law employed by lawyers while advocating at the Bar or dispensing justice from the Bench. Politicians apply the rules while politicking, i.e. practising politics.

A major, if not the sole, aim of the unwritten rules of the game in legal and political practices is simply to outsmart the opponent, but under the guise of rule of law. The behaviour of the lawyer or politician in this regard may hinge on influence peddling, ingratitude, sycophancy, tale bearing, treachery or any other vice or corrupt practice. If this behaviour would guarantee, for instance, the lawyer "winning" a case or the politician "winning" an election, then the end justifies the means. The latter's behaviour I term *political jaywalking*, and the former's behaviour I term *legal jiggery-pokery*

(a) **Political Jaywalking**

Mr. Chairman, sir, ordinarily, politics means activities associated with governance of a country or area.[18] Legally, politics is the science of the organization and administration of the State.[19] There is no marked intellectual difference between these two skeletal definitions of politics. They do show, however, that politics is basically about governance of a domain. It seems immaterial if such administration is good or bad. In this wise any *Wa*, *Zo* or *Bia* could through politics govern or administer a country or area.

But Professor Assisi Asobie, in the 21st Inaugural Lecture of this University put forward a thoughtful meaning of politics as follows:

[18] *Concise Oxford English Dictionary*, 11th ed.
[19] *Black's Law Dictionary*, 8th ed., p. 1197.

> Politics is primarily and ultimately about human welfare. It is about the improvement of the material conditions of life; it is also about maintenance of the psychological and emotional stability of man, and about his spiritual growth as well.[20]

There is no gainsaying the fact that Asobie's postulate is *positive politics*. It is in agreement with what the great Malam Aminu Kano said in 1978, that "…politics is nothing but human management".[21] I concur with these eternal views, but add that positive politics is practicable and performable by individuals who are God-fearing and human-loving.

God-fearing does not necessarily mean being a member of a religion that believes in God. Remember the Pharisees who theoretically preach the goodness of God, but practically do acts diametrically opposed to His Divine injunctions. Such Pharisees are not in short supply in Nigerian politics. Their politics is the antithesis of the Asobie approach. This is *negative politics*; it is the politics of the jaywalker.

Mr. Chairman, sir, *political jaywalking* is a figurative expression I coined from the word "jaywalker". This means "walk in or across a road without regard for approaching traffic."[22] It is implicit in this definition that the personality of the jaywalker is of the essence, and, as a consequence, may be a subject of intellectual disputations. But for the purpose of this discourse, the jaywalker is a psycho-psychiatric phenomenon. I say this with due respect to experts in this field of learning.

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[20] Humphrey Assisi Asobie, *op. cit., p.1.*

[21] A quotation from the speech made at a symposium held in 1978 at the Main Hall of University of Nigeria, Enugu Campus. It was in my final year in the University, and I attended the event.

[22] *Concise Oxford English Dictionary,* op. cit., p.761

However, as a lawyer in defence of a jaywalker facing trial for breach of road traffic law, I am likely to argue that no person of sound mind would walk in or across a road without regard to approaching traffic. This is because the behaviour is suicidal, for many jaywalkers have been maimed or killed on Nigerian roads.

Essentially, the jaywalker has neither regard for his safety nor that of other road users, He is a danger to himself and society. So, a successful plea of the defence of insanity will free him from his jaywalking problem, whereby the court would commit him to a mental asylum for observation and treatment.

By extrapolating the behaviour of the jaywalker to the politician the meaning of political jaywalking becomes manifest. Since he, by virtue of his mental state, has no regard for road traffic rules, *a fortiori*, he has no respect for any form of law. Put in a position of power and authority, the political jaywalker will have no regard for good governance just as the ordinary jaywalker has no regard for his safety or that of other road users. All in all, the political jaywalker is that person whose mental state readily accommodates such flawed tendencies as deceitfulness, selfishness and shamelessness in pursuit of politics and politicking in contempt of the rule of law. No doubt, the political jaywalker is not a fit and proper person to govern or administer any domain.

(b) **Legal Jiggery-Pokery**

Mr. Chairman, sir, by now this critical assembly should, I believe correctly guess the import of legal jiggery-pokery. Like political jaywalking, the phrase is another coinage of mine derived from the word “jiggery-pokery”. It means “deceitful or

dishonest behaviour".[23] Legal jiggery-pokery is the deliberate employment of deceit or dishonesty by lawyers, whether as legal practitioners or judges, in the interpretation of the law, or law makers making bad and or self-serving laws. Similarly, the executive whether as politicians or bureaucrats adopts subterfuge in the enforcement of the law. Legal jiggery-pokery in sum is the making, interpretation and or enforcement of the law according to the rules of the game ostensibly within the rule of law.

As earlier argued, factors which tend to goad lawyers to indulge in legal jiggery-pokery is simply to outwit the other party, interpreting and or enforcing the law in the manner that would satisfy his client or more correctly the paymaster. In a society where the end tends to justify the means, a warped interpretation of the law in the guise of the rule of law becomes an article of faith. One can, therefore, imagine a scenario where political jaywalking combines with legal jiggery-pokery in the governance of a state. As we progress to conclusion in this lecture, I shall attempt to show how this regrettable combination has weakened our institutions, resulting in the springing up of strongmen in our polity.

(c) **Governance**

Mr. Chairman, sir, now governance is not just presidential or gubernatorial manner of conducting the policy and affairs of a state or people. Governance in this disquisition has a holistic import, which is administration at every level in establishments or institutions, whether in the public or private sector of the Nigerian enterprise. For the avoidance of doubt, I am talking

[23] *Concise oxford English dictionary, op. cit, p.764*

about governance from the lowest to the highest level of any institution, organization or area where human and material resources are involved to produce a given result. I am talking of governance which operates under the rule of law.

4. The Rule of Law

Mr. Vice- Chancellor, ladies and gentlemen, nearly two centuries ago, a jurist had this to say about lawyers and their fabled knowledge of the law:

> God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law.[24]

Obviously, this statement is not amenable to one construction. But it seems to me that Abott, C.J., put forward this subject of thought in response to the legal maxim, *ignorantia juris non excusat,* i.e., ignorance of the law does not constitute an excuse.[25] I have to quote the learned jurist because I am about to tread on legal minefield. I always tell my students that I do not teach them the law, but where to look for the law. I do not know all the law, but I do know where to look for the law.

Now, the fact that one does not know all the law does not mean that one does not know that law exists. Knowledge of the existence of the law is what matters and should be the concern of everyone, lawyer and layman alike. *It is this ignorance of the existence of the law that is no excuse.* This is a universal

[24] Abbott, C.J., in 1825 (2C&P) 113, quoted in Glanville Williams, *Textbook of Criminal Law*, 2nd ed., 1983, p.451.

[25] *Black's Law Dictionary, op. cit., p.762; Osborn's Concise Law Dictionary, 8th ed., p. 169.*

concept, originating from the Scriptures, and our Lord Jesus Christ put it as follows:

> … one who did not know and did what deserved a beating will receive a light beating.[26]

But it seems this idea it is popularized by the English common law for those of us trained in that jurisprudence. In Igbo traditional society, for instance, it is no excuse to plead ignorance of customary rules; indeed, it is strange to so plead since knowledge of such customs is deemed to be part and parcel of cultural upbringing of a child.[27]

Ignorance of law as opposed to existing law is what should bother the lawyer. But Abott, C.J., seems to come to the rescue of the "ignorant" lawyer by his thoughtful prayer that God forbid that a lawyer should know all the law. Put differently, the prayer seems to mean that no matter how knowledgeable a lawyer may be, it is not possible for him to know all the nuances of laws.

There are numerous fields of law, and the law student studies only an infinitesimal portion in his four or five years' pursuit of a bachelor of laws certificate. On being called to the Bar and in subsequent legal practice, the lawyer is confronted with the whole gamut of law. But since he has been taught where to look for the law, the lawyer would be able to appreciate every

[26] The Holy Bible, Luke 12:48. I am grateful to my Chaplain, Monsignor Anthony Anijielo, of the St. Mulumba's Chaplaincy, University of Nigeria, Enugu Campus, whose homily at the Morning Mass of October 20, 2010, informed his congregation of the Biblical origin of this concept.

[27] For further reading, see F. U. Okafor, *Igbo Philosophy of Law*, 1992.

area of the discipline as the need arises. Even so, he may still not know all the law. That is why the courts exist to test the legal knowledge of lawyers, and the appellate courts exist to test the knowledge of judges. And at the Supreme Court, the highest court in Nigeria, the rule of law enables justices of that court to review their decisions, which may have been decided because of the inability to know all the law.[28]

Mr. Chairman, sir, it is interesting to note that the layman in this country tends to believe that lawyers know all the law, more so where the lawyer has earned the recognition as a Senior Advocate of Nigeria (SAN). But the senior advocate himself knows that he does not know all the law. Every lawyer knows about decisions of the courts reached *per incuriam*, i.e. through want of care. The implication of *per incuriam* judgments lies in the lawyer's inability to know all the law. But it is lawyers' euphemistic advocacy that the court's attention was not drawn to the relevant statute or case law, hence *per incuriam* decision. In this situation, neither the judge nor the lawyer is blamed for not knowing the law that led to a wrong decision. It is for this reason that the courts have the inherent powers to review their decisions given *per incuriam*[29]

Mr. Chairman, sir, I have trodden this far to analyse the prayer of Chief Justice Abott in order to find protection therein as I discuss this controversial topic of the rule of law[30]. Now, I

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[28] See *Oshoboja v. Amida* (2010) 2NSCR 71. *Veepee Ltd v. Coca Cola Ind. Ltd.* (2008). 13 *NWLR* (Pt 1105) 486; *Bucknor Maclean v. Inlaks* (1980) II SC 1.

[29] *Ibid.* See *Buhari v. INEC* [2008] 19 NWLR (pt 1120) 246, at p. 372 S.C.

[30] See Ben Nwabueze, *Constitutional Democracy in Africa,* Vol. 3, 2004, Chap. 2 where this renowned jurist did a brilliant exposition of the rule of

want to inform that there is no branch of law called the rule of law. The rule of law is a principle, indeed a philosophy that makes sense of law, gives law its dignity and enables law to earn societal respect. The rule of law is the infrangible cord that connects all wings of law, giving meaning to all laws in any political authority. The rule of law simply says that laws should be obeyed by everyone – the ruler and the ruled. It is this obedience that gives life a meaning. Life begets society, and if life is meaningless because of absence of the rule of law, then we may have an anarchic society.

The rule of law is the essence of creation. This is evident in both physical and biological matter. It is even so in spiritual phenomenon, because God in his infinite wisdom is the Rule of Law!

As a Christian, I trace the rule of law to heaven. If we remember, Lucifer rejected the Rule of Law by disobeying the infinite and majestic authority of God. This disobedience led to a heavenly war in which Lucifer and his angelic cohorts were defeated. For his refusal to subject to the authority of the Rule of Law, Lucifer and his angels forfeited their heavenly abode and were hurled down to earth.[31]

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law. See further, Mathew H. Kramer, "On the Moral Status of the Rule of Law", [2004] *C. L. J*, pp. 65-97; Frank Emmert, "Rule of Law in Central and Eastern Europe", *FORDHAM INT'L L.J* vol. 32, No 2, 2009, pp. 551-586; J.M. Elegido, *Jurisprudence,* 1994, reprinted 2001, chap. x; A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law,* 13th ed., 2003, chap. 6. See fn 53, *infra.*

[31] *Holy Bible*, Revelation 12: 7-12.

Characteristically, Lucifer cajoled the scriptural first parents into disobeying the law of the Garden of Eden. Adam and Eve were punished for their disobedience of the rule of law.[32] The resultant effect of their disrespect of the rule of law has continued to afflict humanity to this day. The affliction is in the sense that humanity has refused to subject itself to the authority of the rule of law.

We can see that the rule of law is an ancient philosophy, as old as creation. Plato and Aristotle in circa 350 BC discussed the rule of law. Apparently unhappy with his society's disrespect for the rule of law, Plato had this to say:

> Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.[33]

Plato was neither a Christian nor a Muslim; of course there was no way he could have become one having existed before the birth of the two religions. Perhaps, he might have, by my stretch of the imagination, had an inspirational glimpse into the monotheist religion of the Israelites. Essential to platonic philosophy is that humanity will "enjoy all the blessings that the gods shower on a state" if it respects the rule of law. This is similarly so with Judaism which is the precussor of Christianity and Islam. This goes to buttress my earlier argument that the rule of law is a divine essence. And Socrates seemed to agree

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[32] *Ibid;* Genesis 3

[33] Quoted in John Cooper, *et al, Complete Works by Plato,* 1997, p. 1402, cited in Wikipedia, the Free Encyclopaedia retrieved from Google.com on July 01, 2009, at 8.30pm.

with this postulate. Against the pleas of his good friend, Crito, to avoid execution by drinking poison, Socrates refused to escape from prison, having been condemned to death in accordance with Athenean law. Socrates philosophized on the rule of law, saying to his friend at the end of their dialogue:

> Leave me then, Crito, to fulfil the will of God, and to follow whither he leads.[34]

Mr. Chairman, sir, throughout the Scriptures, the indispensability of the rule of law is emphatically posited in the New Testament. There, our Lord Jesus Christ says this:

> Whoever keeps my commandment is the one who loves me. If he loves me, he will also be loved by my father; I too shall love him and show myself clearly to him.[35]

Earlier in the Old Testament, God pronounces and emphasizes on the supremacy of law and the adverse consequences that follows its breach.[36] He is the Supreme Being and the Law Himself and from Him we trace the origins of the supremacy of law, commonly known as the rule of law.

The supremacy of law is an omniscient jurisprudence, which is not peculiar to any particular clime. It is a universal ideal, albeit the Western nations seem to have blazed a trail in writing and discussing the concept, beginning in Greece many centuries B.C. Aristotle asserted that law should govern the

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[34] Mortimer J. Adler, ed. *Great Books of Western World,* Vol. 1 Plato, 1996, p. 219.
[35] *Holy Bible,* John 14:21
[36] *Ibid*., Exodus 20, 22, 23; Leviticus 26.

rulers and the rulers shall be "servants of the laws".[37] Other Western nations, prompted by the Greek philosophers began to appreciate the beauty of the rule of law. In AD 1215, the supremacy of law prevailed in England when King John signed the Magna Carta,[38] thereby placing himself under the rule of law. The statute provided for the protection of citizens from arbitrary arrest, imprisonment and other abuses of the royal prerogative. The Magna Carta marked the beginning of statutory provisions in common-law England and laid the structure of constitutional liberties.[39] Earlier in the 12th century, Islamic jurisprudence recognized this ideal that even the caliph was subject to the supremacy of law.[40] The principle of the rule of law was further expounded by such Western thinkers as Montesquieu,[41] John Locke[42] and Sam Rutherford.[43]

At the risk of repetition, the rule of law is not an exclusive Western philosophy. It is evident in our different indigenous jurisprudence, because when the British came to the territory now called Nigeria, they met no chaos or disorder. They were welcomed by a legal order, which no doubt contained and still contains branches of law different from the common law. Pursuing these differences is not the concern of this lecture. What is material here is that the British found the rule of law in operation. What they did, as conquerors usually do, was to

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[37] Aristotle, *Politics*, 3.16 also cited in Wikipedia, *op.cit* on fn 30, *supra.*
[38] I.e. great charter
[39] See *Osborn's Concise Law Dictionary op cit,* p. 209; *Black's Law Dictionary, op. cit.,* p.971.
[40] See Wikipedia, *op.cit.*
[41] *The Spirit of Laws,* 1748
[42] *Second Treatise of Government,* 1690
[43] *Lex Rex,* 1644. For further reading see, Brian Tamanaha, *On the Rule of Law,* 2004, p.47.

impose their English common law on the indigenous peoples of this country, thereby creating a new legal order. But the new legal regime did not entirely abolish the customary laws of various ethnic nations of Nigeria. Instead, the common law operated *pari pasu* with the customary laws, except where in the wisdom of English jurisprudence such customary laws were regarded as "repugnant to natural justice, equity and good conscience."[44] However, our indigenous criminal laws were abolished as a result of the imposition of the Criminal Code on Southern Nigeria[45] and the Penal Code on Northern Nigeria.[46] This remains constitutionally valid because our customary criminal laws are unwritten.[47]

Mr. Vice- Chancellor, ladies and gentlemen, throughout history the supremacy of law is a doctrine every noble soul yearns for in quest of freedom from oppression and suppression, a free and democratic society. The rule of law abhors the rule of men. It is this abhorrent rule of men that has historically triggered off revolutions.[48] It was responsible for the French revolution of 1798, the American Declaration of Independence of 1778, the Bolshevik Revolution of 1917, to mention but a few.

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[44] See, e.g. *Eshughayi Eleko v. Officer Administering the Government of Nigeria* (1931) AC 662, at 673; *Lewis v. Bankole* (1908) INLR81, at pp. 99-102; *Dawodu v. Danmole* (1958) 3 FSC 46. For further reading, see *A.O. Obilade, The Nigerian Legal System,* 1979, reprint 2010; pp.100-110.

[45] See Criminal Code Act of 1916

[46] See Penal Code Law (No. 18 of 1959)

[47] The Constitution of the Federal Republic of Nigeria, 1999, s.36 (12)

[48] A revolution is an overthrow of a government, usually resulting in fundamental political change; a successful rebellion: *Black's Law Dictionary, op. cit.,* p. 1346.

It was John Adams in 1790 that enshrined in the Constitution of Massachusetts "a government of laws and not of men."[49] Before the Magna Carta, the English sovereign was law unto himself, resulting in the maxim *rex non potest peccare,* i.e. the king can do no wrong. This obviously non-democratic concept influenced the British behaviour in their colonies, and it was a major factor that compelled the American War of Independence. Thomas Paine in 1776, summarized the American abhorrence to the rule of men thus:

> … in America, the LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King. And there ought to be no other.[50]

Mr. Chairman, sir, it is interesting to know that the rule of law is a strange legal phenomenon. This is because even in the Devil's domain exists the rule of law. The rule of law here is actually the rule of the Devil. Implicit in this averment is that in a bad political authority, operating bad laws, lies the rule of men. History is replete with instances of such bad governments. They include Hitler's Nazi Germany, Mussolini's Italy, Stalin's Soviet Union, Idi Amin's Uganda, Bokassa's Central African Republic, Siad Barre's Somalia, Mobutu's Zaire, Apartheid South Africa, Pol Pot's Cambodia and even Abacha's Nigeria.

Can we at this point say that Nigeria is exempt from bad government upon bad laws and the rule of men? In answer to

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[49] Massachusetts Constitution 1780, Part the First Art. xxx.

[50] Thomas Paine, *Common Sense,* 1994, p. 279. Also quoted in Wikipedia, *op. cit.,* citing Jethro Lieberman, *A Practical Companion to the Constitution,* 2005, p.436. See also Lord Bingham, "The Rule of Law", [2007] *CLJ* vol 66, pt 1, pp. 67-85.

this disquieting question let me say that bad government does not operate only when bad laws exist. Bad government and the rule of men can take place in the midst of good laws. This paradox, as I shall explain later, seems to be the case with Nigeria since its political independence in 1960 from British colonialism.

Essentially, what I am stating in effect is that the rule of law is a controversial legal philosophy interpreted differently in different jurisdictions in pursuit of different ideological tendencies. In domains where negative politics is practised, the inclination is to construe the rule of law to suit the politics of the moment. In this wise, it may seem that the rule of law is a meaningless doctrine of relativism. Herein lies the legal minefield. But as I meander through this minefield, I am protected by Chief Justice Abott's prayer that God forbid that I should know all the law about the rule of law!

Approaches to Rule of Law

Notwithstanding the ideological misuse of the rule of law, jurists have put forward three major interpretations of the subject matter, namely: formal, substantive and functional.[51] A formal approach is the view that the rule of law has the characteristics of custom and usage. Like custom and usage, the rule of law must have applied for a long period in an area resulting in certainty, generality and equality of acceptance by

[51] Brian Tamanaha, "The Rule of Law for Everyone"' *Current Legal Problems*, Vol. 55, 2002, cited in Wikipedia, *op. cit.* Mathew Stephenson, "Rule of Law as a Goal of Development Policy", World Bank Research, 2008. See also Brian Tamanaha, *On the Rule of Law,* 2005

the people.[52] In other words, the rule of law entails the practice that has "become generally adopted through unvarying habit and common use."[53]

The formal approach to the rule of law is not necessarily interested in the contents of the law, which the people are required to and should obey. By implication, while the rule of law protects democratic principles and individual rights, the formal approach acknowledges that the "rule of law" also exists in domains where the law is autocratic and abridges individual rights. In the formal approach, it is possible to interchange the rule of law with the rule of men.

The substantive approach to the rule of law is very much interested in the contents of the law. It approves the view that democratic principles and some, if not all, individual rights must be protected by law. Here, the protection of democracy and individual rights is an intrinsic nature of the rule of law.[54]

In the functional approach, the view is that society must be ruled by law and not by men. However, the human being is only the functional means through which the rule of law operates. For this reason, the law allows human beings to exercise discretion in order to make the rule of law functional. However, the greater the degree of discretion allowed men, the greater the likelihood of their abuse of the discretion. But it is

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[52] See Wikipedia, *op.cit.*

[53] *Black's Law Dictionary, op.cit.,* p.43. Great legal minds have written on the rule of law. They include, A.V. Dicey, *The Law of the Constitution,* 9th ed., 1939; Lon Fuller, *The Morality of the Law,* Rev. ed. 1977; B.O. Nwabueze, *Democratization* 1999.

[54] See Wikipedia, *op. cit.*

probable that a little degree of discretion will enable a better functional rule of law. The implication of the functional approach is that man is not good enough to be entrusted with wide discretion in the affairs of the state and government.[55]

Mr. Chairman, sir, the foregoing are the main approaches to the rule of law. But there is this view which seemingly is not vocally canvassed, namely that the supremacy of law is a guarantee of democracy. I endorse this view, and it is the approach, which this lecture will adopt in the remainder of this discourse.

It is noteworthy that when democracy is guaranteed by the rule of law, it takes care of the substantive and functional views and aspects of the formal tendency, which recognizes and approves some democratic principles and individual rights. In sum, the rule of law that supports democracy is formal, substantive and functional. Democracy, I assume we all know, is a form of government in which the people have a voice in the exercise of power, typically through elected representatives.[56] Since 1999, the assumption in Nigeria is that there is democracy under the rule of law.

5. The Rule of Law as the Jurisprudence of Governance:

Mr. Vice-Chancellor, ladies and gentlemen, governance anywhere in the world is based on philosophy. Philosophy determines legal thought. The rule of law is an aspect of legal thought, which philosophers since Plato agree should be the jurisprudence of governance. In other words, the rule of law should serve as the philosophy of governance.

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[55] *Ibid.*

[56] *Concise Oxford English Dictionary, op. cit.* p.381

Now, governance presupposes a hierarchy. My learned friend, Dr. David West, with whom I spoke in the course of writing this lecture, argued that "as long as hierarchy exists in any organization, there is rule of law." I agree with him, and he equally concurs with my argument that such organization may be godly or devilish. The import of this is that the rule of law is seemingly an unprincipled concept, tending to find comfort and fit into any type of organization or government. This has compelled the following disputation:

> The rule of law is the source of soaring rhetoric and intense frustration. It is a complex concept that does not enjoy consistent usage in jurisprudence or public discourse. Both sides of debates invoke its majesty and its mystery…, making the concept appear fluid to the point of being illusory.[57]

I am in agreement with this thoughtful analysis. But as the authors stated further, the rule of law has "a core and this core expresses a philosophy of governance increasingly embraced around the world."[58] Notwithstanding, therefore, the seeming fluidity of the rule of law, it is by no means a fantasy. It has substance, and it is good. Goodness is not relative; it is a universal reality, for the devil, himself acknowledges what is good.[59] The goodness of the rule of law is implied in the various interpretations of the concept earlier discussed. The common denominator of the interpretations is that the rule of law is a guarantor of democratic principles and individual rights. These are some key factors that determine the quality of

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[57] David P. Fidler and Lawrence O. Gostin, *Biosecurity in Global Age: Biological Weapons, Public Health and the Rule of Law,* 2008, p.191.
[58] *Ibid***.**
[59] Holy Bible, Job 1:4-12; Matt 4:3-11; Luke 4:31-37, 8:28, etc.

good governance.[60] A World Bank research reveals other indicators of good governance, which include the quality of the police, the courts and contract enforcement.[61]

The issues of contract enforcement and the police, among others, fall within the private and public law respectively, and shall shortly be x-rayed in the light of the rule of law.

Now that we have seen that the rule of law is increasingly embraced around the world, let us approach the subject matter in this country against the backdrop of the Constitution of the Federal Republic of Nigeria 1999.[62] Under the Constitution, the Seventh Schedule contains oaths of office of the foremost public officers of the three arms of government, namely, the Executive, the Legislature, and the Judiciary. The summary of their oath of office is to subject them to the supremacy of law. In other words, the oath of office is an affirmation that the rule of law is superior to and overrides the rule of any human leader in all strata of the polity.[63]

It is needless to state that the Constitution and all laws enabled by it are not self-operating. But the people who make, interpret and enforce the laws are required to do so faithfully. To do this, the operators of the law are given some degree of discretion. I have earlier talked about discretion under the functional

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[60] See Daniel Kaufman, **et al**, Government Matters VI: Government Indicators for 1996-2006 World Bank Policy Research Working Paper No. 4280, July 2007

[61] World Bank, Government Matters, 2008, cited in Wikipedia.

[62] The Constitution at present is undergoing amendments.

[63] See John Vile, *A companion to the United States Constitution and its Amendments*, 2006, p.80

approach to the rule of law. Now, I inform further that the executive, legislative and judicial officers are by legal implication allowed to exercise discretion in the discharge of their duties. The Presidency has the discretion to determine the goals of government and how, when and where to achieve the aims. The Legislature has the discretion as to what laws to make and the contents of such statutes. The Judiciary has the discretion as to how to go about the business of interpreting the law. Similarly, bureaucrats, etc, working under the three arms of government whether at federal, state or local government levels exercise some degree of discretion in doing their work. Indeed, in any form of management of human and material resources the law allows the exercise of discretion.

Explanation of Discretion

Mr. Chairman, sir, the crucial question remains this: how is this discretion exercised within the rule of law? To resolve this point at issue it must first be borne in mind that we are here concerned with *legal* discretion. It is not, among others, political, social, medical and economic discretion. When non-legal discretion in any field of human enterprise is in dispute, the ultimate arbiter is the law as interpreted by the courts. The resultant judicial decision on the matter is what is called legal discretion.

The dialectics of legal discretion is as intriguing as it has limitation. In my book, *Police Powers in Nigeria*, [64] I attempted to examine legal discretion from the constitutional, criminal and human rights laws of this country. Elsewhere,[65] I

[64] George O.S. Amadi, *Police Powers in Nigeria*, 2010
[65] George O.S. Amadi, *A Legal Guide to Trade Unions*, 1999

approached the issue from labour law point of view. My finding is that the law provides a common criterion for the exercise of all forms of discretion so long as they require judicial interpretation. In this regard, the concordance among jurists is that, in exercising discretion, the person doing so must have the ability

> *…to discern by the right line of law, and not by the crooked cord of private opinion which to the vulgar is discretion.*[66]

Generally, a "crooked cord of private opinion" can be interpreted as the employment of extraneous matters to influence the exercise of discretion. In this situation, it is difficult "to take relevant facts into consideration" while exercising discretion.[67]

Three salient issues are apparent in the foregoing serious dictum, which I regard as the ugly, the bad and the good, and I argue them seriatim. The ugly is that a vulgarian is incapable of exercising proper discretion. The bad is that a crooked private opinion cannot result in proper discretion. And the good is that a wise private opinions will likely result in proper discretion.

Employing the word "proper" to qualify "discretion" is unnecessary, but it is done *ex abundant cautela*[68] to guard against the temptation of qualifying discretion negatively. For,

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[66] Coke on Littleton, 2276, quoted in GOS Amadi, *Police Powers in Nigeria***,** *op.cit***.** P.19. See also *Jowitt's Dictionary of English Law*, Vol 2, p.1187; see also Vol 1, p.642. Emphasis added

[67] *Milton P. Ohwovoriole v. Federal Republic of Nigeria and Others* (2003) I F.R 171, *per* U.A. Kalgo, JSC at p.183.

[68] i.e., "From excess of caution": *Osborn's Concise Dictionary, op. cit.,* p.136

ordinarily, the noun "discretion", standing naked and alone, is good. Its adjective, "discrete", means careful and prudent.[69] It is this wise conduct that infuses in one the ability "to discern by the right line of law". This means that wisdom enables one to appreciate in every issue of the law permitting discretion, and then exercising it devoid of crookedness and or vulgarism.

Earlier in this lecture, it is revealed that officers in the three arms of government are allowed by law to exercise discretion in doing their work. This discretion can be categorized into three for the purpose of this disquisition. They are administrative, judicial and prosecutional forms discretion.[70]

Administrative discretion is the power to exercise judgement in discharge of duties by public officers or agencies. Judicial discretion is the exercise of judgement by courts on what is fair under the circumstances and guided by the rules and principles of law. Prosecutional discretion is the power of the prosecutor to choose from opinions available to him in criminal cases, whether or not to institute prosecution.[71] It is evident from the earlier arguments that it is only the courts that decide what legal discretion is. On the whole, any discretion under whatever branch of law is subject to the Constitution. Logically, a legal discretion is a constitutional discretion.

Mr. Chairman, sir, I have trodden far to do analysis of discretion because it is *sine qua non* for governance. Its exercise is guided by law, not by whim, fancy and or caprice of individuals privileged to exercise discretion. The rule of law

[69] *Black's Law Dictionary, op. cit.,* p.499
[70] *Loc. cit.*
[71] *Loc. cit.*

suffers disrespect in this country because those who are privileged to exercise discretion seem to lack the wisdom "to discern by the right line of law", resulting in abuse of discretion.

Abuse of discretion has been defined to fall into two broad modes. The first is the adjudicator's failure to exercise sound, reasonable, legal decision making.[72] Here, the adjudicator is the person whose job is to render binding decisions.[73] This includes anyone who is in a position of power and or authority to make decisions, which affects others, and the decisions are to be obeyed for the sake of governance.

The second aspect of abuse of discretion is the appellate court's standing for reviewing decisions that are asserted to be grossly unsound, unreasonable, illegal or unsupported by evidence.[74] This actually involves abuse of discretion by the courts that makes judicial pronouncements.[75]

In general, the broad modes of abuse of discretion cover all aspects of governance, involving the executive, the legislative and the judiciary. In the final analysis, I need not emphasize the fact that the exercise of discretion can make or mar the governance of a state or indeed any political authority. And it is

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[72] *Ibid.,* p.11
[73] *Ibid.,* p.45
[74] *Ibid.,* p.11
[75] *Ibid.,* p.45 See *Milton Ohwovoriole v. Federal Republic of Nigeria and Others* (2003) 1F.R. 171; see also *Olufeagba v Adul-Raheem* [2009] 18 NWLR (pt.1173) 384, where the Supreme Court seriously frowned at the majority decision of the Court of Appeal, which was based on unreasonable, speculative evidence.

only when discretion is exercised under the rule of law that good governance is likely to be attained.

6. Applying the Rule of Law to Governance in Nigeria.

Mr. Vice-Chancellor, ladies and gentlemen, all this while I have endeavoured to distil the substance of the rule of law from its mazy jurisprudence. I think I can now say, without being accused of pretending to knowing all the law, that the rule of law is a facilitator of democracy and protector of individual rights.[76] Since 1999 Nigeria has been experiencing democracy.[77] I now intend to do a brief historical and contemporary overview of the observance of the rule of law in the governance of the country. I shall carry out this test, using three areas of law, namely, in alphabetic order, constitutional, criminal and labour law. For want of time and space I shall discuss one or two items from each of these chosen wings of law. This exercise will help us to appreciate where lies the rule of law in this democratic dispensation.

(a) **Constitutional Law**[78]

The Constitution is the port of entry into the legal system of any given country. Indeed, under it we can discuss any branch of law. As was rightly held by the Court of Appeal,

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[76] See *Inspector-General of Police v. All Nigerian Peoples Party and Others* (2008) 12 W.R.N 65.

[77] Similar experience occurred between 1960 and 1966, 1979 and 1983. The other years 1966-1979, 1983-1999 were military autocratic regimes.

[78] Professor Ben Nwabueze is arguably the best constitutional law mind in this country. His indepth books on the issue are numerous and of international acclaim: they include *Constitutional Democracy in Africa,* Vol 1 (2003), Vol 2 (2003), Vol 3 (2004); *The Presidential Constitution of Nigeria,* 1982; *Ideas and Facts in Constitution Making,* 1993.

> …the Constitution is superior to other legislations (sic) in the country and any legislation, which is inconsistent with the Constitution, would be rendered inoperative to the extent of such inconsistency.[79]

That is why the Constitution has been defined as the fundamental and organic law of a nation or state. It establishes the institutions and apparatus of government. It defines the scope of governmental sovereign powers and guarantees individual rights and civil liberties.[80]

It is little wonder why the Constitution is arguably the most flogged branch of law. Everyone, lawyer or layman, argues about constitutional issues any time anywhere, on pages of newspapers,[81] in street corners, offices, or even in the privacy of homes. This consciousness is commendable. However, the arguments lead to diverse and sometimes absurd, if not laughable interpretations. All this effort is consciously or otherwise tailored towards knowing whether or not the rule of law is being observed.

Presidential Sickness

Mr. Chairman, sir, let me start with the constitutional brouhaha, which, as a matter of fact, was instrumental to my conception of the title of this inaugural lecture. It is about the

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[79] *Inspector-General of Police v. All Nigeria Peoples Party and Others* (2008) 12 WRN 65, at p.107, *per* Adekeye, J.C.A.

[80] *Black's Law Dictionary, op. cit.,* p. 330.

[81] See, e.g., *The Nation,* Wed., Dec. 23, 2009, pp.1, 4, 34; *The Guardian,* Fri., Dec. 4, 2009, pp, 1-2, 51; *Vanguard,* Fri., Dec 4, 2009, pp. 1, 5, 14; Fri., Feb. 5, 2010, pp. 1, 5, 6, 10, 18. For further reading, see, A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law, op. cit.* pt. 1, in particular, chap. 1.

executive arm of government, the presidency of Nigeria. But with the recent amendments of some aspects of the Constitution, and the demise of President Umaru Musa Yar'Adua, the issue may be seen as an academic exercise, based on hindsight arguments. Nonetheless, I consider it necessary, at least historical, to inform about the employment of political jaywalking and legal jiggery-pokery in the governance of this country.

On November 23, 2009, the late President Umaru Musa Yar'Adua left Nigeria for Saudi Arabia for medical treatment. But he did not comply with section 145 of the Constitution. The section provides as follows:

> *Whenever* the President transmits to the President of the Senate and the Speaker of the House of Representatives a written declaration that he is proceeding on vacation or that he is otherwise unable to discharge the functions of his office, until he transmits to them a written declaration to the contrary such functions shall be discharged by the Vice-President as Acting President.[82]

What is in issue here is the exercise of discretion, which is implied in the emphasized opening word, "whenever", in the provision. As was rightly canvassed in the unreported case of *Christopher Onwuekwe v. Attorney-General of the Federation and Executive Council of the Federation,*[83] "Section 145 of the 1999 Constitution… is not a mandatory provision." However, the section was not in issue in that case, which I think was one

[82] Emphasis added. The section more or less copied verbatim from The Constitution of the United States of America, Amendment XXV, (1967) S.3

[83] Suit No: FHC/ABJ/CS/10/2010 delivered on 13/01/2010, at Abuja, by D.D. Abutu, C.J.

of the several lawsuits[84] hurriedly filed in the midst of constitutional bedlam generated by the absence of the President. The case was to determine whether by a combination of sections 5(1) and 148(1) of the Constitution the Vice-President can exercise powers vested in the President in the absence of the latter.

It seems to me that *Onwuekwe's* case was instituted to circumvent section 145. On this, Abutu, C.J. stated, and correctly so, as follows:

> The Provisions of Section 145 of the 1999 Constitution pertains to the circumstances wherein the Vice-President can be elevated to the position of Acting President to perform the functions of the President under the Constitution.[85]

Thereafter Abutu C.J. quoted the section and then held, I think *obiter*, as follows:

> Before the Vice-President can perform functions of the President under the Constitution as Acting President, the requirement of section 145 of the Constitution relating to transmission by the President to the President of Senate and the Speaker of the House of Representatives must be complied with. As Acting President, the Vice-President performs the function of the President under the

[84] They include: *Incorporated Trustees of Nigerian Bar Association and Others v. Attorney-General of the Federation,* Suit No. FHC/ABJ/CS/761/2009, delivered on 29/01/2010, at Abuja, by D.D. Abutu, C.J.; *Hon. Farouk Adamu Aliyu and Another v. Attorney-General of the Federation,* Suit No. FHC/ABJ/754/2009, delivered on 22/01/2010, at Abuja, by D.D. Abutu, C.J. These two suits, like *Onwuekwe's* case, held "that the Vice-President has in the absence of the president been performing the functions of the office of the President under the Constitution": *Ibid.,* p.26 of the typescript.

[85] *Ibid.* at p. 17 of the typescript.

> Constitution *in his own right as Acting President. The power, which he exercises, is not the power delegated to him by the President.*[86]

I agree with the learned Chief Judge in respect to the constitutional effect of complying with section 145 by the President. But why the President did not exercise his discretion therein in favour of the Vice-President remained, and still remains a mystery. Yet this was the crux of the constitutional debate in the polity. Apparently concerned with the situation, the plaintiff thought that a combination of sections 5(1) and 148(1) could be interpreted by the court to enable the Vice-President exercise executive powers as Acting President under section 145, but without actually being designated as Acting President.

Section 5(1) says that subject to the provisions of the Constitution, the executive powers of the Federation shall be vested in the President. Again, subject to the Constitution and the provision of any law made by the National Assembly, the executive powers may be exercised by the President either directly or through the Vice-President *and* Ministers of Government of the Federation *or* officers in the federal public service.

Furthermore, section 5(1) provides that the executive powers of the President shall extend to the execution and maintenance of the Constitution all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make.[87]

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[86] *Ibid.,* p. 18 of the typescript. Emphasis added.
[87] Similar provisions are provided for the States in s. 5(2).

On the other hand, section 148(1) provides that the President may in *his discretion* assign to the Vice-President *or* any Minister of the Government of the Federation responsibility for any business of the Government of the Federation, including the administration of any department of government.

In the light of sections 5(1) and 148(1), the parties argued their case based solely on affidavit[88] evidence. This is an interesting mode of proving evidence, for, as is usually the case, the plaintiff's affidavit may be opposed by the defendant's, and that was what played out in *Onwuekwe's* case. Here, the plaintiff's originating summons was supported by affidavit. The first defendant Attorney-General filed a counter affidavit, alleging further facts. This created a situation where the plaintiff would have to file further and or better affidavit to oppose any averments(s) deposed by the defendant. This may necessitate the latter to file further counter affidavit. But this pendulum of affidavit evidence cannot continue *ad infinitum.* Apparently, *Onwuekwe's* case showed that there were conflicts in the parties' affidavit evidence.

The law is, however, clear on how to resolve conflicting affidavit evidence. On the one hand, where the conflicts in affidavit evidence are not material to a case or where the facts therein are inadmissible in evidence the courts should not be saddled with the responsibility of calling oral evidence to

[88] A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public: *Black's Law Dictionary, op. cit.,* p.62. See *Maraya Plastics Industries Ltd v. Inland Bank of Nigeria Plc* [2002] 7 NWLR (Pt. 765) 109 C. A.

resolve the conflict. Again, the need to call oral evidence would not arise if the areas of conflict are so narrow and are not significant.[89]

On the other hand, where the conflicts are in respect of material facts or issue for determination, the courts will be obliged to resolve them by calling evidence on both sides.[90] In this regard, therefore, the only course open to the learned trial judge is to call for oral evidence to resolve the conflicting affidavit evidence.[91]

In the present case Abutu, C.J. seemed to see no conflict in the affidavit evidence of the parties. He held that paragraph 5(h) of the defendant's counter affidavit was not denied by the plaintiff since he did not file a further affidavit. The paragraph averred as follows:

> 5(h) That the Vice-President has been diligently discharging the functions of the President as were assigned/delegated to him by the President before his trip of 23rd November, 2009.[92]

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[89] *Attorney-General of Adamawa State and others v. Attorney-General of the Federation and others* 24 NSCQR 429, at p. 452, *per* M.I. Uwais C.J.N

[90] *Nigerian Breweries Plc v. Lagos State Internal Revenue Board* (2002) 5 NWLR1, at p.15 *per* Galadima, J.C.A.

[91] *The Military Administrator, Akwa Ibom State and others v. Chief Godfrey Davies Obong* (2001) 1NWLR 214 at p. 230, *per* Opene J.C.A; *Lagos State Dev. And Property Corporation v. Adold/Stamm International (Nig) Ltd* (1994) 7NWLR, (Pt. 358) 545; *Oformata v. Onwuzuligbo* [2002] 8 NWLR (Pt 769) 298 C. A.

[92] *Onwuekwe v. Attorney-General, supra,* at p. 10, 14 of typescript.

But in paragraphs 8 and 9 of the plaintiff's affidavit, the following were stated:

8. That in the President's absence the Vice-President has refused, neglected or failed to exercise any or all the executive powers vested in the President pending when the President will return to take over such powers.[93]

9. That no person has been discharging the functions of the President since 23rd day of November, 2009.[94]

The foregoing defendant's counter affidavit 5(h) and plaintiff's affidavit 8 and 9 were in conflict, and this conflict was material to the case; that is whether or not the Vice-President was performing the functions under sections 5(1) and 148(1) of the Constitution as argued by the defendant. I submit, therefore, with due respect, that the learned Chief Judge could have invited oral evidence to find out whether indeed the Vice-President was "diligently discharging the functions of the President as were assigned/delegated to him by the President before his trip of 23rd November, 2009". To have come to the conclusion that the "averment in paragraph 5(h) of the counter affidavit above reproduced [was] not…denied"[95] by the plaintiff was, with due respect, wrong; because the plaintiff did not need to file a further affidavit, since paragraphs 8 and 9 of his affidavit were informative enough to show conflict between them and paragraph 5(h) of the counter affidavit.

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[93] *Ibid.* at p.9 of the typescript.
[94] *Loc. cit.*
[95] *Ibid.,* p.15 of the typescript.

Another curious dimension in *Onwuekwe's* case was the contention of the defendant Attorney-General that the President complied with section 5(1) and 148(1) before he travelled out of the country. Now, section 148(1) was quoted and argued without adverting to section 148(2). The latter subsection gives meaning to the former subsection as is hereunder explained.

Subsection 148(2) provides that the President shall hold regular meetings with the Vice-President and all the Ministers of the Federal Government for the following purposes:

> a. To determine the general direction of domestic and foreign policies of the Federal Government.
>
> b. To coordinate the activities of the President, the Vice-President and the Ministers of the Federal Government in the discharge of their executive responsibilities; and
>
> c. To advise the President generally in the discharge of his executive functions other than those functions with respect to which he is required by the Constitution to seek the advice or act on the recommendation of any other person or body.

There is nothing unclear about the provisions of sections 148(2) (a), (b) and (c) just revealed; it shows indeed that section 148(1) should be read in conjunction with section 148(2) to enable the Vice-President and Ministers carry out the executive responsibilities assigned to them by the President. It is not possible for the Vice-President to act under section 148(2) and then assign "responsibility for any business of the Government of the Federation" as Vice-President. He can only do so as Acting President under section 145, which, salient issue was only mentioned in passing by the learned trial Chief Judge. I shall shortly revisit this section 145.

Back to section 148(2) of the Constitution. I dare say that it remains a mystery of legal advocacy why the plaintiff did not refer to this indispensible subsection in understanding the entire section 148. More mysterious was why the first defendant Attorney-General of the Federation, who appeared in person, did not seem to know of the existence of section 148(2). And most mysterious was why the trial Chief Judge, who as a judge, was (and is) deemed to have *judicial notice*[96] of statutes,[97] did not advert to section 148(2). This is not the question of the learned jurist's prayer about lawyers not knowing all the law! There are obvious legal matters a lawyer should know, more so when he has been shown where to look for the law. In this regard, it seems inexplicable why in *Onwuekwe's* case, the parties and the court would fail to appreciate that section 148 of the Constitution has two subsections, and that the two should be read together in order to make meaning out of the entire section.

At the risk of repetition, the indispensability of section 148(2) lies in the fact that it empowers the President to "hold regular meetings with the Vice-President and all the Ministers" whom he assigns "responsibility for any business of the Government of the Federation" under section 148(1). On this Femi Falana has this to say:

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[96] The courts take cognisance or notice of matters, which are so notorious or clearly established that formal evidence of their exercise is unnecessary; and matters of common knowledge and everyday life: *Osborn's Concise Law Dictionary, op. cit.,* p. 188.

[97] Evidence Act, Cap E14, Laws of the Federation of Nigeria 2004, s.74; see also ss 73, 75, 144-131. For further reading see T. Akinola Aguda, *The Law of Evidence,* 4th ed., 1999, reprinted 2001, chap. 10.

> There is no provision of the Constitution empowering the Vice-President to hold meetings with Ministers. They are not his Ministers, they are Ministers appointed by the President.[98]

Femi Falana's statement, it is submitted, is correct. For if the Constitution wanted the Vice-President qua Vice-President to hold regular meetings with the Ministers under section 148(2) and assign them duties under section 148(1) in the absence of the President, it would have provided so. The totality of section 148 is clear and unambiguous. But neither sections 148 (1) nor 148(2) alone will satisfy the intention of the legislature of assignment of responsibility to the Vice-President and Ministers and holding of regular meetings aimed at determining the nature and scope of federal government business to be carried out by the public officers therein mentioned. Accordingly, sections 148(1) and 148(2) are complimentary and each should not be read in isolation[99] but together as a whole.[100]

It may be necessary to reiterate in conclusion that the only way the Vice-President can comply with the provision of sections 5(1) and 148 is as an Acting President under section 145. But for section 145 to be operative, the President will have to exercise his discretion by transmitting a declaration to the President of Senate and the Speaker of the House of Representatives that he is proceeding on vacation or otherwise he is unable to discharge the functions of his office.

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[98] *THE NATION,* Wed, Dec. 23, 2009, p.34

[99] See *Council of the University of Ibadan v. Ademolekun* (1967) 1 All NLR 213

[100] *Ibid.* For further reading on interpretation of Statutes, see e.g. A.O. Obilade, *op. cit.,* chap. 3

Mr. Chairman, sir, another aspect of mystery in *Onwuekwe's* case revolves on the court's apparent cavalier attitude to section 144 of the Constitution. In his submission, the first defendant Attorney-General argued that the plaintiff was not competent to state, as he did in his affidavit, that the President was temporarily incapable of discharging the functions of his office. He argued further that under section 144 "only the Federal Executive Council could pronounce on the capacity of the President to discharge his functions." His argument was supported by a resolution annexed to his counter affidavit as an exhibit. He contended that the resolution was passed by the "Federal Executive Council to the effect that the President was not incapable of discharging his functions."[101]

Section 144 has five subsections, and it was simply referred to as such without any argument whatsoever on the section or its subsections. Yet this was the section, which the trial Chief Judge seemed to have relied on in holding that the President was not incapacitated from discharging the functions of his office, notwithstanding his undue absence as a result of his sickness.

Now, section 144(1) provides that the President or Vice-President shall cease to hold office if:

> a. By a resolution passed by two-thirds majority of *all* members of the executive council of the Federation it is declared that the President or Vice-President is incapable of discharging the functions of his office; and

[101] *Onwuekwe v. Attorney-General, supra,* at p.7 of the typescript.

> b. The declaration is verified, after such medical examination as may be necessary, by a medical panel established under subsection (4) of this section in its report to the President of the Senate and the Speaker of the House of Representatives.

The medical panel under subsection (4) shall be appointed by the President of the Senate, and shall comprise five medical practitioners in Nigeria, including the personal physician of the President or Vice-President. Under subsection (2), it is when in the opinion of the medical panel it certifies in its report that President or Vice-President is suffering from such infirmity of body or mind which renders him incapable of discharging the functions of his office that the President of the Senate and the Speaker of the House of Representatives shall sign a notice to that effect and this shall be published in the official Gazette of the Government of the Federation.

It is evident from the foregoing subsections of section 144 that it requires a laborious procedure to declare the President or Vice-President medically incapable or discharging the functions of his office. Neither the plaintiff nor the defendant Attorney-General was competent to declare in their affidavit and counter affidavit respectively on the (in) capacity of the President under section 144. The resolution, which the latter exhibited in his counter affidavit, was at best a piece of paper that increased the volume of the document he filed in court. For there was no evidence before the court, first, that the "resolution was passed by two-thirds majority of *all* the members of the executive council of the Federation." It was a notorious fact from public discourse that the President's

Ministers were spilt down the middle regarding his incommunicado and long absence from the country.[102]

Secondly, the defendant Attorney-General did not provide any evidence that the resolution he exhibited in his counter affidavit was as a result of the meeting of all the Ministers; and if there were such meeting whether it was summoned by the President. As have been earlier argued, the Vice-President qua Vice-President is incompetent to summon the meeting of Ministers under section 148(2) of the Constitution.

Thirdly, the defendant Attorney-General did not reveal that, even if the meeting of the Minister was validly summoned, the resolution exhibited in his counter affidavit was founded on any medical examination of the President as provided in section 144(1) (b) of the Constitution.

And, fourthly, it is important to note that section 144 as a whole is provided to ascertain whether the President or Vice-President should cease to hold office if medical examination, in accordance with the provisions of the section, reveals that he is permanently incapacitated to discharge the functions of his office. Now, the resolution exhibited by the defendant Attorney-General in his counter affidavit "to the effect that the President [was] not incapable of discharging his functions"[103] was purportedly based on section 144. The implication here is that this very same section 144 can also be used to ascertain that the President or Vice-President is not permanently incapacitated to discharge the functions of his office. This was

[102] See, e.g. "Akunyili's memo that split ministers", *VANGUARD*, Fri., Feb 5, 2010, p.1,5

[103] *Onwuekwe v. Attorney-General, supra,* at p.7

not argued by the defendant Attorney-General. But I submit that it is a correct implication, because under section 144(2), the medical panel will have to show in its opinion that the President or Vice-President is actually permanently incapacitated to do his work. It is trite to say that opinion on any issue may be positive or negative, so is true with medical opinion which section 144(2) requires the medical panel to express on the health of the President or Vice-President whenever the need arises to do so under the section.

In concluding this discussion on *Onwuekwe's* case, it is interesting to inform that notwithstanding the foregoing material lacunae in the evidence of the parties, the learned trial Chief Judge still held, and wrongly so, as follows:

> On the whole it is my firm view that having regard to the totality of the affidavit evidence in this case… It is hereby declared that by the Provisions of section 5(1) and 148(1) of the 1999 Constitution the Vice-President can on the basis of an assignment or delegation by the President to him of the executive powers of the President under the Constitution exercise the executive powers vested in the President under the Constitution in the absence of the President.[104]

Mr. Vice-Chancellor, ladies and gentlemen, I shall at this juncture come back to section 145 of the Constitution. Earlier, I have wondered why the President exercised his discretion in default, in spite of his prolonged absence from the country. Now that the President is late, Nigerians shall never know the true story of his willingness or unwillingness to empower the Vice-President to become Acting President while he was on sick vacation.

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[104] *Ibid.,* at pp. 18-19 of the typescript.

However, political jaywalkers cashed in on the unfortunate situation and then there ensued constitutional debates as to the import of section 145. Public discourse on this issue can be classified into opposing perspectives. On the one hand was that that President should have complied with section 145 when he travelled out of the country for medical treatment. For being away for a prolonged period and at the same time remained incommunicado, section 144 should be invoked by the executive council of the federation (EXCOF) to determine the medical capability of the President to continue in office. But if the EXCOF was not willing, for obvious reasons, to invoke section 144, then the National Assembly should have to decide to impeach the President for seeming breach of section 145. In either scenario, a successful declaration of permanent incapacitation of the President or his impeachment would enable the Vice-President become the President and Commander-in-Chief of the Armed Forces of the Federation.

On the other hand, the argument was that the invocation of section 144 was uncalled for, since the Vice-President was exercising the President's executive powers in the absence of the latter. That the President was not incapacitated by his sickness; he could govern from anywhere in the world. The other argument was that section 145 was a permissive provision, which allowed the President to exercise discretion, and this he would do as he deemed fit.

Mr. Chairman, sir, the foregoing were roughly the two sides of the public discourse on the President's sickness and absence. I need not bore this audience that the law of the matter was emotionally engulfed by ethno-religious and geo-political and partisan sentiments. In the midst of the sentimental babel in the

guise of reasoned politico-legal discourse the rule of law remained unpleasantly quiet. The rule of law, like truth, is unusually silent in the midst of noisy legal jiggery-pokery. This reminds me of the eternal saying credited to that great American writer, Mark Twain:

> In the race between truth and falsehood, while truth is still lacing its boots, falsehood has traversed the whole world and back to the starting point.[105]

It was apparently in search of this truth, i.e. the rule of law that two principal officers of the Federal Government joined the constitutional debates. One was from the executive and the other was from the legislative arms of the Federal Government. In their individual views the law was that the President could exercise his discretion under section 145 the way he deemed fit. Accordingly, the then Attorney-General, who was the first defendant in *Onwuekwe's* case, argued on the pages of newspaper that the President could govern the country from anywhere in the world, even from his sick bed. He was quoted as saying:

> As far as he is not incapacitated, he can exercise his powers, except if the President comes out to say he is too sick to continue to function.[106]

This statement begged the question that the President did not comply with section 145 to enable the Vice-President act in his stead as Acting President while he was on sick vacation. In any

[105] I am not too sure whether the quotation is correctly put as in the original; I memorized it long ago from a book I read.

[106] *THE GUARDIAN,* Wed. Dec 16, 2009, p. 64 *per* Michael Aondoakaa, SAN. See also, *VANGUARD*, Wed, Dec. 16, 2009, p.1,5

case, he never came out to tell Nigerians whether or not he was "too sick to continue to function", for he was incommunicado to the common knowledge of Nigerians. Then on January 12, 2010, the President was purported to have granted an interview on the *British Broadcasting Corporation* (BBC).[107] The summary of the interview was that he acknowledged that he was sick; that he was recuperating; and that he would return to Nigeria when his doctors certified him fit to do so. This seeming interview was the first time the President's voice was heard since December 23, 2009. But the interview gave the lie to the Attorney-General's above quoted statement made about a month before the President broke his silence.

A similar other argument was put forward by the Deputy President of the Senate in the following words:

> The Constitution did not make provision for how long a President can stay out of the country and then he would lose his job. There is no such provision in our Constitution, so if he spends one year abroad, of course *you have a Vice-President who will be acting in his place.*[108]

Again, like the Attorney-General's argument, this begs the question that the Vice-President can act in the President's stead without the invocation of section 145 by the latter. Let me hasten to say that the statements by the learned Attorney-General and the Deputy President of the Senate, himself also a lawyer, would not be classified as legal arguments. At best they were partisan political views, falling within the rubrics of political jaywalking under the façade of rule of law. Their

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[107] See *THE GUARDIAN,* Sun. Feb. 28, 2010, p.25.
[108] *VANGUARD,* Fri. Dec. 4, 2009, p.5, *per* Senator Ike Ekweremadu.

arguments assume matter-of-factly that in the President's prolonged absence, the Vice-President as a matter of course "will be acting in his place".[109] I need not repeat my earlier contention in this regard that the Vice-President qua Vice-President has no capacity to operate the executive powers of the President under sections 5(1) and 148 of the Constitution.

What is important and in issue here is the exercise of the President's discretion in section 145 of the Constitution. But the apparent sophism of the two principal officers of the Government of the Federation seemed to circumvent and overlook the way and manner the President's should exercise his discretion under the section 145.

The import of discretion and manner of exercising it under the law has already been discussed under Segment 5 of this lecture. The mode of exercising presidential discretion does not differ from the form of doing same by any other mortal under the law, including the Constitution. For the avoidance of doubt, the discretion exercisable by the President under section 145 of the Constitution is *legal* discretion, no more no less. Accordingly, the President cannot exercise this discretion as he deems fit. If that is the case then it means that the President exercises his discretion guided by the rule of man, not rule of law. Indeed, not even a court of law can exercise discretion the way it deems fit. On the score, the Supreme Court has held:

> …where the trial court based its exercise of the discretion on matters extraneous to the issues before him (sic), or failed to take

[109] *Loc. cit.*

> relevant facts into consideration, the exercise of the discretion will not be bona fide and this court will be entitled to interfere.[110]

In that case it was found that the trial court based the exercise of its discretion on wrong principles or considerations, meaning that such was not legal discretion. Usually, appellate courts very rarely interfere with the discretion of trial courts, since, as courts of first instance, they are seized of the facts of cases before them. In that wise, the appellate court cannot substitute its own discretion for that of the trial court. But in the present case the appellate court had to interfere on grounds of reasons quoted above. It simply means that the trial court's discretion was not *discretio legalis.*

Now, what facts can be considered relevant in respect of the exercise of discretion by the President under section 145 of the Constitution? In answer, the facts include: (a) the President was on prolonged sick vacation, and meanwhile he remained incommunicado; (b) as a result, the President was expected under section 145 to inform the President of the Senate and the Speaker of the House of Representatives so as to enable the Vice-President become Acting President pending his return; this is the spirit[111] as opposed to the letter of section 145 of the

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[110] *Milton Ohwovoriole v. Federal Republic of Nigeria* (2003) 1 F.R. 171, at p. 183, *per* Kalgo, J.S.C. See also *Bank of Baroda v. Mercantile Bank (Nig) Ltd* (1987) 3 NWLR (Pt. 60) 233; Bakare v. A.C.B Ltd (1986) 3 NWLR (Pt 26) 47; *Gadi v. Male* [2010] 7NWLR (Pt 1193) 225 *Mohammed v. COP* [1999] 12NWLR (Pt 630) 331; *Re Alase* [2002] 10NWLR (Pt 776) 553; *U.B.N. Plc v. Adjarho* [1997] 6NWLR (Pt 507) 112.

[111] The Spirit of the law is "The general meaning or purpose of the law, as opposed to its literal content.": *Black's Law Dictionary, op. cit.,* p.1437. The latter of the Law: "The strictly literal meaning of the law, rather the intention or policy behind it": *Ibid,* p.924.

Constitution; (c) the implication in section 145 is to avoid a vacuum in the exercise of the executive powers of the President while he is away; again, this is the spirit of the Constitution, and (d) the need of the President to be faithful to his oath of office and defend the Constitution, here section 145.

Implicit in my arguments thus far are: that the President's prolonged sickness seemed serious enough for the EXCOF to invoke section 144, and that the President's silence on section 145 during his prolonged sick vacation seemed serious enough to warrant the commencement of proceedings by the National Assembly to remove him from office under section 143 of the Constitution. It is self-evident from the President's BBC interview that he had the presence of mind before and after the interview to comply with section 145. I consider his not doing so as a deliberate act of unfaithfulness to his oath of office and *a fortiori* in contempt of the Constitution. All this would have compelled the EXCOF or the National Assembly to free the nation from the rule of man. But because political jaywalking and legal jiggery-pokery were apparently influencing the unwary public towards ethno-religious and geo-political sentiments, neither the EXCOF nor the National Assembly was able to uphold and defend the Constitution.

In the midst of the constitutional din generated by heated debates, the National Assembly seemed to realize that the rule of man might drive the country towards untoward consequences. To avoid this, the National Assembly in a strange politico-legal manoeuvre, anchored on the ancient legal *doctrine of necessity* to enable it to invoke section 145 and then declare the Vice-President the Acting President. And, so, on

February 9 2010,[112] almost a month after the President's BBC interview, the Vice-President was proclaimed by the National Assembly as the Acting President and Commander-in Chief of the Armed Forces of the Federation.[113]

Before this historic proclamation, the National Assembly had argued that the said interview by the President on the BBC satisfied, in view of the political exigency of the moment, the provisions of section 145. The absurdity in this convenient argument lies in the face of it. For the President can as well through the same BBC or indeed any medium give another interview that he has recovered from his sickness and he is back in the country. Would the National Assembly as a result accept the interview as satisfying section 145? I believe the National Assembly has to accept it; otherwise it would be tantamount to taking benefits and rejecting liabilities imposed by the same instrument and in this case the doctrine of necessity. The law indeed does not allow any person or body to approbate and reprobate, i.e. blowing hot and cold concurrently.[114]

Explanation of the Doctrine of Necessity[115]

Mr. Chairman, sir, the bone of contention is whether the doctrine of necessity availed the National Assembly in the light of the apparent constitutional crisis created by the unfortunate

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[112] See *SUNDAY SUN,* Feb 28, p.11

[113] See The Constitution, 1999, s.130(2)

[114] See *Osborn's Concise Law Dictionary, op. cit.,* p.29. See further, Akpo Mudiaga Odje, "Acting President, National Assembly and the Doctrine of Necessity", *THE GUARDIAN,* Sun. Feb. 28, 2010, p. 25.

[115] For a detailed discussion on this subject see B.O. Nwabueze, *Constitutionalism in the Emergent States*, 1973, pp. 180-214

sickness and prolonged absence of the President, who while absent remained incommunicado. The answer lies in the legal import of necessity and the context in which it was employed.

Ordinarily, necessity is an indispensable phenomenon, which philosophically is something inevitable, so that the contrary is impossible.[116] In law necessity is a controversial doctrine, hinging on the basic issue of right conduct. For it is amenable to democrats and autocrats or indeed any mode of government ostensibly in pursuit of the rule of law. That is why it has been argued that judges are suspicious of the doctrine of necessity "because they fear that it may be subversive".[117]

Impliedly, necessity entails no alternative or option. And because there is no such option, necessity becomes a ground for breaking the law. This confirms the old English adage that "Necessity hath no law". Centuries back, the famous English writer, Oliver Goldsmith, wrote as follows:

> In all human institutions, a smaller evil is allowed to procure a greater good.[118]

Even in the Scriptures, necessity is captured in the dialogue between the Pharisees and our Lord Jesus Christ wherein the former demanded an explanation why the Latter's disciples would not observe the Sabbath, "picking ears of corn, rubbing then in their hands and eating them". In answer He asserted that king David and his followers, because of hunger, ate

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[116] *Concise Oxford Dictionary, op. cit.*, p.956
[117] Glanville Williams, *Textbook of Criminal Law, op. cit.,* p.597
[118] *In the Vicar of Wakefield* cited and quoted in *Loc. Cit.*

"loaves offering which only priests" were allowed to eat.[119] Again, necessity was implied in the Devil's temptation of Christ to change stones into bread in order for the Latter to assuage His hunger.[120]

These scriptural examples show that necessity is a doctrine, which tends to accommodate any tendency to suit any sublime or ignoble purpose. It is the

> …plea for every infringement of human freedom. It is the argument of tyrants.[121]

Notwithstanding the aim of pleading necessity, the doctrine inherently conceals the fact that the person invoking it always has a choice between two unpleasant scenarios.[122] This portrays necessity as a doubtful doctrine, compelling the courts to be very cautious in applying it whenever it is canvassed before them. On this score, Professor Glanville Williams has this to say about the doctrine:

> Necessity in legal contexts involves the judgement that evil of obeying the letter of the law is socially greater in particular circumstances than the evil of breaking it. In other words, the law has to be broken to achieve a greater good.[123]

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[119] *Holy Bible*, Luke 6:1-5; see also 6:6-11
[120] Ibid., Matt 4:3, 1_10
[121] Glanville Williams, "The Defence of Necessity", *Current Legal Problems*, 1953, p.223; quoted also in B.O. Nwabueze, *Constitutionalism in the Emergent States, op.cit.,* p.184
[122] See R.F.V, *Henson, Salmond on the Law of Torts,* 17th ed., 1977, p.493.
[123] Glanville Williams, *Textbook of Criminal law, op. cit.,* p.597

I can decipher from these statements a situation of *felix culpa*,[124] i.e. "good" coming out of evil. But this "good" which actually is the evil of intentional disobedience of the law is less than the evil, which may result in keeping the law. This paradox perhaps explains why necessity is also known as the doctrine of lesser evil.[125]

Evidently, necessity is generally a defence against breach of the law. As a defence, it cuts across both civil and criminal law. This defence serves as a justification for breaking the law. Depending on the circumstances of individual cases,[126] the defence of necessity may relieve one of criminal or civil liability or may mitigate punishment or damages[127] as the case may be.

However, I hasten to inform that the foregoing line of thought in respect of the defence of necessity does not necessarily fall within the purview of this lecture. All that is intended here is to give background information of the doctrine of lesser evil with a view to understanding its application to the resolution of constitutional crises.

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[124] Literally "A fortunate mistake; a happy fall".

[125] See f.n. 117, *supra*., chap 26, in particular, pp. 579-601; also "*Current Legal Problems*", 1953, *op.cit*., p.223

[126] E.g., *R v Justus Tobia* [1963] 2 AU NLR 72. This seemed to be a clear case of necessity, but was wrongly decided on another legal principle: see S.A.M. Ekwenze, *Nigerian Criminal Law Cases*, 2006, p.111; *Uzoahia v. Atu* (1995) 5 EC SLR.139

[127] For further reading, see Sir John Smith, *Smith and Hogan: Criminal Law*, 2002, pp.266-275; C.O. Okonkwo, *Okonkwo and Naish: Criminal law in Nigeria*, 2nd ed., pp. 113-114; *Salmond on Torts*, *op.cit.,*

Professor Ben Nwabueze, in his indepth treatise on the subject-matter, discussed the invocation of necessity in periods of political exigencies in several countries, including Nigeria. His exposition of necessity can be summarized in his words:

> …the doctrine does not operate from outside the law, but it is implied in it as an integral part thereof.[128]

I humbly submit that the doctrine is also an intrinsic "part thereof." Being an intrinsic and integral part of the rule of law, it means any invocation of the doctrine has the support of the law. This seems to be a contradiction in terms in view of earlier arguments. But the resolution of this apparent contradiction lies in the fact that once the inevitable act of necessity is not inexcusable, unjustifiable or unwarrantable within the law, then it automatically dissolved into the supremacy of law. It is in the light of this that we have to ascertain whether the National Assembly was justified in acting under section 145 of the Constitution on grounds of necessity.

I hereby submit with all humility that the National Assembly had no excusable, justifiable or warrantable ground to plead necessity in breach of section 145 of the Constitution. My contention is founded on the existence of two options under section 143 and 144 of the Constitution, which would have enabled the National Assembly and EXCOF respectively to do their duty to the peoples of this country. And there was ample time for either body to carry out its constitutional functions within the appropriate section as stated above. I want to reiterate that there was no necessity within the legal meaning of the term, or within the context it was employed. What existed

[128] B.O. Nwabueze, *Constitutionalism in the Emergent States, op.cit*., p.181

was a contrived and avoidable political "exigency" which was expediently foisted on the nation by political jaywalkers under the guidance of legal jiggery-pokery. The resultant effect was the contemptuous disregard of the rule of law. It seems Niki Tobi, JSC, had this in mind when he prophetically held in the case of *Attorney-General, Abia State v. Attorney-General of the Federation*[129] as follows:

> The Nigerian democracy is a constitutional democracy based on the rule of law. *Where the rule of law reigns political expediency ought to be satisfied on the altar of the rule of law so as to guarantee the continued existence of democratic institutions fashioned to promote social values of liberty, orderly conduct and development…*[130]

This is a weighty pronouncement by the Supreme Court on why the rule of law must not be sacrificed in order to appease political expediency. By hiding under the doctrine of necessity the National Assembly seemed to have wittingly or unwittingly undermined its strength as a constitutional institution. This may not be the case of prudence being a better part of valour, because the National Assembly apparently did not exhibit some courage, let alone dressed it with care and thought for the country.

All in all, it seems to me that the problem with the National Assembly lay in its indecisiveness brought about by overt and covert ethno-religious and geo-political sentiments that beclouded sound politico-legal decisions under the supremacy of law. This is the problem that tends to weaken democratic

[129] [2006] 16 NWLR (Pt 1005) 265
[130] *Ibid.,* at p.421. Emphasis added.

institutions.[131] Indeed, the exhibition of strength by democratic institutions puts them in good stead to invoke necessity in genuine cases of constitutional exigencies. A good example of such constitutional necessity came up in the case of *The National Assembly v. the President of the Federal Republic*.[132]

In that case, the court was called upon to annul the Electoral Act 2002, because the statute was not enacted in compliance of section 58(5) of the Constitution. Under section 58(1) the provision is that the power of the National Assembly to make law shall be exercised by bills passed by both the Senate and House of Representatives and, except as otherwise provided by subsection (5), assented to by the President.

Now, when the said Electoral Bill was passed by the National Assembly in accordance with section 58(1), the President did not assent to it within the mandatory 30 days. Then the National Assembly acting under section 58(5) passed the Bill into law. This subsection provides that where the President withholds his assent and the Bill is again passed by each House by two-thirds majority, the bill shall become law and the assent of the President shall not be required.

However, the National Assembly in breach of section 58(5), i.e. without forming a quorum of two-thirds majority individually in the Senate and House of Representatives and by motion purportedly passed the Electoral Bill into law as the Electoral Act 2002. Based on this Act, the 2003 elections were conducted. The court of Appeal declined to declare the Act

[131] For further reading, see Rev. Fr. M.H. Kukah, *Religion, Politics and Power in Northern Nigeria,* 1993, reprinted 2003.
[132] [2003] 9 NWLR (pt 824) 104

unconstitutional, impliedly on grounds of necessity even though the doctrine was not specifically mentioned. In the words of Oguntade, J.C.A. (as he then was) who delivered the leading judgment:

> The said Law is now being used for the 2003 National Elections. To declare it unconstitutional and strike [it] down at this stage may lead to a widespread disruption of national life… it is not in my view necessary to strike down the Law.[133]

I agree with the decision of the learned Justice. Although, as just stated, the judgement did not say categorically that the refusal to annul a clearly unconstitutional statute was based on necessity, the pronouncement of the learned jurist implicitly affirmed so. The case evidently shows an ironic but regrettable situation where a law-making body acts outside the law, which resultant effect can be anarchic, but for the sagacity of the court's implied invocation of the doctrine of necessity to avoid "a widespread disruption of national life". This is a shining instance of how necessity is an intrinsic and integral part of the rule of law.

In conclusion, it is important to put on record that the invocation of the doctrine of necessity by the National Assembly was and possibly will never be tested in our courts. Perhaps, that would have helped to determine the strength or weakness of our democratic institutions in the present dispensation. It is needless to emphasize that the Legislature, Executive and Judiciary are the foremost democratic institutions in our Constitution. A weakness of any of them,

[133] *Ibid.,* at p.134.

particularly the judiciary, would invariably undermine the rule of law in the governance of Nigeria.[134]

b. Criminal Law

Mr. Vice-Chancellor, ladies and gentlemen, the criminal or penal law is another *corpus juris*[135] I want to employ to test the observance of the rule of law. According to *Black's Law Dictionary,* it is that body of law defining offences against the community at large, regulating how suspects are investigated, charged and tried and establishing punishment for convicted offenders.[136]

This definition is broad enough to encompass both substantive and procedural aspects of criminal law, operating within the criminal justice system. In this country, the Constitution provides that offences must be "defined and the penalty therefore is prescribed in a written law".[137] The substantive criminal law defines the offences and prescribes the penalty or punishment. The procedural criminal law is about arrest and investigation of suspects. It also involves the arraignment and trial of accused persons. Finally, it prescribes the procedure for conviction and sentence. A punishment may attract imprisonment, and that completes the process through the criminal justice system.[138]

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[134] See *attorney-General of the Federation v. Abubakar* [2007] 10 NWLR (Pt 1041) 1, at pp. 179-180, *per* Aderemi, J.S.C.; *Gadi v. Male* [2010] 7 NWLR (Pt 1193) 225

[135] i.e., "body of law"

[136] Op. cit., p.403.

[137] The Constitution 1999, s. 36(12)

[138] For further reading, see Bob Osamor, *Fundamentals of Criminal Procedure,* 2004.

From the foregoing information, it is discernible that criminal law operates through three constitutional institutions, namely, the police, the courts and the prisons.[139] These make up the criminal justice system. But I am not here to do a jurisprudential dialectics of these institutions, which enables the operation of the criminal law. What is important in the context of our discussion is that criminal law punishes people who offend it; it is not interested in the whys behind the perpetration of offences, unless such reasons fit into the defences against criminal responsibility.[140] However, the enquiry into criminal causation falls within the purview of criminology.[141]

Interestingly, one sure reason why people commit offence is ignorance. Earlier, I have informed that ignorance of the law does not excuse. In other words, everyone is presumed to know the law.[142] This is hardly a rebuttable presumption in criminal law from which the maxim originated.[143] This criminal law concept was perhaps postulated to prevent pretentious plea of innocence to avoid penal punishment. Yet, it is admittedly a hash rule, because the offender may have been innocently unaware that his conduct offended the criminal law.

Be that as it may, ignorance of the criminal law is not a defence against criminal responsibility. One, therefore, has to be

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[139] See Steve Uglow, *Criminal Justice, 1995.*
[140] See Criminal Code, chap. 5
[141] See f.n. 8, *supra*
[142] Alan Reed and Peter Seago, *Criminal Law, 2002, p.1.*
[143] Glanville Williams, *Textbook of Criminal Law, op. cit.,* p. 451; Sir John Smith, *op. cit.,* pp. 97-99. Richard Card, *Card, Cross and Jones: Criminal Law*, 16th ed., 2004, pp. 147-148

circumspect in one's behaviour. But I dare say that many of us at our own level of governance in this country may have ignorantly offended the criminal law. There are, however, others who, in the name of governance, deliberately offend the criminal law. In this regard, the intentional offender has no respect for the rule of law, and he may have some motive or reason for doing so. Security is a major motive commonly put forward for breach of the law in the governance of Nigeria, and indeed many other parts of the world.[144]

Security and Rule of Law

Before reflecting on security and the rule of law, it is important to state that motive, unless otherwise specifically provided as a defence in an offence, is immaterial with regard to criminal responsibility.[145] It may, however, mitigate the punishment to be inflicted on the offender.[146] On this score, if the motive behind an offence is the pursuit of security, it does not provide a defence to the offender. Security, therefore, must be pursued within the rule of law.

Mr. Chairman, sir, in different times of history and in different nations of the world, tension has always existed between security and the rule of law.[147] Actually, this means that the rule of law has the onerous task of creating a balance between competing security interests concerning the nation or public, the government and the people. But the clash of security

[144] David P. Fidler and Lawrence O. Gostin, *op. cit.,* pp. 189-190
[145] Criminal Code, s. 24
[146] See C.O. Okonkwo, *op. cit.,* pp. 56-57; Sir John Smith, *op. cit.,* pp. 95-96.
[147] For further reading, see, David P. Fidler and Lawrence O. Gostin, *op. cit.,* chap. 6.

interests is mainly between the style of governance and the claim of individual rights. Often, governance operates under the façade of government security to infringe on the rights of the citizens. But this is not proper, for the government interest is not interchangeable with national or public interest. Whereas the latter benefits at least majority of the people, the governors and the governed within the polity, the former is a partisan establishment, the government of the day, having a resemblance of a bird of passage, which may be different from the government of another day. The rule of law takes cognizance of these circumstances in its effort to strike a balance between security and individual rights.

The primary security body in any given country, whether democratic or otherwise is the police institution. In that position, the police stand sentinel over as well as being a gateway into the criminal justice system. Obviously, the police are a strategic constitutional body[148] and for this reason their duties include prevention and detection of crime apprehension of offenders, preservation of law and order, protection of life and property and enforcement of all laws and regulations.[149]

A World Bank research finding which we have earlier discussed reveals that an indicator of good governance under the rule of law in any country depends on the quality of its police institution. There is no gainsaying the fact that a poor quality police will provide services of poor quality. This is aptly put in the Latin aphorism: *nemo dat qui non habet*, i.e. no one gives what he does not possess.[150]

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[148] The Constitution 1999, s.214. See also ss. 215-216.
[149] Police Act, s.4
[150] *Osborn's Concise Law Dictionary, op. cit.,* p.227

The Constitution gives the police the powers to obey the rule of law, not rule of man. In other words, the police owe their allegiance to the rule of law, not to any man, authority or government of the day.[151] This may sound strange to Nigerians, but I have argued this in my *Police Powers in Nigeria,* a book I am, by the grace of God, proud to say is being cited by lawyers and judges in their effort to resolve the delicate issues of criminal justice and civil liberties.

However, in practice, the police tend to predispose themselves to usage as agents of government and "powerful" individuals to the detriment of the rule of law. Stories of the misemployment of the police as agents of men instead of law are not only replete in the news media but are also of common knowledge to Nigerians. Let us recall here the attempt on July 10, 2003 at Awka to abduct Dr Chris Ngige, the then Governor of Anambra State. On that fateful day, the police Assistant Inspector–General (AIG) Raphael Ige led a team of police officers to forcibly remove Dr Ngige from office as governor. The police action was ostensibly to enforce the order of Stanley Nnaji, J. of the High Court of Enugu State, to the effect, among others, that the governor was not properly elected and therefore, should cease to act as such. The order was made extra-territorially and without jurisdiction. Both judicial order and its (manner of) executive enforcement were outrightly condemned by all reasonable lawyers and laypeople alike as a recipe for anarchy. It seems to me that both public officers wittingly, for whatever reasons, allowed themselves to become pawns in the chessboard of political jaywalkers, culminating in

[151] G.O.S. Amadi, *Police Powers in Nigeria op. cit.* pp. 10-11

the dismissal of Justice Nnaji and premature retirement of AIG Ige from service.

Now, Mr Chairman I want to draw attention of this august assembly to a typical instance of use of the police in the name of security to flout the rule of law in the governance of this country. I dare say that there is hardly any Nigerian who is not aware of siren-blaring convoy of people in power and authority who regularly ply our highways. But what our citizens perhaps may not know is that, while the convoy is in motion, several offences are simultaneously committed by the very same people who are duty-bound to respect and govern by the rule of law. The offences committed include:

> i. **Public or Common Nuisance:** Here the law provides that any person who does any act not warranted by law, or omits to discharge any legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to the public is guilty of an offence.[152]

This provision is self-explanatory. A siren-blaring convoy, moving at an unreasonable speed, as is usually the case, obstructing public roads, and causing inconvenience to other road users certainly offends section 234(f) of the Criminal Code.

> ii. **Breach of Road Traffic Law:** Stemming from the offence of nuisance as above described are some offences against the road traffic law. The first is the reckless and dangerous driving of the convoy; the second is the driving of the convoy above the legal speed limit as the circumstances of the highway demand, and the third is the driving of the convoy against the traffic. Usually, the

[152] Criminal Code, s. 234 (f)

convoy tends to occupy both lanes of the highway, halting the movement of on-coming motorists or forcing them out of the road, or possibly compelling them to drive on the verge to the detriment of pedestrians and other road users.[153]

iii. **Common Assault:** The definition of assault in the Criminal Code[154] is quite involved. But simply and concisely put, assault is the striking, touching or otherwise applying force of any kind to another person without his consent.

iv. **Assault Occasioning Harm:** This is a graver form of assault in which a person is caused bodily hurt, disease, or disorder, whether permanent or temporary.[155]

v. **Grievous Harm:** This is the gravest form of assault, which may maim the person or endanger his life. The person may be permanently injured or disfigured.[156]

vi. **Homicide:** Murder or Manslaughter: This is the intentional or reckless or negligent killing of another[157] as the case may be.

vii. **Injury to Property:** The law provides that any act, which causes injury to the property of another and which act, is done without his consent is an offence, unless the act is authorized or justified or excused by law.[158]

Mr. Chairman, sir, the foregoing are some of the offences that a siren-blaring convoy is likely to cause in its movement on our roads. There may still be more, in particular, collateral

[153] See G.O.S. Amadi, *Police Powers in Nigeria,* chap. 7, in particular pp. 161-162; Ademola Ogunleye, *The Motorist and the Law*, 1976.
[154] Criminal Code, s. 252, also s. 35
[155] *Ibid.,* s. 351
[156] *Ibid.,* s. 335
[157] *Ibid.,* ss. 308 (definition of killing) 316 (definition of murder), 317 (definition of manslaughter).
[158] *Ibid.,* s.440

offences, resulting in shock or trauma of citizens. Again, Nigerian road users may on their own incur criminal or civil liabilities, injuring others or damaging their property in their bid to scramble to safety to make way for the noisy, speeding convoy.

Apart from the offences likely to be committed by police officers accompanying a siren-blaring convoy, there is something sinister about siren, which perhaps we do not realize. In my Ph.D thesis[159] I examined the use of the device by people in power and authority. It is a craze, which Professor Chinua Achebe aptly described as "the siren mentality".[160] In my thesis, the relevant portion that I shall now quote, I call the user of siren, "the siren personality".[161] There I said thus:

> Siren, etymologically, is of Greek origin. In that country's mythology a siren is one of a number of the fabulous winged women living on rocky isle whose songs charmed sailors and caused their destruction. In modern usage a siren is an apparatus which produces shrill loud noise but which is only activated during emergencies by a fire-engine on its way to fight fire or to undertake other rescue operations, an ambulance rushing a seriously ill or injured person to a hospital, the police in hot pursuit of a felon, or in a wartime, to warn citizens of enemy air-raids or other emergencies.[162]

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[159] G.O.S. Amadi, *Police Powers and the Rights of Citizens in the Nigerian Criminal Justice System,* Unpublished Ph.D Thesis 1994, University of Nigeria.

[160] Chinua Achebe, *The Trouble with Nigeria,* 1983, p.34.

[161] G.O.S. Amadi, Unpublished Ph.D Thesis, *op. cit.,* p. 858.

[162] *Ibid*., p. 857. See also Chinua Achebe, *op. cit.,* p. 34. Governor Babatunde Fashola of Lagos State does not use siren, and he confirmed in the *BBC World* Documentary "My Country Nigeria" 6-7pm local time, on October 02, 2010, that the device is for the emergencies as stated above.

We can see from the foregoing quotation that the use of siren is not a yardstick for measuring status in any civilized system; rather it is a barometer for knowing the mindset of people privileged to exercise power and authority in Nigeria. On this score, I dare say that there seem to be no difference between the siren personality and the winged goddesses of Greek mythology. In other word, "the siren personality is as dangerous to the road user as the siren in Greek mythology to seafarers".[163]

Mr. Chairman, sir, I must again confess that I do not know all the law. Perhaps, that is why I am yet to read of any law, which specifically provides for certain people in this country not only to use the siren, but operate it in a convoy accompanied "by gun-toting and cane-wielding police officers,"[164] and in the process possibly commit offences or civil wrongs against other road users. But this is what happens almost daily on our public roads throughout the country.

In August 2010, the news media were again awash with the menace of the siren personality. This time, the victim was a Catholic priest. In an open letter to the President of Nigeria, a group called the Catholic Mothers' Forum in an advertorial stated the facts, which I hereby partly reproduce verbatim as follows:

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[163] *Ibid.,* p. 859.

[164] *Ibid.,* p. 858. See *Miss Okere and another v. Rear Admiral Arogundade and others,* Suit No. m/615/08, Unreported, delivered on 27/01/2010, by O.O. Oke, J. (Lagos Division).

> At 6.30pm on Sunday August 8, 2010, Rev. Fr. Okorie left St. Mary's Parish, Ogada, Ikeduru after a long vigil mass and was heading back to Owerri, driving along the narrow Owerri-Okigwe Road. Along sped the usual long and menacing convoy of Governor Ohakim. As the convoy approached, forcing road users off the road, Fr. Okorie who was approaching a dangerous gully managed to park off the road as far as time, safety and space could permit to avoid falling into the gully.
>
> As he waited for the convoy to pass, a jeep in the convoy stopped by his car. The occupants jumped out, smashed the windscreen, rammed guns into the bonnet, the body of the car, tore open the door and dragged out the petrified Man of God. Threatening to kill him for blocking the Governor's convoy, they pushed him into their own jeep and sped off to the Government House where he was handed over to the Governor's Chief Security Officer. Right there in the Government house, the Reverend Father dressed in the Cassock of a Priest, was stripped naked, brutalized and interrogated and kept under sub-human conditions.[165]

The foregoing facts are not before any law court yet as far as I know. And the incident may never be an issue of litigation and or criminal prosecution having regard to the victim involved. Nonetheless, the point is that the other side is yet to be heard. The natural justice principle of *audi alteram partem*[166]does dictate that we cannot come to conclusion based on the story of one party in a dispute. However, it is on record that Governor Ikedi Ohakim did publicly apologize[167] to the Catholic Archdiocese of Owerri, where Reverend Father Okorie belongs. In law such apology can be taken as an admission of what happened to the clergyman. But that is not the issue

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[165] *THISDAY*, Tuesday, August 24, 2010, p.16.
[166] i.e., "Hear the other side."
[167] It was broadcast in the radio and television as well as published in the newspapers.

before us. The point I want to establish here in the light of the above facts is the number of offences that were possibly committed by the security officials accompanying the convoy. Again, the acts that were carried out were done ostensibly under the guise of security in the governance of that part of the country. The rule of law was treated with utter contempt.

A similar situation occurred earlier in 2009 in Lagos. It was in issue in the case of *Miss Uzoma Okere and Another v. Rear Admiral Arogundade and Others.*[168] In that case, a motorist Miss Okere, the first applicant, on November 3, 2009 met a heavy traffic hold-up on Muri Okunola Street, Victoria Island, Lagos. The time was about 5:30pm. She was in the car with the second applicant. Then a siren-blaring convoy of Rear-Admiral Arogundade, the first respondent, was heard. The convoy wanted other motorists to give way to the first respondent Rear-Admiral and other respondent naval ratings. But the naval ratings felt that Miss Okere's car blocked the convoy's passage. Then one of the cars in the convoy overtook Miss Okere's vehicle. Thereafter the naval ratings jumped out of their car after blocking Miss Okere's way. The ratings pulled her out of her car and then began to flog her and second applicant with horsewhips, including using gun butts on them. In the process Miss Okere was stripped naked from waist up and then handcuffed. Not done with humiliating her in the full glare of publicity, the ratings abducted and took her to a place where she was detained for one and a half hours.

In her claim for damages for breach of her fundamental rights, the court found the Rear Admiral and his naval ratings liable,

[168] Suit No. M/615/08, Unreported, delivered on 27/01/2010, by O.O. Oke, J. (Lagos Division)

even though they denied all the applicants' allegations. The evidence of the parties was based on affidavit, but the court relied on documentary and corroborative evidence of the applicants, which was a video clip of the manhandling of Miss Okere by the naval ratings. The court awarded the #100 million damages claimed by the applicants against the respondents jointly and severally. In her judgement, the trial judge stated as follows:

> There is no doubt in the mind of the court that the Respondents while on their convoy intimidated the Applicants and other road users by blaring their siren and the Ratings used horsewhips to clear motorists out of the way for their convoy as if they were clearing herd of cattle away from the road.[169]

On the issue of siren-blaring, the court said:

> …siren blowing of convoy only adds to the disorderliness on our roads rather than help an already bad traffic situation. It causes additional hardship, fear of safety of the lives of other motorists who see gun trotting (sic) officers becoming emergency traffic wardens just to pass their own vehicles out of the traffic hold-up. [170]

What *Uzoma Okere's* case actually establishes is that there is no law yet in this country, which permits the siren personality, the privilege, let alone the right, of discriminatory use of the highway against motorists and other road users. Everyone, the ruler and the ruled, is entitled to equal treatment and access to public roads without discrimination whatsoever in compliance with the applicable road traffic laws and regulations. Any such

[169] *Ibid.,* p. 31 of the typescript.
[170] *Ibid,* p.32 of the typescript

discriminatory use of the highway is a violation of the right of movement and the dignity of the human person. In the end, the rule of law demands that everyone has equal right and privilege to the usage of the highway. And such is and should be a parameter for good governance, more so in a democratic dispensation.

Governance in Breach of Right to Life

In concluding these issues of criminality in the governance of Nigeria, let me refer to two more instances. The first is the unprecedented case of *Nasiru Bello and Others v. Attorney-General, Oyo State*[171] that occurred during one of the military regimes in this country. In that case, the appellant, Bello, was convicted of the offence of armed robbery by the High Court of Oyo State. He was sentenced to death. Consequently, he filed an appeal. But while the case was pending before the Court of Appeal, the Governor of Oyo State signed the appellant's execution warrant on the advice of the State's Ministry of justice. The appellant was accordingly executed. The deceased dependants, including his wives, children and parents sued the Oyo state Government, claiming, among others, that the execution of the appellant was unconstitutional because it violated the deceased's right to life as well as his right to have his appeal heard under section 220(1) of the 1979 Constitution.[172]But the respondent Oyo State Government argued that the appellant did not comply with the form required to commence the appeal, meaning that the case was not properly before the Court of Appeal. The respondent's argument was rejected, and rightly so, by the Supreme Court

[171] [1986] 5NWLR (pt 45) 828
[172] Now, The Constitutions, n1999, s.241(1)

on the ground that a "mere form or fiction of law" should not be allowed to work a wrong against the "real truth and substance of the case before it."[173]

Now, what was "the real truth and substance of the case" facing the Supreme Court in *Bello's* case? To all intents and purposes, the apex court was called upon to do justice, to decide between the rule of law and the rule of man. Holding in favour of the appellants, Aniagolu, JSC stated as follows:

> This is the first case in this country of which I am aware in which a legitimate Government of this country - past or present; colonial or indigenous – hastily and illegally snuffed off the life of an appellant whose appeal had vested and was in being, with no order of court upon the appeal and with a reckless disregard for the life and liberty of the subject and the principles of the rule or law. *The brutal incident has bespattered the face of Oyo State Government with the paintbrush of shame.*[174]

The *Nasiru Bello* case once more confirms the supremacy of law in the governance of this country[175]. Although the Oyo State Government was liable in the civil claims against it, it is my submission that all those responsible for "the illegal, unlawful and unconstitutional"[176] execution of the appellant

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[173] *Nasiru Bello &others v. Attorney- General, Oyo State, Supra, per* Oputa, JSC, 886

[174] Ibid., p. 860. Emphasis added.

[175] *See further, Attorney-General, Lagos State v. Attorney-General of the Federation* 2004 11-12 S.C. 85; *Attorney-General of the Bendel State v. Attorney-General of the Federation* (9181) 10 S.C1; The Military Governor, Lagos State v. Chief *Ojukwu* [1980] 1NWLR (pt 18) 621

[176] Chief Justice M.L. Uwais, *The Evolution of Constitutionalism in Nigeria: The Role of the Supreme Court under the 1979 and 1999 Constitutions,* 2006, p.31

should have been prosecuted for his murder. Nonetheless, the Supreme Court has emphatically established in that case that the right to life cannot be extinguished simply because one has been convicted and sentence to death. In that circumstance, the right to life remains in being until the convict, if he so desires, has exhausted the appeal processes up to the Supreme Court.[177]

Again, *Bello's case* settles the issue that legal technicalities should be used as a shield to protect the intent and purpose of law, and not as a sword to destroy it. In other words, legal technicalities should not be employed to defeat the truth and substance of law. Furthermore, it is the law that any form of executive powers exercised in governance of this country must be done within the rule of law.[178]

Notwithstanding the series of Supreme Court's decisions[179] that governance should operate under the rule of law, the executive arm of government in particular seems to prefer the rule of man. *Bello's case* happened in the last quarter of the 20th century, involving the lawlessness of a state governor; but in the first quarter of the 21th century the federal government did not seem to care about its face being "bespattered… with the paintbrush of shame" in exercising power outside the rule of law. And, so, in the case of *Attorney-General of Lagos State*

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[177] *Loc. cit.*
[178] *Ibid.,* p. 33.
[179] See f.n. 175 *supra*; see also *Peoples Democratic Party and Another v Independent National Electoral Commission and others.* [2001]. FWLR 2735; *Saidu Garba v Federal Civil Service Commission and Another.*[1989] NWLR 449; *Obeya v. Attorney-General of the Federation* [1987] 3 NWLR (pt. 60) 325; *Eleso v. Government of Ogun State and Others* [1990] 2 NWLR (pt. 133) 420.

v. Attorney-General of the Federation[180] the Federal Government believed that the rule of man should be employed to solve its differences with the Lagos State Government.

The issue in dispute in that case was the creation of 37 new Local Government Areas by the Lagos State Government, which the Constitution allows it to do. However, the validity of the new councils cannot be fully effected unless and until the National Assembly amends the Constitution under section 8(5)[181] to include them with their headquarters as provided under section 3(6).[182]

But in exhibition of strongmanism, and perhaps with a view to punishing the Lagos State government, the Federal Government withheld the Statutory Funds due to the former's constitutionally recognized 20 local government areas. This behaviour was compelled by the belief that the funds will be used to run the additional created local government areas. While holding that the Constitution did, and does, not empower the President of Nigeria, expressly or impliedly, to suspend or withhold the statutory allocation payable to Lagos State,[183] Niki Tobi, JS.C., stated as follows:

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[180] [2004] 11-12 S. C. 85

[181] "An act of the National Assembly passed in accordance with this section shall make consequential provision with the respect to names and head quarters of states or local government areas as provided in section 3 of this Constitution…"

[182] "There shall be seven hundred and sixty-eight local government areas in Nigeria as shown in the second column of Part I of the First Schedule of this Constitution…"

[183] *Attorney-General of Lagos State v. Attorney-General of the Federation, supra, per,* Kutigi J.S.C. at pp. 122-123.

> If the Federal Government felt aggrieved by Lagos State creating more local governments, the best solution was to seek redress in a court of law without resorting to self-help. *In a society where the rule of law prevails, self-help is not available to the executive or any arm of government.* In view of the fact that such a conduct could breed anarchy and totalitarianism and since anarchy and totalitarianism are antitheses to democracy, courts operating the rule of law, the lifeblood of democracy, are under a constitutional duty to stand against such action…. *In our democracy, all governments of the country as well as organizations* and individuals must kowtow to *the due process of the law and this they can vindicate by resorting to the court for redress in the event of any grievance.*[184]

The foregoing pronouncement was not made in a criminal case. And I am not competent to criminalize such anarchic behaviour evident in the unconstitutional exercise of power by the President in the case under discussion. But that case is cited here to illustrate the regrettable lack of sense of shame apparently inherent in the style of governance in Nigeria. It re-echoes the paintbrush of shame splashed on the face of Oyo State Government 25years ago.

Vote-Rigging and Rule of Law

But this brings to mind the second and final instance of criminality in the governance of this country, which also bespatters our face with the paintbrush of shame. I am talking about the electoral offence of rigging. I use rigging here to connote all forms of electoral fraud. This crime is done with unashamed consciousness, and it is generally believed to be

[184] *Ibid.,* p.151. Emphasis added.

instrumental to installing various governments of the federation even since colonial times.[185]

Ordinarily, the verb "rig", for the purpose of this lecture, means manage or conduct (something) fraudulently to gain an advantage.[186] It is notoriously believed that vote rigging is endemic in Nigerian electoral culture, a rule rather that an exception in our electoral history. This assertion may be arguable, if not untenable, since those who carry out the rigging and the beneficiaries therefrom are seen to be innocent in the eyes of the law, having not been convicted of such electoral fraud under the criminal law. The law, no doubt, must always seek for proof of evidence concerning vote rigging. That was what informed the Supreme Court in the case of *Buhari v. INEC* [187] wherein the late President Umaru Musa Yar'Adua was declared, by split majority, the winner of 2007 presidential election. Yet it is on record that the late President in his inaugural speech did acknowledge in good conscience that the election that brought him into power was somewhat flawed.

It is not my intention at this point to express my opinion about the split majority judgement of the Supreme Court, in particular the leading decision of Niki Tobi JSC, but suffice to say that the case is a typical example of successful and

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[185] See Remi Anifowose, *Violence and Politics in Nigeria*, 1982.
[186] *Concise Oxford English Dictionary, op. cit.,* p. 1238.
[187] [2008] 19 NWLR (pt. 11220) 236. Note the Electoral Act 2006 upon which case is based does not use the word "rig" or "rigging" in any of its electoral offences in Pt. VIII, ss. 124-139. The word is used here in a generic sense to include any electoral offence, which may influence the outcome of elections under the Act.

unsuccessful electoral litigation that is apparently decided under the rule of law. Yet this rule of law is seen as suspect by Nigerians who seem to be witnesses of the alleged electoral fraud of the 2007 elections. In the circumstance, what seems to govern electoral petitions is what is cynically regarded as the *ruse of law*, influenced by political jaywalking and legal jiggery-pokery.

Interestingly, the serious problem of vote rigging cannot be fully comprehended, let alone resolved, from the standpoint of criminal law. Electoral fraud, like all other criminal acts, is a behavioural phenomenon, and as such it is a criminological question, which can be fathomed through criminological research. This is because, notwithstanding penal provisions[188] on this apparent enigma, vote rigging in Nigeria tends to increase by leaps and bounds in successive elections. This is another assertion, requiring evidential proof. I am not here to offer any proof. I liken the situation to where one feels heat coupled with smoke, but there is no fire anywhere associated with the elemental discomfort. In other words, Nigerians are aware of vote rigging in elections, but no persons, the riggers and their beneficiaries are arrested let alone prosecuted, under the criminal law. Also, the parties whose candidates are allegedly rigged into office in the guise of winning elections go scot-free. They are seemingly as elusive as will-o'-the-wisp, free from the noose of criminal justice and live to return to the next elections to perpetrate yet another bout of electoral fraud.

Criminologically, I make bold to say that many Nigerians of the age of franchise are aware of vote rigging by virtue of

[188] Electoral Act. 2006, ss. 124-139 now repealed and replaced with Electoral Act 2010, ss. 116-131.

being participant observers. I am one of those Nigerians who have been a participant observer in elections since 1999. And I know that since then elections have not been fair, free and credible.

A participant observer, by the way, is one who formally or informally studies "a group in its natural setting by observing its activities and to varying degrees, participating in its activities."[189] This is a social-criminological method of unearthing hidden criminality.[190] It enables the participant observer "to gain critical insight through an understanding of the entire context and frame of reference of the subjects under study."[191]

The subjects of interest here are the riggers and the mode of their rigging operation. Two questions readily come to mind in my claim as a participant observer. My answers may help any other Nigerians to understand his type of participant observation. The first question is whether my participant observation was formal or informal. In other words, whether I was formally commissioned to do a research into electoral fraud or by happenstance, I observed the riggers in action. The second issue is whether I actually in any varying degrees did participate in any rigging activities.

The answer to the first question is that my participant observation was coincidental, and the reply to the second issue is that I have seen riggers in operation. My observation is

[189] Frank E. Hagan, *Research Methods in Criminal Justice and Criminology,* 3rd ed., p.189.
[190] See f.n. 8, *supra*, for further reading.
[191] Frank E. Hagan, *op. cit.,* p. 190.

buttressed by stories of Nigerians who informed me, and I verily believed them, that they were either observers and or indeed participants in vote rigging!

Mr. Chairman, sir, there are various forms of electoral fraud in Nigeria. I classify them into three divisions, which are primary, secondary and tertiary. This classification is not sacrosanct, but may agitate interested minds for further work.

The primary or pre-election fraud includes, enactment of electoral statute which may aid rigging or make rigged elections difficult to challenge in the law courts or tend to impede democratic growth[192]; creation of fake or ghost polling booths for ghost voting, inflation of voters' register with fake or ghost names; display of fake register containing foreign names purported to be the names of voters of the ward where it is displayed; and appointment of malleable and dishonest electoral officers.

The secondary or election fraud includes, stuffing ballot boxes with fake votes; discriminatory treatment of voters and conscientious electoral officers to prevent them from doing what is right and proper against rigging; electoral officers deliberately coming late in order to tire out voters, with a view to disenfranchising them; appointment of malleable and dishonest returning officers; disappearance or destruction of

[192] See The Headline news: "Changes in Electoral Act stir fresh row", *The Guardian,* Mon, Nov. 8, 2010 p.1-2, where it is alleged that the National Assembly controlled by the People Democratic Party(PDP) wants to "smuggle a clause into the Electoral Act that will regulate party primaries". See fn 321, *infra*

ballot boxes; and distortion, doctoring or suppression of electoral results.

The tertiary or post-election fraud includes, composition of suspect electoral tribunal; intimidation or threatening of witnesses, including electoral officers who may wish to provide proof of vote rigging; distortion, doctoring or suppression of vital evidence to prove electoral fraud; and suborning of witnesses and prosecutors or judges to pervert justice.[193]

Perhaps, the ultimate electoral fraud is the cancellation of authentic results or annulment of valid election of somebody whom the electoral organ, kowtowing to the rule of man, would not want to benefit from the fruit of his electoral success. This may well fall into the tertiary or post-election fraud, because the beneficiary of this free and fair election may be frustrated at the courts if he desires to litigate against the cancellation or annulment as the case may be. Accordingly, the courts may be seen as being used to distort, doctor or suppress evidence in order to achieve a particular verdict to favour the rule of man.

This brings us back to the case of *Buhari v. INEC,*[194]which centres on the interpretation of the Electoral Act 2006, in particular sections 45(1) and (2) and 146(1). Respectively, they provide as follows:

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[193] See *Democracy in Nigeria*, published by International Institute for Democracy and Electoral Assistance (International IDEA) 2002, reprinted 2001, chap. 10. In particular, pp. 217-118.

[194] [2008] 19 NWLR (Pt 1120) 246

> 45(1) The Commission shall prescribe the format of the ballot papers, which shall include the symbol adopted by the Political Party of the candidate and such other information as it may require.
>
> (2) *The ballot papers shall be bound in booklets and numbered serially* with differentiating colours for each office being contested.[195]

The main issue before the Supreme Court was whether the non-serialisation of the ballot papers by the Independent National Electoral Commission (INEC) was alone enough to invalidate the presidential election. The resolution of this question lies in the conjunctive construction of sections 45(2) and 146(1) of the Electoral Act. The latter provides as follows:

> 146(1) An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act, if it *appears* to the Electoral Tribunal or Court that the election was conducted *substantially in compliance with the principles of this Act* and that the non-compliance did not affect *substantially* the result of the election.[196]

To understand section 146(1) in the light of the facts of this case, the ballot papers were not "numbered serially" as prescribed by the Electoral Act in section 45(2). In addition, the evidence showed that this fact was not denied by the INEC. The Supreme Court by a majority of four to three held that the non-serialisation of the ballot papers did not *substantially* affect the result of the election, because there was no sufficient evidence to decide otherwise.

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[195] Emphasis added. Now, Electoral Act 2010, ss. 44(1) and (2) respectively.
[196] Emphasis added. Now, Electoral Act 2010, s. 139(1). *N.B.*, in the Arrangement of Sections on p. 4 of the new Act, this provision is numbered as s. 138.

Since section 146(1) is the key to the majority and minority judgments in the *Buhari case*, it is essential that we carefully understand what it entails. But I must caution that the section is like a sizeable and rough lump of meat, which, at the risk of choking, should be eaten in bits rather than as a whole. Accordingly, the section may require being broken into segments similar to what Oguntade, JSC, did in his dissenting decision.[197] But this shall be examined later after analyzing the majority decision.

In his leading judgment of the majority, Niki Tobi, JSC, did not approach section 146(1) segmentally; instead, he singled out, among others, three words therein, namely "shall" "appears" and "substantially" for interpretation, apparently in the context of the wording of the entire section.[198] In my own understanding, the learned jurist was, with due respect, either postulating the dictionary meanings of the words or positing their various synonyms. In the end of what I consider, with due respect, judicial rhetorics, the learned Justice held that the non-serialisation of the ballot papers did not seem to him to have substantially affected the result of the election because

> … the tribunal or court need not be satisfied that the election was conducted totally in accordance with the principles of the Act, *whatever is the meaning of the principles…*[199]

This is an interesting statement by Niki Tobi, JSC. He seems to treat as inconsequential the word, "principles" embodied in the

[197] *Buhari v. INEC, supra,* at p. 458.
[198] *Ibid.,* pp. 366-368
[199] *Ibid.,* at p. 368

phrase "substantially in compliance with the principles of this Act". The emphasis is on "principle", which is not defined by the Electoral Act, but which, I believe, is not put therein in vain. It is trite that in the construction of statutes, every word, including even punctuation marks, is important, using the relevant canons of interpretation to give meaning to the intendment of the Legislature.[200] Obviously, the word "principles" in the context of its usage in section 146(1) is crucial to appreciating the essence of elections in a constitutional democracy. But since "principle" is not defined by the Act, we have to fall back on its ordinary meaning. And it is a fundamental truth or proposition serving as the foundation for belief or action."[201] It is on this score, I believe, that Oguntade, JSC, in his dissenting judgement underlined the importance of this word in understanding the purport of section 146(1).

It is my submission that the makers of the Electoral Act employed the word to emphasize the building of constitutional democracy on the foundation of truth. And this truth is that constitutional democracy is founded, and it thrives, on free, fair and credible elections. I submit that this is the intendment of Parliament in its reference to "the principles of this Act." Niki Tobi, JSC did not seem to advert to the import and implications of the principles in the Electoral Act, and that perhaps did account for his apparent cavalier phrase "whatever is the meaning of the principles."

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[200] See for further reading, A.O Obilade, *op. cit.,* pp. 56-63. See also C.A Ogbuabor, "The Supreme Court and Presidential Election Petition in Nigeria: 'The impregnable Reign of Literalism'" *Nigerian Bar Journal,* Vol 6 No 10, July 2010, pp 123-164; A.D Badaiki *Interpretation of Statues,* 1996.

[201] *Concise Oxford Dictionary, op. cit.,* p.1141

But Oguntade, JSC, took the opposite approach, holding in his minority judgement

> … that the 'principles' of the Electoral Act are the fundamental elements of the law governing elections which must be seen as sacrosanct in a democratic system of government.[202]

According to the learned jurist, the principles include *inclusiveness,* which is exemplified by the eligible voter's entitlement to exercise his right to franchise; *transparency,* which is evident in the example of serialisation of ballot papers to prevent any form of fraud; and *secrecy, which* in section 53(1) of the Act provides that voting shall be by open secret ballot. This reasoning has support in Article 21(3) of the Universal Declaration of Human Rights (UDHR), which states as follows:

> ….the will of the people shall be the basis of the authority of government; this will be expressed in periodic and genuine elections, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedure.[203]

In sum, the principles of the Electoral Act are encapsulated in free, fair and credible elections, ensuring the sacredness of one-person one vote in electing contestants of the choice of voters, using genuine ballot papers as mandatorily prescribed by 45(2) of the Electoral Act.

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[202] *Buhari v. INEC, supra,* at p. 459

[203] United Nations General Assembly Resolution 217(111) of Dec. 1948. See also C.A Ogbuabor, *op. cit, p.146.*

However, the majority of the justices did not seem to be aware of these democratic principles implied in the Electoral Act. This is manifested in Justice Niki Tobi's "whatever-is-the-meaning-of-the-principles" pronouncement. It seems that this was the judicial mindset, which impeded even a *prima facie* enquiry into the principles of the Electoral Act. Commonsensically, transparency is the fundamental truth behind the mandatory provision in section 45(2) that the "ballot papers shall…be numbered serially". The wording of this provision does not permit permissive interpretation.[204] Its indubitable implication is to prevent dubious or turbid acts of politicians and their agents as well as to protect the sacrosantity of the ballot paper in elections.

I agree with the indepth reasoning of Oguntade, JSC, concerning the principles of the Electoral Act, which among others, cast doubts as to genuiness of the ballot papers not numbered serially. On this, I quote the learned justice *in extenso*:

> The necessity for transparency explains why it is required by section 45(2) that ballot papers be serialized and bound in booklets. This provision is no doubt a bold effort to eliminate the possibility of the ballot papers being substituted with some others. It ensures that ballot papers which are moved across the country from State to State and from polling unit to polling unit, would be monitored and accounted for during the elections and *further for use in the event of a dispute after the elections.* Without ballot papers being serialized and bound in booklets as required by section 45(2), it becomes possible to print fake ballot papers, which can then be introduced into the ballot boxes fraudulently. *When ballot papers are not serialized and bound as required by*

[204] *Ibid.,* at p. 460, *per* Oguntade, JS.C, citing *Maxwell on Interpretation of Statues,* 12 ed., pp. 322-323.

> *law, the principle of transparency in the election is compromised and the election no matter how otherwise properly conducted loses credibility.*[205]

I need not underscore the cogency of this analysis of the principles of the Electoral Act, exemplifying the fraudulent consequences of using unserialized ballot papers in elections. Section 45(2) to all intents and purposes is a mandatory provision and its breach is enough to void elections under the Act. But section 146(1) allows the Electoral Tribunal or court to exercise some discretion based on what "appears" to it concerning the validity or invalidity of elections in spite of section 45(2). Therefore, notwithstanding the breach of section 45(2), or any other provision of the Act, the elections can be validated if it "appears" to the court that it should be so. However, in exercising this discretion, the court's opinion must be founded on the principles of the Electoral Act. We have to recall that the rules influencing the exercise of discretion also apply here, meaning that the exercise of discretion in section 146(1) cannot be outside the import of the principles of the Electoral Act.

Interestingly, the majority of the justices did not consider the intention of the Legislature regarding the principles of the Electoral Act. Yet they concluded that the breach of section 45(2) did not, in their opinion, invalidate the presidential election. The implication of the majority judgement is that the breach of section 45(2) proved by the petitioner can only be condemned by the court if, and only if, the petitioner provides additional evidence that the offender, i.e. the respondent, actually benefitted from his offence! In other words, the

[205] *Ibid.,* pp. 450-451. Emphasis added.

petitioner must prove that the use of the unserialized, i.e. invalid, ballot papers "substantially" affected the result of the election to warrant invalidation. This is an unreasonable burden of proof on the aggrieved petitioner, which I do not think is the intention behind the provision of section 146(1).

However, Niki Tobi, JSC, is on the view that section 146(1) allows the courts to take electoral "irregularities for granted unless there are of such compelling proportion, or magnitude as to 'affect substantially the result of election'."[206] For this reason, he describes the section as "the rock of Gibraltar, solidly standing behind and for a respondent to an election petition." Let me observe, with due respect, that I do not know whether the learned Justice made this pronouncement in error, out of humour, or cynicism. He, however, hastened to explain himself, saying that "a Presidential Election Petition can never succeed in the light of section 146(1) … it can, if the petitioner discharges the burden the subsection places on him."[207]

I do not agree, with due respect, with the foregoing statements of Justice Niki Tobi. The pronouncement would tend to encourage electoral irregularities of any type, and the beneficiaries of such fraud would believe that the *Buhari* case is their defence, their rock of Gibraltar, in election petitions against them. I see the Justice Niki Tobi approach to the interpretation of section 146(1) as an open sesame to fraudulent elections in Nigeria.

Section 146(1) should be constructed in favour of free, fair and credible election of one person one vote. That is the essence of

[206] *Ibid.,* p. 427
[207] *Ibid.,* pp. 42-428

democracy. If we recall, I have earlier argued that democracy is basically a government in which the people have a voice in the exercise of power, and this voice is and should be manifested in the peoples' choice of their representatives in a free, fair and credible franchise. To conduct the 2007 presidential election using unserialized ballot papers against the mandatory prescription by section 45(2), in the light of the meaning of democracy, is "of such compelling proportion or magnitude as to 'affect substantially the result of the election'." Here , I have used the very words of Niki Tobi, JSC, to interpret section 146(1) in favour of democracy. What this goes to show is that it is the interpretation, which the court gives to section 46(1) that places undue burden of proof on the petitioner.

Interestingly, the learned Justice Niki Tobi in a similar but later case of ***Abubakar v Yar'Adua***[208] acknowledged the significance of ballot papers as follows:

> The importance of ballot papers in the conduct of an election cannot be over emphasized. As a matter of fact, nothing makes an election an election without ballot papers. Election is election because of ballot papers.[209]

But his lordship strenuously reasoned[210] that there was no proof that the ballot papers were not in conformity with the Electoral Act, since they were not produced as real evidence before the court.

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[208] [2008] 19 NWLR (pt 1120) 1.
[209] *Ibid., p. 149*
[210] *Ibid., at pp. 145-149.*

With due respect, I do not think that His Lordship's reasoning was tenable, having regard to the evidence before the court. The record of proceedings reveals that the 4th to 808th respondents admitted that the ballot papers were not serialized. Among these respondents, the fourth and fifth were INEC and the chairman of INEC, Professor Maurice Iwu, respectively. On this crucial issue, Professor Ben Nwabueze, the leading counsel for the appellants (petitioners), has this to say:

> Exhibit EPT/03/P/30 was tendered by the petitioners to establish the fact that these ballot papers were ordered and printed in South Africa… The said exhibit also established the fact that it was the fifth Respondent who authorized the printing of the said ballot papers without serial numbers…
>
> All these facts were admitted by the 4th – 808th respondents in paragraph 7(d) (viii) of the reply to the petition.[211]

It is a clear from the forgoing evidence that both parties admitted the fact that ballot papers were not serialized, and that was the argument of the appellants. But Niki Tobi, JSC, disagreed, saying:

> If "both parties" in the paragraph mean the appellant (sic) and all the respondents, I will not agree… because the conclusion is not borne out from the replies that there is no admission on *the part of some of the respondent that the ballot papers were not serialized.* As the issue of non- serialization *was denied by some respondents,* the burden of proof was on the appellants. This is because *admission by a set of respondents cannot in law affect another set of respondents.* The petitioner has a duty to prove the non-

[211] Ben Nwabueze, 'Supreme Court Verdict on Presidential Election (2)", *Daily Independent,* Thurs. Dec.25, 2008, p. B8; quoted also in C. A. Ogbuabor, *op. cit., p. 153.*

> serialization of the ballot papers as it affects the respondents who did not admit.[212]

I must confess, with due respect, that the reasoning of the learned jurist is indeed strange, having regard to Exhibit EPT/03/P/30 and paragraph 7(d) (viii) of the reply to the petition of the appellants. It is a wonder that the Supreme Court searched for proof of the non-serialization of the ballot papers when such proof stared it in the face with the admission, among others, of INEC and its Chairman, the fourth and fifth respondents respectively. In addition to these custodians of the ballot papers, an overwhelming number of the respondents, i.e. from the sixth to 808th, admitted selfsame fact. The pertinent question is: what number and who made up "some of the respondents" who denied the issue of non-serialization of the ballot papers? The learned Justice Niki Tobi did not attempt to define or discuss this. Instead, he held that "the petitioner has a duty to prove the non-serialization of ballot papers as it affects the respondents who did not admit". And the way to prove it is for the petitioners to produce before the court "even a copy of the non-serialized ballot papers."[213]

Again, I confess my inability to understand the strange reasoning of the learned Justice Niki Tobi. Pray, what proof did the Supreme Court require when an overwhelming number, including the producers and custodians of the ballot papers admitted that they were not serialized? The answer apparently lies in the nebulous argument that "some" or "a set of respondents" denied the non-serialization of the ballot papers, requiring their production before the court by the petitioners as

[212] *Abubakar v Yar'Adua, supra.,* at p.146 Emphasis added.
[213] *Loc. cit.*

a proof of the fact. Similar evidence of non-serialization of the ballot papers was available in the earlier case of *Buhari v INEC,* yet the majority of their lordships did not seem to appreciate it.

It seems to me that the evidential burden of proof was made the scapegoat of the majority decisions in the Supreme Court cases. While the evidence law states that he who assert must prove,[214] the same law says that facts admitted need no proof.[215] All in all, the *Abubakar* and *Buhari* cases were decided on the apparent inability of the petitioners to convince the majority of the Supreme Court Justices that the ballot papers were not serialized, and even so, such non-serialization did not affect substantially the result of the election. This inability of the petitioners to prove their individual cases stemmed from the peculiar interpretation, the Supreme Court gave to section 146(1) of Electoral Act. It seems to me this section as interpreted in these cases can be regarded as a shield protecting fraudulent elections and a sword piercing the hearts of aggrieved petitioners.

Happily, this Rock of Gibraltar of a section is not impregnable after all as is evident in the judgment of the minority. In levelling this rock, Oguntade, JSC, broke section 146(1) into three parts for easier and tenable interpretation. They are:

> a) An election shall not be liable to be invalidated by reason of non-compliance with the provision of this Act if it appears to the Election Tribunal or court…

[214] *Jack v Whyte 5* NSCQR, 610, at p.621, *per* Uthman Mohammed, JSC.
[215] *Abubakar v Yar'Adua, supra,* at p.148, *per* Niki Tobi, JSC.

> b) that the election was conducted substantially in accordance with the principles of this Act…
>
> c) and that the non-compliance did not affect substantially the result of the election.[216]

After due analysis of these parts of section 146(1), the learned justice has this to say on (b) above:

> In the judgment of the court below, no consideration was given to the single most important clause under section 146(1), which I had identified as (b) above. The court or tribunal before coming to a consideration of the question whether or not an identified non-compliance with the provisions of the Electoral Act affected substantially the result of the election must first identify the principles of the Electoral Act. If the elections were not conducted in accordance with the principles of the Act, the stage could not be reached for a consideration of whether or not the non-compliance affected substantially the result of the election. The central and major purpose of section 146(1) is that non-compliance with the principles of the Electoral Act ought not to be forgiven or overlooked.[217]

The foregoing sequential analysis is self-explanatory. It shows that the Election Tribunal did not exhaustively construe section 146(1). The appeal tribunal, i.e. the Supreme Court, similarly did not do so in its majority judgement. The majority approach is akin to crossing the bridge without getting there. In his incisive discussion on this issue, my learned friend and colleague, Chukwunweike Ogbuabor, in the case of *Abubakar v Yar'Adua,*[218] approached section 146(1) from another interesting but correct angle, stating that the section falls into a

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[216] *Ibid,* p. 458. Emphasis in original.
[217] *Loc. cit.*
[218] [2008] 19 NWLR (pt 1120); [2008] 36 NSCQR (pt 1) 231.

structure and a superstructure. The former is that the election must be conducted substantially in accordance with the principles of the Act, while the latter is that the non-compliance did not affect substantially the result of the election. Accordingly, the superstructure cannot stand if the structure does not exist. Therefore, the structure, which is embodied in section 45(2), i.e. ballot papers shall be bound in booklets and numbered serially, was not complied with and *ipso facto* did not exist. And it is common sense that it is not practicable to build a superstructure on non-existing structure. That is to say, one cannot imagine about the non-compliance, which did not affect substantially the result of the election when the election was *prima facie* invalid.[219]

On the whole, it is impermissible in the interpretation of section 45(2), or indeed any statute, to treat any word used therein as superfluous, irrelevant or inconsequential.[220] In *Tukur v. Government of Gongola State*[221] Nnnaemeka-Agu, JSC held that the first principle in construing statutes is that Parliament does not use any words in vain. This gives the lie to Justice Niki Tobi's assertion in "whatever is the meaning of the principles" of section 146(1) of the Electoral Act.

It may be true that the way section 146(1) is worded, it may be difficult to prove electoral irregularities, in particular presidential or even gubernatorial election because of the size and geopolitics of the country or State but it is true that Nigerian politicians tend to anchor their behaviour on do-or-die

[219] C A Ogbuabor, *op cit.*, pp. 145-146
[220] *Ibid.,* at p. 458, *per* Oguntade, JS.C
[221] [1989] 4 NWLR (Pt. 117) 517, at p. 579.

politics. The courts in Nigeria ought and should take judicial notice of this negative and fraudulent attitude of politicians during elections. This ought and should weigh on the minds of the courts while exercising their discretion in interpreting section 146(1).

It is trite that the primary duty of the courts in interpreting statutes is to find the intention of the Legislature. Where the words used are unambiguous, the usual or ordinary meanings of the words portray the intention of Parliament. But most, if not all words have more than one meaning. This notwithstanding, the courts have the onerous duty to fathom the intention of Parliament from the ambiguous words. But the courts are not allowed by its rules of interpretation to fill in lacunae in statutes, using words to make the affected provisions meaningful. It is only the Legislature that can remedy the situation by a later enactment.[222]

However, section 146(1) has no such lacunae; its words are quite plain, although its style of grammar seems ambiguous, if not woolly. This seeming ambiguity or woolliness is in regard to what appears to the court as substantial compliance with the principles of the Electoral Act as well as how non-compliance with the principles of the Electoral Act does not affect substantially the result of the election. It is in the effort to decipher the intention of the Legislature from this seeming ambiguous or woolly sense of grammar in section 146(1) that led to the split judgment of the Supreme Court.

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[222] *Okumagba v. Egbe* [1965] All NLR 62, at p. 65; *London Transport Executive v. Betts* [1958] 2 All ER 636; at p. 655. See further, A.O. Obilade, *op. cit.,* pp. 56-57.

After due analysis of the opposing decisions, I vote for the minority judgement. My stand is based solely on the vital evidence of non-serialization of the ballot papers, which I consider sufficient enough to warrant the nullification of the 2007 presidential election. But my stand on the side of the minority does not of course cure the defect in the majority judgment. All that I am saying is that the *Buhari* case was wrongly decided and should not be seen as a good case law. Unfortunately, under the rule of law, the decision demands obedience. And that was why the late President Umaru Musa Yar'Adua was sworn in as the ruler of Nigeria.

It must be noted, however, that the swearing in of the President did not convert the *Buhari* case into a good case law. This is because the judgment seems to say that it is within the rule of law to use unserialized ballot papers, against the provisions of the Electoral Act, to conduct elections as long as it does not substantially affect the elections. In other words, under the rule of law as is now stated by the Supreme Court in the *Buhari* case, the present INEC can as well conduct the 2011 general elections, in particular presidential election, with unserialized ballot papers in spite of the provision of section 44(2) of the current Electoral Act 2010.

The issue remains that, notwithstanding the seeming confusion section 146(1) of the Electoral Act 2006 tends to create in the minds of the courts, the Nigerian Legislature reproduced verbatim the same provision in section 139(1) of the Electoral Act 2010. This is the third successive enactment of similar provision in a decade. Its earliest precursor is section 135(1) of the Electoral Act 2002. It is indeed strange that in spite of overt misgivings of lawyers and judges, including discerning

laypeople, this selfsame provision is retained in the Electoral Act 2010. It is evident from the *Buhari* case and similar other cases[223] that the section does not seem to prevent electoral fraud, let alone protect the sanctity of democratic franchise. This seems to be a preferred situation by politicians, using the Legislature to perpetuate the provision to enable the perpetration of electoral irregularities in successive elections. This lends credence to my hypothesis concerning the primary or pre-election fraud via statutes.

It is my submission that section 139(1) of the Electoral Act 2010 does not seem to serve any useful purpose in its present form. So, it has to be amended, using plain grammar, devoid of ambiguity, to enable the courts void any election that has any trace of electoral irregularity. I make this submission with all sense of purpose, because since our politicians generally believe in and practice do-or-die politics, then the law should be strict and clear enough to nullify any elections conducted on obvious irregularity. The proof of such irregularities whether civil or criminal should be on the balance of probabilities.

Indeed, I suggest and submit that electoral offences should be treated as falling within the realm of quasi-criminality. I consider electoral offences as political turpitude, i.e., an admixture of political and base conduct. It is employed by political jaywalkers and or their agents to gain undue political advantage over opponents. This is the rule of the game amongst politicians in the business of politics. It seems to be a universal problem whether in democratic or despotic domains.

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[223] See *Buhari v. Obasanjo* [2005] 13 NWLR (Pt. 941)II; [2005] 23 NSCQR 442; *Awolowo v. Shagari* (1979) 6-9 S.C. 51; *A Abubakar v Yar'Adua, supra.*

As a consequence, I regard acts of political turpitude as crime *mala prohibita*[224] as oppose to crimes *mala in se.*[225]

Crimes *mala prohibita,* are wrongs which are merely prohibited by statute, although they are not necessarily immoral. But crimes *mala in se* are evil in themselves. That is, crimes that are inherently immoral such as theft, rape, and murder.[226] Since electoral offences are acts, which must be proved beyond reasonable doubt whenever they are alleged in electoral cases, it is almost an uphill task to prove such allegations under our present laws of crime and evidence. The result is that politicians, aware of this legal difficulty, would prefer to win elections by fraudulent or corrupt means and then await the petitioners to prove their criminal allegation(s) beyond reasonable doubt in the election tribunals. Many a petitioner has lost electoral cases on this ground.[227]

It is the foregoing arguments that compel the suggestion that electoral offences should be considered as political turpitude, requiring proof of their perpetration on the balance of probabilities as in civil cases. In other words, the burden of proof should not be beyond reasonable doubt as is required in criminal cases. This, therefore, should mean amending the relevant laws, in particular the law of evidence.[228] By this, it

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[224] "Prohibited evils"; singular: *malum prohibitum*

[225] "Evil in themselves"; singular: *malum in se: see Black's Law Dictionary, op. cit., p.978.*

[226] *Loc. cit.*

[227] *Nwobodo v Onoh [1984] 1 SCNLR 1; Omoboriowo v Ajasin [1984] 1 SCNLR 108; Buhari v Obasanjo [2005] 13 NWLR (pt 941) 1.*

[228] Evidence Act, ss. 138(2),(3). On the rule of law as it affects the law of evidence, see Colin Tapper, "The Law of Evidence and the Rule of Law"[2009] *CLJ* Vol 68 pt 1, pp. 67-89.

may become less difficult to prove electoral offences in election cases and check fraudulent politicians from attaining undeserved political office. It is right and proper that only mentally and morally sane persons, fairly, freely and credibly elected, should govern this country.

c. Labour Law

Mr. Vice-Chancellor, ladies and gentlemen, labour or industrial law is the third and final *corpus juris* I will employ to ascertain the style of governance in this country. This is a field of law governing the dealings of employers and the unions that represent employees.[229]

This definition gives an inkling of the import of industrial law. We can fathom therefrom two issues: the relationships between employers and employees, and the former and trade unions. But there is a third related issue, which does not seem evident from the definition; this is about the safety of workers in the course of their employment. All three put together make labour law one of the most difficult areas of study. The fact is that industrial law hinges on the means of livelihood, touching on issues of wealth and poverty, sometimes bordering on life and death scenarios.

Having said this, labour law can conveniently be divided into three broad areas: the law of contract of employment, law of industrial safety, including employer's liability, and law of trade unions, including industrial relations.[230] Each of these

[229] *Black's Law Dictionary, op. cit.,* p. 890

[230] I.T. Smith and G.H. Thomas, *Industrial Law,* 6th, 1996, reprint. 1998, p.3. For industrial relations, see e.g. Agwu Akpala, *Industrial Relations Model for*

areas is quite involved and can be studied as a separate law course.

However, it is not possible and it is not necessary to examine the entire labour law in this lecture. The intention is to pick and choose some issues from any of the aspect(s) of the subject relevant to the explanation of governance under the rule of law. But I hasten to say that industrial law as a whole is germane to the understanding of the nature of governance in Nigeria.

For instance, any good government should legislate and enforce internationally acceptable industrial safety laws,[231] which would protect workers from industrial injuries and diseases in places of work and in the course of employment.[232] Again, any good government should be sensitive to the welfare of its workpeople, by providing and enforcing internationally acceptable employment and trade union laws. Such laws would protect workers from industrial barons and other manner of employers whose main aim tends to be the maximization of profits at the expense of their workers' well-being. It is needless to emphasize that the safety and welfare of workers, whether in the public or private sector should not be taken for granted or treated with levity in the governance of Nigeria.

Developing Countries, 1982; T.M Yusuf, *The Dynamics of Industrial Relations: The Nigerian Experience,* 1982.

[231] See International Labour Organization (ILO) Conventions 87 (of 1948); 98 (of 1949); 151 (of 1978). See further G.O.S Amadi, *A Legal Guide to Trade Unions, op. cit.,* pp. 23, 37, 100. *Cf. R.T.N.A.C.H.P.N.V* M.H.W.U.N [2008] 2 NWLR (pt 1072) 575, at pp.615-616

[232] Factories Act, Cap Laws of the Federation of Nigeria, 2004

Trade Union in History

Historically, the safety and well-being of employees have always been a source of discord between them and their employers. This is so all over the world. But any good government would like to minimize, if not erase, such industrial disharmony. The historic birth of trade unions was a consequence of the materialistic profit-and-loss mentally of employers, extracting so much labour from employees working under debilitating conditions and paying them poor wages.[233]

The history of trade unionism has been a slow and gradual but difficult movement from hash laws, which regard strikers as criminal[234] and later civil[235] conspirators against industrial development, to progressive legislation, which acknowledges the right of workers to withdraw their labour in protest for better terms and conditions of service.[236] Today, in Nigeria, a trade union is statutorily defined as "… any combination of workers or employers… *the purpose of which is to regulate the terms and conditions of employment of workers…"*[237]

Unlike at the historic birth of trade unions and many years later when workers formed combines, employers are now also free to unionize. This is in consonance with the constitutional provision of the right to associate with others, including

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[233] G O S Amadi, *A Legal Guide to Trade Unions, op. cit.,* chap *1.*

[234] *R v Journeyman Tailors of Cambridge (1721) 8 Mod.* 10; *R v Duffield* (1851) 5 Cox CC. 436. See *ibid* pp. 2-5.

[235] *Allen v Flood* (1894) A C I; *Reynolds v Shipping Federation* [1924] 1 Ch 28; see *ibid*., pp. 5-7

[236] Trade Dispute Act, Cap T8 Laws of the Federation, 2004, s. See further*, ibid*, chap 5

[237] Trade Unions Act, Cap T14 Laws of the Federation, 2004, s. 1(1). Emphasis added.

belonging to a trade union.[238] But the trade unions of employers and employees have, as in the above definition, a common purpose, *which is to regulate the terms and conditions of employment of workers.* So, employees are the focal point of trade unionism, which employers must respect. This common purpose is the *principal* aim of trade unionism.

For the avoidance of doubt, any association of persons called trade union, which does not have this common, and principal purpose is not a trade union properly so called under the law and it is not legally recognizable as such.[239] It seems that the common purpose is to create a balance of industrial action between employers and employees, thereby putting into focus the likely issues of trade dispute. This balance lies in the behaviour of the parties, in the event of failure of a negotiated settlement of their dispute, resorting to lock-out and strike respectively.

Interestingly, the balance of industrial action is more theoretical than practical, for employers and employees do not stand on equal pedestal in their relationship. This is not an incorrect assertion, even though it is generally believed that the law regards the parties to a contract (of employment) as being on the same footing while negotiating the terms of their agreement.[240] As I have argued elsewhere,[241] their relationship in our cultural aphorism is similar to where the employer has

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[238] The Constitution, s.40.

[239] *Re Union of lfelody, Timber Dealers and Allied Workmen* [1964] 2 All NLR 63; see GOS Amadi; *A Legal Guide to Trade Unions, op. cit, p.11.*

[240] See *Alamu v Afrotec Technical Services (Nig.) Ltd [1986]* 2 QLRN 126; Michael Jefferson, *Principles of Employment Law,* 3rd ed, 1997, pp. 47-48.

[241] GOS Amadi, *Jurisprudence of Trade Union Status, 2002, p.9.*

both yam and knife. A knife is used in preparing and eating yam. But the employee has none of these, except his appetite for yam. The yam and the knife respectively represent employment and wherewithal for payment for services, while appetite represents readiness and willingness to work. The imagery created here is a *salivating* employee who has no choice but to eat as much yam as the *tantalizing* employer is ready and willing to give him.

Unemployment in Nigeria

The foregoing scenario graphically stands out in sharp relief in a country of soaring unemployment against the backdrop of saturated labour market. I make bold to say that it does not require any empirical evidence or hard statistical data to state that today's Nigeria is fair and square a nation of unemployment. If my memory serves me right, some four decades back, I was taught in O'level economics that there were three forms of unemployment. They are: unemployment proper, under employment, and disguised unemployment. Of these three, it seems to me that the most pathetic is disguised unemployment, which gives a person a false sense of employment, apparently bordering on unwitting self-deceit.

It is possible to see the "disguised unemployee" as having no ostensible means of livelihood. He sees himself as doing something in the guise of employment, because he is even unable to find under employment. In other words, he is that worker who, as we say in Nigeria, "busy doing nothing." This phrasal paradox puts the disguised unemployee in a similar fate with the hands in this local adage: as the other parts of the body are comfortably resting in their positions when the torso is

sitted on a stool, the hands have no place to rest except on the knees.

Mr. Chairman, sir, unemployment of whatever colour is a dreaded psycho-social problem no reasonable, able bodied human being of employment age would want to experience. There is no gainsaying the fact that unemployment debases the human person, erodes his confidence, tends to generate in him suicidal behaviour, and in the end destroys the human resource in him. It is to avoid this waste of human resource, which is *sine qua non* for national development and survival that any good government anywhere in the world invests so much on job creation. For this reason, progressive laws are made to enable development of all sectors of the economy, creating employment in the process. Again, similar laws are made to protect and sustain employment, as well as to prevent arbitrary and or unlawful determination of employment.

Two main issues are herein discernable, and they are the creation and protection of employment. On the issue of creation of employment, I am yet to come across any legal blueprint for the creation and sustenance of employment in all the sectors of the economy. Without this legal framework, it will be difficult to harness our human and material resources in this country. The main reason for this underdevelopment of our country is not unconnected with bad governance, influenced by political jaywalking and legal jiggery-pokery. That is why industries are sited where they should not be; that is why the railway system has retrogressed from what we inherited from Lord Luggard since 1914; that is why the roads remains underdeveloped, and those developed remains unmaintained; that is why the aviation industry remains an unserious business,

monopolized by few airlines; that is why the waterways are undeveloped and unnavigable; that is why the sports industry remains untapped and our citizens spend time and money on foreign sports; that is why our tourism industry repel tourists. Similar lamentations are generated by the less than satisfactory development of our agricultural, educational and health industries. All these areas of the economy, among others, if reasonably developed will not only create employment for our citizens, but will also give Nigerians meaningful opportunities to discover and develop their individual talents.

Types of Contract of Employment

On the issue of protection of employment, there is no labour law legislation yet which reasonably protect workers who have done no wrong from losing their jobs. Instead, the style of governance in Nigeria tends to encourage precarious contract of employment. I have in some measure discussed elsewhere[242] this uncertain nature of employment law in this country. This falls into three categories, which the Supreme Court in *Olarewaju v Afribank (Nig.) Plc*[243] describes as employment of master and servant, employment at the pleasure of the employer, and employment governed by statute. There is nothing basically original about these types of employment since they originate from the English common law. The Supreme Court has to adopt this categorization as it has done in

[242] GOS Amadi, "Redundancy and Termination of Contract of Employment in the Private and Public Sectors in Nigeria, "*UNIZIK LAW JOURNAL,* Vol 5, No 1, 2005, pp.31-49.
[243] [2001] 13 NWLR (pt 731) 691, at p.705; [2001] 7 NSCQR 22, at p.31.

earlier cases[244] in the absence of any labour law statute on the issue.[245]

The contract of master and servant is an insecure form of employment, which is very much applicable in Nigeria. This is where either party, in particular the employer, can determine the contract of employment with or without notice and with or without reason. Where the proper notice is given, no cause of action arises, even if the reason given for ending the contract is untenable.[246] However, where inadequate or no notice is given as provided in the contract the remedy lies in damages. This is the money the employee, or the employer, would have earned had he been given the appropriate notice of termination of the contract. The employee has no claim for reinstatement in his employment, if he so desires; and any action to that effect will fail.[247] Of course it is otiose in the same circumstance for the employer to sue for the continued employment of the employee. The Supreme Court calls this form of employment "contract of personal service".[248] It is a contract that indeed depends on the whims or fancies of either party in the employment relationship.

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[244] *Olaniyan v University of Lagos [1985] 2 NWLR (*pt. *9) 559,* citing several other cases.

[245] See further, *Osisanya v Afribank (Nig.) Plc [2007]* 6 NWLR (pt 1031) 565, SC; *Bakare v NRC* [2007] 17 NWLR (pt 1064) 606, SC.; *C.B.N v Igwillo* [2007] 14 NWLR (pt 1054) 393, SC.

[246] *Lake Chad Research Institute v Ndefoh* [1997] 3 NWLR (pt 491) 72, at pp. 79-80. CA.; *Azenabar v Bayero University, Kano* [2009] 17 NWLR (pt 1169) 96, at p.108. CA

[247] *Olarewaju v Afribank Nigeria Plc, supra,* at p.705; 32

[248] *Olaniyan v University of Lagos, supra,* p. 599. See further, G O S Amadi, "Contract of Service v Contract of Personal Service", (1991-1993) *Nig J R.* pp. 182-186

Employment at the pleasure of the employer concerns the appointment of persons into offices by government. Historically, at common law such appointees were civil (public) servants whose employment began and ended at the pleasure of the Crown, i.e. the king or queen as the case might be. The appointees were subjects of the Crown and under the British constitutionary theory employees of the sovereign had no cause of action even if their appointment were wrongfully determined. Nigeria inherited this anachronistic law. But today the situation has changed in both Nigeria and England. English civil servants can now sue their employers (Her Majesty's Government),[249] so also can Nigerian civil servants and other public officers sue the government for breach of contract of employment.[250]

This brings us to the third form of employment in Nigeria, which is the type that is governed by statute. Generally, statute governs employment of public officers, including civil servants. The Supreme Court has in many cases described employment of this category as having statutory flavour.[251] But this must be distinguished from such public employment that

[249] Michael Jefferson, *Principals of Employment Law,* 3rd ed., p. 99, 206. See further, G O S Amadi, "Redundancy and Termination of Contract of Employment in the Private and Public Sectors in Nigeria," *op. cit,* p. 42.

[250] This is now trite law as is evident in the cases in this segment of this lecture. For further reading see G O S Amadi, *Ibid*

[251] E.g. *Olaniyan v University of Lagos, supra; Olarewaju v Afribank (Nig) Plc, supra; Lake Chad Research Institute v Ndefoh, supra; Shitta-Bay v Federal Public Service Commission* [1981] 1 SC 40.;*Osisanya v Afribank (Nig) Plc, supra; Bakare v NRC, supra., Olufeagba v Abdul-Raheem* [2009] 18 NWLR (pt 1173) 384; *Ziideeh v RSCSC* [2007] 3 NWLR (pt 1022) 554*; SPDC (Nig) Ltd v Emehuru* (pt 1022) 534. *CBN V Igwillo, supra.*

has political flavour. Within this we find political appointees such as ministers, commissioners whose employment is purely at the pleasure of the employer. This political employer is always free, without rhyme or reason, and at no risk of a lawsuit, to determine the appointment of his political employee.

The other category of political appointees are those who have a tenured employment. They are like the public officers, including civil servant, who are engaged in tenured employment, which is backed up by statute. This enables such employment to begin and end the contract in accordance with the provisions of the statute.

In tenured employment, the employer cannot determine such contract without good cause and in accordance with the terms of employment. This employment is usually permanent and pensionable, after a period of probation. The security of tenure of this type contract of employment is usually founded on a term of fair hearing, which must prevail before a tenured employee can be removed from office. For the avoidance of doubt, if the terms of employment do not provide for fair hearing, either expressly or by necessary implication, then the rule does not avail the tenured employee; he is like the employee in the contract of personal service, which is subject to termination by giving the appropriate notice. Outside this caveat, where a tenured employee is denied fair hearing, even if he displayed bad conduct in the course of his employment, his removal from office will be treated as a breach of contract.[252]

[252] *Olaniyan v University of Lagos*, *supra*

Doctrine of Fair Hearing

It is necessary here to briefly discuss fair hearing. This doctrine simply means a judicial or administrative hearing conducted in accordance with due process.[253] It contains two eternal principals of natural justice, namely, *audi alteram partem* and *nemo judex in re sua.* Respectively they mean, to hear the other side, i.e. no person shall be condemned unheard, and that no person shall be a judge in his own cause.[254] In sum, fair hearing means, in the reasoning of Edozie, JSC, a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties in a case. *It lies in the procedure followed in the determination of the case and not in the correctness of the decision.* It is synonymous with trial and implies that every reasonable and fair minded observer who watches the proceedings should be able to come to the conclusion that the hearing has been fair to all the parties.[255]

Essentially, fair hearing lies in the observance of the procedure embodying the rules of natural justice, and not in the alleged bad conduct that led to the determination of the contract of employment of a tenured employee. In other words, the employer must follow the rules of natural justice to determine whether the employee misconducted himself within the terms of his contract, and it is by so doing that the former is enabled

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[253] *Black's Law Dictionary, op. cit.,* p. 738

[254] *Osborn's Concise Law Dictionary, op cit,* p. 37, 228.

[255] *Magma Maritime Ltd v Oteju [2005] 22 NSCQR 295, at pp. 319-320,* per Edozie, JSC. See also *State v Onagoruwa [1992] 2* NWLR (pt 221) 35, at p. 56; *Kotoyo v CBN* [1989] 1 NWLR (pt 98) 419, at p.444; *Salu v Egbon* [1994] 6 NWLR (pt 308) 23; *Ariori v Elemo* (1983) 1 SC 13, at p. 24.

to remove the latter from office if found wanting. This was what God did before condemning Adam and Eve for their sin of disobedience, and Fortescue, J, cited it with approval as the source of the doctrine of fair hearing in the old case of *R.v. Chancellor of the University of Cambridge*[256].

Termination and Dismissal

All this while, I have avoided the use of the well-known terms of "termination" and "dismissal" as they concern the ending of a contract of employment. The reason for this is that termination and dismissal have technical connotations in our extant employment law. The determination of a contract of employment by termination involves a period of notice. In other words, either party to the contract would fall in breach of it if it is determined without the appropriate notice as prescribed by the contract.

The notice may be for a certain or reasonable period of time, if the contract is silent on the certainty of time. This type of employment is usually the contract of personal service, normally, involving no security of tenure. Termination is a normal disengagement in employment; it does not usually entail any wrong doing on the part of either party, in particular the employee. Both the employer and employee are respectively entitled to pay wages and render services during the period of termination. But the termination may be anchored on "in lieu of notice", in which situation the period of

notice is not required to be worked out. However, the party giving this type of notice is required to pay the other for the

[256] (*1723) 1 Str. 557; See Holy Bible Gen.3: 8-19.*

period of notice; otherwise it would be regarded as wrongful termination of the contract of employment. On the whole, termination entails that the employee is entitled to the earnings due to him before the contract was terminated.[257]

On the other hand, dismissal is a very grave method of ending a contract of employment. It is a effected summarily; a pre-emptive action to dispense with immediate effect the services of the employee. *Prima facie*, dismissal is a consequence of serious wrongdoing of the employee, warranting the employer to end the contract forthwith.

The emphatic nature of dismissal may account for why it is sometimes tautologically termed *summary* dismissal, or erroneously described as dismissal *without notice.* Technically, the employee's receipt of a written or oral statement of dismissal is notice. But this is not notice in the sense of termination, which has just been explained above. What distinguishes dismissal from termination is succinctly put by the Supreme Court in the case of ***Irem v Obubra District Council:***[258]

> A dismissal from the service carries such infamy that a termination does not carry. One finds as in the present case, that the appellant was entitled to certain benefits like gratuity, etc, which under pain of dismissal he would not be entitled to.[259]

The foregoing distinction shows that termination of contract of service and dismissal from service are mutually opposite in the

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[257] See fns. 245,251, *supra.*
[258] [1960] 5 FSC 24
[259] *Ibid,* at p. 27. See E.E Uvieghara,, *Labour Law in Nigeria,* 2001, p. 75

determination of the contract of employment. While in termination the employee is entitled to his earnings, in dismissal he loses his financial benefits including sometimes even his reputation. This is why in a case of dismissal the employer must not only give reason(s) for doing so, he must also prove to the satisfaction of the courts that the employee's misconduct embodied in the reason(s) given warranted his removal from his employment.[260] Where the employer fails to justify the dismissal, i.e. he is unable to prove that the employee actually misconducted himself in the light of the allegation(s) against him, and then such dismissal is wrongful. Accordingly, the employee is entitled to his earnings as well as damages for wrongful dismissal. He may, however, in lieu of damages ask for reinstatement into his position in the employment if his contract allows it.[261]

The foregoing overview of the common law terms of termination and dismissal is intended mainly to highlight the insecurity of employment in Nigeria. However, modern labour law statutes may modify or even dispense with them in order to

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[260] In addition to cases cited regarding the determination of employment contract see, e.g. *Momoh v CBN* [2007] 1 NWLR (pt 1055) 504, CA; *Rector, Kwarapoly v Adefila* [2007] 15 NWLR (pt 1056) 42, CA; *A.G Kwara State v Ojulari* [2007] 1 NWLR (pt 1016) 551, CA; *Omidiora v FCSC [2007] 14 NWLR* (pt 1053) 17, CA; *Raji v Unilorin [2007] 15 NWLR (pt 1057) 259, CA; Borishade v NBN Ltd* [2007] 1 NWLR (pt 1015) 217, CA; *NEPA v Adeyemi* [2007] 3 NWLR (pt 1021) 315, CA; *Jibril v Mil Admin, Kwara State* [2007] 3 NWLR (pt 1021) 357, CA; *Ujam v IMT [2007] 2 NWLR (pt 1019) 470, CA; Ado v Comm, Works Benue State* [2007] 15 NWLR (pt 1058) 429, CA; *Kwara State v Lawal* [2007] 13 NWLR (pt 1051) 347, CA; *DA Nig. AIEP Ltd v Ohiwadare* [2007] 7NWLR (pt 1033) 336. CA, *JUTH v Ajeh* [2007] 1 NWLR (pt 1016) 490, CA; *Akinfe v UBA Plc* [2007] 10 NWLR (pt 1041) 185, CA.

[261] *Ibid.*

keep abreast with politico-socio-economic circumstances in the polity.

Today in England legislation has modified the concepts, providing for "fair" and "unfair" dismissal, and giving them statutory meanings different from what obtains at common law[262].In Nigeria there is no such enactment yet on this common law method of determination of contract. That is why our courts apply the concepts of termination and dismissal in ending the contract of employment. This is, however, as I have earlier argued, subject to the contract of employment of the parties.[263]

The Labour Act,[264] which is the major statute on contract of employment, does not address the problem of insecurity of work. It merely in sections 11 to 20 codified the common law meaning of termination, apparently providing for minimum statutory terms of contract of service for the employee called a "worker".[265] This "worker" is simply the person doing manual labour or clerical work. The "worker" does not include persons exercising administrative, executive, technical or professional function as public officers or otherwise.[266]

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[262] For further reading, see e.g. Michael Jefferson, *op.cit.* see further Irish Employment Legislation, which, like its English counterpart, progressively departed from common law principal on employment law: Anthony Kerr, ed., *Employment Rights Legislation,* 2002 ed.

[263] See *Shell Petroleum v Nwaka* [2003] 1 SCNJ 417, at p.430, *per* Ajoola J.S.C

[264] Cap L1 Laws of the Federation of Nigeria, 2004

[265] *Ibid,* s. 91

[266] *Evans Brothers v Falaiye* [2003] 3 FR 124, at p. 141. See also G O S Amadi "Redundancy and Termination of Contract of Employment in Private and Public Sectors in Nigeria," *op. cit.,* p.35

This circumscribed meaning of a "worker" under the Labour Act does not improve the employee's lot at common law. It seems that the much the Act does is to prevent the employer and the "worker" from contracting out of the statutory terms of service which revolves on giving the latter a written contract of employment and giving a certain period of termination in accordance with the length of service. Beyond this, the Labour Act is as inadequate as it is unprotective of the tenure of employment of the worker. And it is irrelevant to the "non-worker". All this makes Nigerian employees of whatever status "to rely solely on their individual contracts of employment".[267] The regrettable absence of any progressive legislation, enabling and protecting innovative terms and conditions of employment in Nigeria apparently compelled the Supreme Court to state as follows in the case of ***Shell Petroleum v Nwaka:***

> When parties make a contract they make their own law to which they are subject and which creates the rights and obligations, which bind them to which the general law gives recognition and force.[268]

That was a pathetic case in which Nwaka, one of the best brains in the oil industry in the employ of Shell Petroleum, had his contract terminated on grounds of redundancy. It was claimed that the redundancy was as a result of the reorganization carried out by and in the company. But the reorganization was actually to lay off certain Nigerian employees to make way for expatriate workers. Nwaka did not succeed in his action for wrongful termination, let alone reinstatement, because his contract of employment with Shell

[267] *Ibid,* at p. 36
[268] *Supra,* at p.430

Petroleum was not breached by the latter. This is a typical example of insecurity of employment in a country where there is no protective labour law for her citizens against exploitative or even racist employers.

Belonging to Trade Union: Industrial Action; Industrial Relations.

The general law referred to in *Nwaka's* case is the common law, under which the parties can negotiate their contract of employment. But we have seen that the employee does not stand on equal footing with the employer in negotiating terms and conditions of his individual contract of service. This inability of the individual employee to negotiate the nature of his contract of employment with his employer compelled him to combine with fellow employees to form trade unions. The trade union now speaks and negotiates on behalf of the employees the terms and conditions of their individual employment contract.

The agreement reached on behalf of employees between the trade union and the employer(s) is known as collective agreement, and the process which brings it about is called collective bargaining. But employers the world over are seemingly averse to trade unions, in particular active trade unionists. This is so in Nigeria. This notwithstanding, the Constitution empowers employees and employers to freely associate, including belonging to trade unions.

The right of employees to belong to trade unions include their right to withdraw their labour during strike. Similarly,

employers have the right to shut out labour by way of a lock-out as a form of industrial action.[269] In either case, what is in operation is the exercise of the constitutional right to associate. That is why it is not unconstitutional to provide statutorily for "no work no pay".[270] This enactment is simply a codification of common law rule, which enables employees to withdraw their labour and employers to stop wages respectively for work not done. And in this regard, either party can determine the contract of employment. What this means is that the constitutional right to withdraw labour, which may be accompanied by stoppage of wages, is inchoate. That is to say, what exists is freedom as opposed to right to strike.[271] In other words, neither the employer can justiciable ask the employee to work for him in order to receive his pay, nor the employee ask the employer to pay him for services not rendered during the strike.

It may interest us to know that the common law is judge-made law based on contemporary common sense. If common sense means good sense and sound judgement in practical matters,[272] the implication is that it does change from time to time to keep abreast with current realities that tend to influence it. A further implication is that common sense may differ from jurisdiction to jurisdiction in acknowledgment of existing circumstances. Common sense, therefore, dictates that the common law rule of no-work no-pay posited centuries beyond living memory may

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[269] See G O S Amadi, *A Legal Guide to Trade Unions, op cit.,* p.79. See Trade Disputes Act, s. 47(1)

[270] Trade Disputes Act, ss. 42(1) (a) and (b)

[271] See Davies and Freedland, *Kahn-freund's Labour Law,* 3rd ed., p.355; G O S Amadi, *A Legal Guide to Trade Unions Act, op. cit.,* pp.86-87

[272] *Concise Oxford English Dictionary, op. cit,* p. 289.

not stand the test of contemporary industrial relations reasoning. That is why I consider the codification of the rule as absurd; because by such codification the hands of judges are tied to apply the rule *stncto sensu.* This will prevent the judges from doing justice in the light of the prevailing practice in industrial or labour relations; for strike should be seen as not striking at the root of the contract of employment, but as a means of drawing attention to the plight of workers.

Industrial relations tend to see the no-work-no-pay rule as pure legalism, which tends to create deeper discord between employers and employees during industrial action. It is always very probable that, notwithstanding their dispute, the parties may not want to end their contractual relationship; a relationship founded on trust and confidence over the years. It is like a conjugal relationship built on trust and confidence of a couple whose quarrel, even is it leads to separation, will not bring the marriage to an end. In the light of this arguable analogy, I once canvassed elsewhere as follows:

> … a strike should be viewed by the courts as putting the contract of employment in a suspended animation, but which revives automatically at the end of the strike. What follows from this is that there should be no break in the continuity of service or loss of any seniority rights… as a result of the strike. And notwithstanding the provisions of the Trade Disputes Act of no-work-no-pay by and to the strikers... the employer may still pay wages during strike or, if wages are withheld, arrears of wages after the strike. This position is in accord with modern industrial relations since both parties, in spite of the strike, would still want to relate to each other as employer and employee… Even the church[273] recognizes that

[273] *The Workers' Charter,* Encyclical Letter (*Rerum Noverum)* of Pope Leo XIII, May 1891, published by the Catholic Institute for Development, Justice and Peace, Enugu, 1990, pp. 25-31

> workers have a right to withdraw their labour in protest against an unfair and unjust remuneration and poor condition of work.[274]

A major reason behind the foregoing proposition is in respect of the security of tenure of employment in Nigeria. In a country where there are no unemployment benefits or social security, where successive governments since the Civil War seem uninterested in solving the unemployment problem, then workers should earn their wages when they embark on legal and legitimate strikes for the betterment of their terms and conditions of work. When employers are under legal obligation to pay, or pay arrears of wages if withheld, during legal and legitimate strikes, then they are likely to reframe from doing avoidable acts, which could precipitate strikes.

Strikes: Source and Solution

Mr. Chairman, sir, a sore factor that tends to generate strikes in Nigeria is the absence of mutual trust and confidence between employers and employees. The former does not seem to regard the latter as an equal partner in the movement towards the economic development of the polity. Employees are apparently seen as insatiable, beggarly irritants who are always agitating for better terms and conditions of service without considering the employers' capability to meet their demands.

This argument tends to credit employees with little intelligence, as a bunch of unthinking hewers of wood and drawers of water who would always agitate no matter their employment lot. Yet the fact remains that employees produce the goods and services on which the wheels of the economy

[274] G O S Amadi, *A Legal Guide to Trade Union, op.cit,* pp.87-88

run and the survival of the nation hinges.They have some modicum of intelligence to appreciate their economic output and to know when their employers have the wherewithal to meet their genuine demands for the improvement of their employment lot.

Again, industrial psychology does show that employees working under poor conditions and receiving less than living wage cannot possibly give their best to the establishment. Credence is lent to this argument by an erstwhile government employer of labour, Governor Ogbonnaya Onu of the old Abia State of Nigeria. In a seminal work and a must-read book for those who govern and intend to govern this country, Dr Onu states, and rightly so, as follows:

> …when workers are paid adequately, this helps bring stability to the work place. It boosts the morale of workers and helps improve their productivity. I recall the experience I had when I served as a member of the Board of Directors of the Nigeria Cement Company, Nkalagu in the 1980's. The company then, *as it became twenty years later*, was in bad shape. What the Board of Directors did then was to sort out the problems of the workers and instituted *good management practices*. As soon as the workers were happy, the company was turned around. Even without a kobo, just under a few years, the company made profit for the first time in so many years and subsequently was re-quoted on the Nigeria Stock Exchange.[275]

The foregoing revelation is self-explanatory. Therefore, it is not correct to blame workers for industrial disharmony since they would very much like to keep their employment to earn a living. When a misunderstanding arises between employers and

[275] Ogbonnaya Onu, *A Foot Print: Memoirs of a Chief Servant*, 2005, p.100. Emphasis added.

employees common sense demands that they resolve their dispute through the industrial relations process of collective bargaining. Interestingly, government employers tend to display aversion towards collective bargaining; and when they do negotiate with trade unions, their inclination is towards unilateral abandonment of the collective agreement. This is often done with impunity, for government employers have this monarchical attitude of regarding employees as subjects and the latter, as such, should acknowledge the former's breach of trust and confidence as part and parcel of the politics of governance. This unacceptable governmental behaviour is more of a rule than an exception in this country. It does not augur well for industrial relations.

As I write this inaugural lecture, several strikes are going on simultaneously in different parts of the country, including strikes by university workers in all the state universities throughout the South-East of Nigeria.[276] The sore cause of the strikes remains government employer's disregard for trust and confidence, which is the bedrock of industrial relations. The climax of this government impunity compelled a grave labour reaction on Wednesday, November 10, 2010. On that day, the Nigerian Labour Congress (NLC) and the Trade Union Congress (TUC) jointly declared a three-day general "warning" strike. The industrial action bred angst and anger and lamentations throughout the federation. The strike was as a result of the federal government's failure to honour its agreement with the unions to pay the #18,000 national minimum wage. It must be placed on record that this sum was far below the #52,000 minimum wage the trade unions

[276] See "Vanguard Comment", *Vanguard,* Wed., December 15, 2010. p. 18.

demanded. Yet the federal government resiled the agreement. Let it be stated without fear of contradiction that the #18,000 the federal government agreed to pay is not even a living wage in the light of the prevailing economic realities in the country.

The general "warning" strike was called off the next day because of the personal intervention of the President who, on behalf of the federal government, promised to satisfactorily address the issue.[277] True to his promise, the President on November 25, 2010 presented the matter before the Council of State (CS)[278] for advice. The CS is established under section 153(1) (b) of the Constitution. Its power, among others, under Part 1Paragraph B (2) of the Third Schedule made pursuant to section 153(1) (b), is to advise the President whenever requested to do so on the maintence of public order within the federation or any part thereof and on such other matters as the President may direct. The CS duly considered the issue and advised the President "to immediately forward the Bill [on the national minimum wage of #18,000] to the national Assembly for enactment."[279] I pray and hope that the Bill when enacted into law will be implemented by employers both at the public and private sectors of the economy throughout the federation so as to avoid a TUC-NUC full blown national strike.

Scapegoatism

Mr. Chairman, sir, the one-day general strike is typical of strikes in Nigeria, generated, as earlier argued, by the style of

[277] See "Daily Sun Comment", *Daily Sun,* wed, Nov. 17, 2010, p.18

[278] Unconstitutionally named "National Council of State" (NCS) by the news media: see, e.g. *Daily Sun*, Fri. Nov. 26, 2010, p.7; *The Guardian,* Fri Nov. 26, 2010, p.1; *Vanguard,* Fri Nov. 26, 2010, p'6

[279]*The Guardian, ibid, p.2.*

governance that is not allergic to breach of trust and confidence. Instead of preventing avoidable strikes, government employers prefer to invoke the genie of scapegoatism to disguise their poor approach to industrial relations. Scapegoatism of whatever texture and in whatever circumstance is a cowardly doctrine of passing the buck. It is an omen *of* unjust determination of contract of employment of the scapegoats. For the doctrine dictates that responsibility for industrial actions should be shifted to trade unions. And in passing the buck, employers freely pick and choose trade union activists, in particular their leaders, for punishment for allegedly instigating the strike. This is reminiscent of the historical trade unionists sanctioned for embarking on strikes.

Fortunately, progressive legislation has now made it impossible for strikers to suffer punishment for criminal[280] or civil[281] conspiracy against employers and or industrial growth. Notwithstanding the consignment of the criminal and civil wrong of industrial conspiracy to the dustbin of labour law history, the Nigerian government seems to revive that *in terrorem* law in the Trade Union(Amendment) Act 2005.[282] In that statute, the federal government seems to criminalize strike or lockout if any "person, trade union or employer" engages in the industrial action without first complying with certain provisions[283] of the Act.[284] Out of the provisions I shall mention two, but discuss one of them. The first is that it is an

[280] See Criminal Code, s. 518A.
[281] See Trade Unions Act, ss 23(1), 42(1), 43(1).
[282] Laws of the Federation of Nigeria.
[283] *Ibid.,* s. 30(6) (a)-(e).
[284] *Ibid.,* s. 30(7).

offence for workers employed in "essential services"[285] to go on a strike. The second is that it is an offence to embark on a strike or lockout on matters, which do not "concern a labour dispute that constitutes *a dispute of right*".[286] A dispute of right means any labour dispute arising from the negotiation, application, interpretation of a contract of employment or collective agreement under the Act or any other enactment or law governing matters relating to terms and conditions of employment.[287]

It seems that the meaning of "a dispute of right" is tailored towards preventing what government employers regard as "political" strikes. The implication here is that trade unions may be committing an offence if a strike is declared in protest against poor governance, including governance in breach of the rule of law. There is no gainsaying the fact that bad government policies may adversely affect workers and their conditions of employment. It remains to be seen how this disguised criminalization of strike can be enforced in a country where economic adversities naturally goad workers, including those engaged in "essential services" to withdraw their labour in protest.

It is perhaps as a result of the inability of government employers to enforce retrogressive labour laws and contain industrial agitation that makes them to resort to the doctrine of scapegoatism to punish alleged instigators of strikes. The most

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[285] *Ibid.,* s. 30(6) (a). See Trade Disputes Act, First Schedule wherein are listed "essential services". See G O S Amadi, *A Legal Guide to Trade Unions, op. cit.,* p. 64.
[286] Trade Union (Amendment) Act, s. 30(6) (b). Emphasis added.
[287] *Ibid.,* s. 30(9) (a).

compelling but rough and ready punishment awaiting the scapegoats is the determination of their individual contracts of employment. However, this sanction is often preceded by the invocation of the rule of no-work-no-pay against all strikers, or in military regimes by both non-payment of wages and proscription of the trade union(s) on strike. The Nigerian military regimes did not believe in human rights.[288] Of all these, the employer tends to regard deprivation of income as the soft underbelly of strikers, and attacking it may willy-nilly compel the latter to return to work. Where this fails, then the hammer of termination or dismissal may descend on the trade union scapegoats. The trade union, which has particularly been so treated, including proscription, over the decades in this country, is the Academic Staff Union of Universities (ASUU).

Types of Employers: The Corporate Personality

Mr. Vice-Chancellor, sir, ladies and gentlemen, in employment law, the employer may be the individual, a business firm or a corporate personality. In this disquisition, the interest is in the corporate body[289], which may be formed under the Companies and Allied Matters Act (CAMA)[290] or created by statute.[291] By sheer legal fiction the body in either case becomes an artificial legal person(ality) also known as corporate person(ality). The nature of the artificial legal person is that it can sue and be sue in its corporate name and it is capable of performing juristic

[288] See Public Officers (Special Provision) Decree No. 17 of 1984
[289] E.g. Access Bank Plc.
[290] Cap C20 Laws of the Federation of Nigeria 2004, s. 679(1).
[291] E.g. University of Nigeria.

acts,[292]including owing property and having and protecting its reputation.[293] In sum, an artificial legal person is capable of doing what a human person can do, except of course marriage.[294]

The Agent- Employee

A corporate personality is an abstraction, although created for convenience for business and commercial transactions. It acts, therefore, through human beings who are its employees. But there are certain employees who act as agents of the corporate personality. Their duty is to manage the material and human resources of the legal person for the purposes of production of goods and services. Such managers or administrators are generally seen as the *alter ego* of the corporate personality[295]. I call this manager or administrator the *agent-employee.* He occupies the office in his establishment which may designate him as director, director-general, manager, managing-director, permanent secretary, provost, rector, vice-chancellor, etc. By virtue of his office, the agent-employee has, among others, the powers of hiring and firing employees. But these powers are subject to the rule of law.

Regrettably, however, agent-employees tend to find it difficult to resist government-employers' pressure to exercise their

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[292] See *Fawehinmi v Nigeria Bar Association* (No 2) [1989] 2 NWLR (pt 105) 558

[293] See *Electric, Electronic, Telecommunications and Plumbing Union v Times Newspapers* [1980] 3 WLR 98.

[294] For Further reading, see e.g. G O S Amadi, *Jurisprudence of Trade Union Status, op. cit.,* in particular, Chap. Four.

[295] See *NNSC v Sabana* [1988] 2 NWLR (pt 74), 23 SC

powers outside the rule of law, in particular, the power of firing. This power is readily used to remove alleged "troublesome" employees, mainly trade union leaders, i.e. the scapegoats who are perceived to be instigators of strikes.

Many cases of punishing ASUU scapegoats from the 1970s to date abound in our various universities. This speaker, together with eleven others, including the then National President of ASUU, Professor Assisi Asobie, was sacked by the agent-employee of this University in 1996, notwithstanding a clear court order restraining him and the University of Nigeria from interfering in whatsoever manner with his contract of employment. The twelve ASUU scapegoats were reinstated in their individual positions in 1999 after the natural collapse of the military regime that installed the agent-employee as the "Sole Administrator" of this institution in crass violation of the University of Nigeria Act.

The Unilorin Case

Mr. Chairman, sir, the most palpable reported university case yet of a vulgar display of power of firing by an agent-employee in coarse disregard to the rule of law was against "The Unilorin 44". They were the 44 lecturers of the University of Ilorin whom the Vice-Chancellor used as ASUU scapegoats to announce to the world that he has unbridled power of firing fellow employees. Litigation on the matter, which lasted for eight years, reached the Supreme Court in the case of *Olufeagba v Abdul-Raheem.*[296]

[296] [2009] 18 NWLR (pt 1173) 384. SC

Briefly, the facts of that case were as follows: The appellants were lecturers of the University of Ilorin. They were sacked for embarking on strike action as members of ASUU. They were not queried or taken through any disciplinary procedure before "cessation of appointment" letters, dated May 22, 2001, based on misconduct were issued to them. The federal government through the National Universities Commission (NUC) directed Universities where lecturers were sacked as a result of the strike to recall such staff. But the Vice-Chancellor and the University of Ilorin disobeyed the directive.

The contents of the NUC letter, dated June 29, 2001, and signed by its Executive Secretary, Professor Munzali Jibril, were as follows:

> The Pro-Chancellor, University of Ilorin
> The Pro-Chancellor, University of Nigeria, Nsukka
>
> Federal Government/ASUU Negotiations
>
> I am directed to draw the attention of your council to the cases of academic staff *whose rights of continuous employment have been wrongly and prejudially affected* as a direct consequence of the national strike of ASUU - *and to request you to kindly reverse such action taken by your council administration in order to ensure peace and harmony in the campuses in the country and in the spirit of negotiations.*[297]

While I believe that the foregoing letter speaks for itself, it is necessary to make the following observations: first, the letter was euphemistically worded to imply that the universities in

[297] *Olufeagba v Adul-Raheem, supra,* at p. 440. Emphasis added.

question sacked their academic staff as a result of the ASUU national strike; secondly, the letter was written during the federal government/ASUU negotiations to end the strike, showing that the two institutions, by their actions, were perhaps not interested in ensuring peace and harmony in the universities in the country; thirdly, the government recognized that the sacking of the lecturers wrongly and prejudicially affected their right of continuous employment, implying that the punitive action did not follow due process as provided by the individual contract of employment of the lectures; fourthly, the government realized the fact that the approach of the two universities would not "ensure peace and harmony in the campuses in the country"; and, fifthly, the spirit of negotiations requires displaying such behaviour that would conduce to cordial industrial relations.

On the whole, the NUC letter was carefully worded to show respect for the governing council and administration of the university. The letter recognizes the fact that employers of lectures in public universities are their individual governing councils, each under the chairmanship of a pro-chancellor. This is provided by the statute[298] establishing every public university. But while this is so, the government substantially funds the universities. The relationship between the government and the governing council can be compared with that of the payer of the piper and the piper himself. The former calls the tune while the latter plays it. But both of them must be careful to call and play the tune respectively within the rule of law. I believe it was the rule of law that guided the NUC letter.

[298] E.g. University of Nigeria Act, Cap U11 Laws of the Federation of Nigeria, 2004, ss. 2, 2(b), 5, 6. See also University of Ibadan Act, Cap U6, University of Ilorin Act, Cap. U7.

However, the NUC letter was disregarded by the University of Nigeria, initially; and the University of Ilorin, completely. In this institution, the then Vice-Chancellor suspended the employment of the late Professor H.M.G. Ezenwaji, the chairman of ASUU, University of Nigeria (ASUU-UNN). But he dismissed from service, Mr. Alex Nzei, the secretary, ASUU-UNN. These disciplinary measures were taken without due process and against the rule of law. However, the Vice-Chancellor was compelled to recall and reinstate the two lecturers when ASUU-UNN declared a local strike in protest against this agent-employee's impunity.

At the University of Ilorin, the Vice-Chancellor, Professor Shuaib Oba Abdul-Raheem, the first respondent in the *Olufeagba* case, ignored the NUC letter. Indeed, he became a law unto himself and pig-headedly refused to recall and reinstate "The Unilorin 44" who were wrongly and unlawfully removed from the services of the university.

Consequently, the 44 lecturers, led by Professor B.J. Olufeagba, in 2001 sued their university at the Federal High Court, Ilorin, before His Lordship- Olayiwola, J. On July 16, 2005 the learned judge gave judgment[299]in favour of the lecturers, ordering that they be reinstated into their post and paid their entitlements. But dissatisfied with the judgement, the Vice-Chancellor and his co-appellants appealed to the Court of Appeal where they won a victory that did not stand the test of time. In the majority judgment delivered on July 12, 2006,[300]Muhammad Saifullah Muntaka-Coomassie, JCA, who

[299] Suit No: FHC\IL\CS\29\2001.
[300] Appeal No: CA\IL\65\2005.

presided and read the leading judgement and Tijjani Abdullahi JCA, upheld the appeal of the University of Ilorin; but the minority decision of Helen Moronkeji Ogunwumiji, JCA, dismissed the appeal and upheld the judgment of the trial court.

Meanwhile, three of the lecturers passed away, but the surviving 41 courageously plodded on to a glorious victory at the Supreme Court. On December 11, 2009, after eight long years of tortuous but worthwhile legal battle, the apex court unanimously set aside the majority judgment of the Court of Appeal and restored the decision of the trial court. It commended the disserting judgment of the Court of Appeal, describing it as "sound."[301]

It is clear from its unanimous judgment that the Supreme Court was unhappy with the behaviour of Professor Abdul-Raheem and his co-respondents. On this Fabiyi, JSC said:

> … it was the respondents who refused to put an end to the impasse as at 29th June 2001 when they refused to comply with the directive of the National Universities Commission -the parent body of the respondents to reinstate the appellants…[302]

After quoting the NUC letter, which was earlier herein reproduced, the learned justice continued:

> *One cannot understand the reasons for the intransigence put to bear by the respondents.* If they had complied, the matter would have ended by 29th June 2001. *It is in evidence that the authorities of University of Nigeria, Nsukka complied and averted unnecessary impasse. That is how it should be.* I do not for one

[301] *Olufeagba v Abdul-Raheem*, *supra,* at p.456 *per* Ogbuagu, JSC.
[302] *Ibid., at* p. 440

> moment see why the appellants who are on this side of the divide should not be reinstated with their full salaries and allowances. The living appellants must be and they are hereby reinstated; that is the law *'Good faith' should always be the watch words (sic) in human administration.*[303]

Mr. Chairman, sir, good faith is indeed the bedrock of human relations. It is usually lacking in any administration of any domain where the rule of law is laughed to scorn. Certainly, it was absent in the governance of the University of Ilorin between 2001 and 2009. This is clearly manifest in the observation of the Supreme Court in the *Olufeagba* case.

Good faith, if I must explain, hinges on truth. It is honesty or sincerity of intention in one's relationship with others. Its antonym is bad faith, which is intention to deceive.[304] Bad faith was at play at the University of Ilorin throughout the duration of the *Olufeagba* case. This is evident in the foregoing statements of Fabiyi, JSC. The case seems to highlight a disturbing surprise in university administration. The surprise is disturbing because a university ought to and should be a repository of everything sublime. In Igbo the university is known as *mahadum,* meaning: knows or knowing everything. It is a thoughtful name in Igbo lexicography. It is a paradox then that somebody who does not know that good faith is always the watchword in human administration is in charge of a *mahadum*. That is the worry.

The *Olufeagba* case has exposed what seems to be the style of governance in our universities and indeed other institutions and

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[303] *Ibid., at* pp. 440-441. Emphasis added.

[304] See *Concise Oxford English Dictionary, op. cit.,* p.98, 612

establishments in the larger society. At the risk of repetition, everyone seems to look up to the *mahadum* for direction in respect of ideal style of administration. The reason for this expectation is that those of us in the *mahadum* are seen to know everything, including how to bring about good governance founded on truth. If, therefore, the eggheads who profess learning and knowledge cannot govern themselves in good faith, then the larger society is likely to be governed by deceitful or dishonest individuals, who profess less, or less than satisfactory, learning and knowledge.

This argument may seem simplistic; it tends to show that the less one is learned and knowledgeable, the more one is likely to be deceitful or dishonest in human administration. Actually, it may be the other way round: the more learning and knowledge one acquires the more he is equipped intellectually to hypocritically or brazenly practice deception or dishonesty in human administration. This seems to be the case in the governance of this country.

In the final analysis it seems arguments on good faith and governance may be open ended. Good governance bred by good faith is not guaranteed by a galaxy of certificates one acquires, albeit such acquisition portrays one as an intellectual, a member of societal intelligentsia. Nor is it guaranteed by ignorance and or unintelligence. What is fundamentally lacking, however, in the intellectual or unintelligent ruler or leader is education. By this I mean that the uneducated is the one who is amoral; he is bereft of moral and spiritual substance that acts as a check and balance against naked intellect. The educated person is he who because of his moral and spiritual upbringing, always acts in good faith in the management of

human and material resources under his charge. He is Plato's philosopher king.

A major problem with the uneducated intellectual or hebetude is his pretention to learning and knowledge; a tendency which breeds complex -superiority or inferiority complex, depending on the situation in which he finds himself. He is, as Professor Ikenna Nzimiro said in one of his several symposia I had the privilege to attend, an "intellectual ordinary man". His pretention to what he is not is in itself bad faith!

I do not pretend to be a psychologist, but I dare postulate that an uneducated agent-employee is not likely to manifest good faith in his relationship with his subordinates. He tends to feel threatened even in his privileged position when his fellow employees constructively criticize his style of administration and or assert their rights upon which he may have infringed. In a situation of this nature, the agent-employee is likely to abuse his powers to emphasize the point that he is in charge. Assertive employees are regarded as "confrontational", who, often on frivolous grounds, are "disciplined" by way of denial of promotion, suspension or dismissal from service. Meanwhile, tale-bearing, sycophantic employees are welcome in the bosom of the agent-employee as "good boys" and are compensated with mundane things, including unmerited promotions. Yet in the university all characters ought to and should be accommodated and the devil given his due within the rule of law. But this was absent at the University of Ilorin; and it is implicit in the following words of Ogbuagu JSC:

> *I have a haunch that there must be much that meets the eyes (sic) in the sustained opposition by the respondents to restore the appellants to their posts. But since I and the court are not allowed*

> *to speculate anything, I say no more than to deal with some other material aspects of this appeal.*[305]

Indeed, there was more to something than met the eye in the *Olufeagba* case. Like his Lordship, I will not, beyond the hypothesis just expressed, speculate on the interesting whys behind the mindset to prevent the return of the living 41 lecturers to their posts. But suffice it to say that the Supreme Court was justifiably worried at the clearly untenable submissions based on extraneous matters, which formed the ground for the majority judgement of the Court of Appeal. On this Ogbuagu JSC has this to say, and I quote him *in extenso:*

> In a *well considered judgment…* the learned trial judge granted all the reliefs sought by the appellants. Surprisingly to me, a majority of the learned Justices allowed the appeal and dismissed the appellants' case *in spite of the clear and unambiguous statutory provisions in section 15 of the Unilorin (sic) Act which as a matter of fact recognized or is a restatement as it were, section 36 of the Constitution of the Federal Republic of Nigeria, 1999, which provides for everyone to be accorded fair hearing in all situations where the rights are at stake*.
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> *Instead of honourably and humbly conceding this very fundamental principal or entrenched law, which was flagrantly breached by the respondents and given a blessing so to say, by the majority judgment of the court below,* what I see regrettably is the preliminary objections and submissions that are with respect, *antithetic to truth and justice. One of them is that the death of two or three of the plaintiffs renders the entire action incompetent and unmaintainable. Wonders, it is said, shall never end.*
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> *Another most disgusting if not disturbing aspect of the respondents' case, is that since some or few of them, got an*

[305] *Olufeagba v Abdul-Raheem, supra* p. 450. *emphasis added.*

> *alternative employment, "to keep the body and soul together", they have lost their chances of being reinstated even where it is clear to me as held by the trial court that the purported termination, was wrongful, null and void and of no effect.*[306]

The foregoing statements, which speak for themselves, are weighty indeed. They lend credence to my contention in this lecture of the unfair and unjust effects of political jaywalking and legal jiggery-pokery. Both phenomena apparently were respectively employed at the University of Ilorin and at the Court of Appeal, resulting in the majority decision that prolonged the suffering of innocent lecturers, which persecution led to the demise of three of them. The rule of law was waiting to be buried with the deceased academics. But the Supreme Court came to the rescue of the supremacy of law, allowing the appeal of the glorious Unilorin 41, while praying for the courageous three who passed on. Accordingly, Fabiyi JSC, who read the leading judgment held as follows:

> …I find that this appeal is, no doubt, meritorious. It is hereby allowed. The decision of the majority Justices of the Court below is hereby set aside. In its place, the judgment of the trial Judge is restored to the effect that the living forty-one (41) appellants are hereby reinstated and should be paid their salaries and allowances from February 2001. *For the three plaintiffs who died during the protracted litigation may their souls rest in peace. It has been written of the old that 'it is appointed unto men once to die, but after this the judgment.' In their graves, they must be crying for justice.*[307]

I do concur with the learned justice that the deceased "Unilorin Three" cried in their graves for justice. And now that justice

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[306] *Ibid,* pp. 449-450. Emphasis added.
[307] *Ibid.,* p. 443. Emphasis added.

has been done, albeit belatedly and posthumously, their noble souls will surely rest in peace.

Predatory Governance

Mr. Chairman, sir, the *Olufeagba* case brings to mind the predatory nature of governance in this country. It occurs at every level in institutions and establishments across the country. It occurs because of the alienation of the rule of law by those at every level of power and authority in the governance of Nigeria. It occurs particularly in employment law where employers prey on agent-employees and the latter preys on subordinate fellow employees. In other words, predatory governance operates from the highest to the lowest levels of exercise of power and authority.

Another example of operation of predatory governance, this time affecting an agent-employee occurred in the case of *Ndili v. Okara.*[308] In that case, Professor Frank Ndili was removed from the office of the Vice-Chancellor of the University of Nigeria and retired as a professor from the service of the institution, purportedly by the federal government employer. This was done under what I consider a bad law known as Public Officers (Special Provisions) Decree No. 17 of 1984.

The Decree, promulgated by the then military regime, had several characteristics; and they include: the abrogation of the fundamental rights Chapter IV of the then 1979 Constitution;

[308] Suit No. E/331/86, reported in the *Guardian Law Report*, *The Guardian* Aug. 18, 1987, p.7. See also G.O.S. Amadi, "Security of Employment of Public Officers and the Public Officers (Special Provisions) Decree No. 17 of 1984", Vol. 3 (1978-1988) *Nig J.R.* p. 112.

and the ouster of the jurisdiction of the courts to hear any civil proceedings in respect of any act done or omitted to be done by the "appropriate authority" against the employment of any public officer. In other words, the appropriate authority is the person or body empowered to enforce the provisions of the Decree.

The appropriate authority was respectively the Head of State (President) and Governor with regard to federal and state institutions or establishments. Now, Professor Ndili was removed from office by the Visitor to the University of Nigeria who happened to be the Head of State. His removal was sequel to the findings of The Visitation Panel set up by the Visitor under section 13(2) of the University of Nigeria Act No.1of 1978.

At the trial for unlawful removal from office, the defendants raised a preliminary objection on the ground that the court had no jurisdiction to entertain the plaintiff's case, having regard to the ouster provision in section 3(3) of the Decree. Conversely, the plaintiff argued that the person who removed him from office was not the appropriate authority as provided by the sections 1(1) and 4(2) of the Decree.

The appropriate authority could under sections 4(2)(i) and (ii) delegate his powers to "any person" to act on his behalf for the purpose of the Decree. But there was no evidence before the court that the appropriate authority did delegate his power to remove Professor Ndili to himself as Visitor of any other person. A resolution of this crucial issue would determine whether or not the court had jurisdiction to hear the plaintiff's case. In the light of this, Nwokedi, CJ, held:

> If he [the appropriate authority] signed as Head of State, this entails certain consequences. If he signed as the Visitor then other consequences may follow. It seems to me that evidence has to be led to clarify the position. This interchange of names Visitor and Head of State gives rise to a confusion as to in which capacity the action was taken which confusion can only be cleared by evidence.[309]

In the absence of any clear evidence that Professor Ndili was removed from office by the appropriate authority under the Decree, the learned Chief Judge held, and rightly so, that the court had jurisdiction. "The rightness of this ruling," I have cause to argue elsewhere[310] over 20 years earlier, "lies in the fact that the law courts…jealously guard their jurisdiction" when confronted with statutory ouster provisions. On this Ademola, JCA, has this to say:

> [The] courts of law being jealous of their jurisdiction must watch enactments ousting their jurisdiction closely and meticulously and would only bow to the ouster of jurisdiction if the words doing so are clear and unambiguous.[311]

Mr. Chairman, sir, the *Ndili* case did not go into the merits as to whether the Vice-Chancellor was lawfully removed from office and prematurely retired as a professor of the University of Nigeria. But the fact that he was not sacked by the appropriate authority under the Decree No. 17 of 1984 *ipso*

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[309] At p.12 of the typescript; also see G.O.S. Amadi, "Security of Employment of Public Officers and the Public Officers (Special Provisions) Decree No. 17 of 1984", *op. cit*., p.112.
[310] *Loc. cit.*
[311] *Federal Civil Service commission v. Saidu Garba* [1986] 2 NWLR 395, at p. 403. For further reading, see *Ibid.*

facto meant that the statute was inapplicable to the determination of his contract of employment by his government employer. Accordingly, the applicable law would have been the University of Nigeria Act No. 1 of 1978 under which Professor Ndili attained his chair and subsequently became the Vice-Chancellor of the university. It is needless to inform that the University of Nigeria Act was not applied in the *Ndili* case. For this singular reason the removal of Professor Ndili as the Vice-Chancellor of the University of Nigeria and his forced retirement as a professor from the employment of the university was unlawful, null and void and of no effect. This is similar to the *Olufeagba* case.

The *Ndili* and *Olufeagba* cases are typical examples of what obtains in predatory governance that is governance outside the rule of law. But in either case, the courts did show that the supremacy of law is the structure upon which the superstructure of governance can be erected. On this score, it is worth noting the extra jurisprudential effort the trial court in *Ndili's* case put up to meander through the bad law in order to uphold the rule of law. The bad law was the Decree No. 17 of 1984. Yet, the then military regime could not operate within this obnoxious law in the removal of the Vice-Chancellor from office. It took a courageous judge to say no to this government-employer's impunity. It is my submission that Nwokedi, C J, displayed judicial activism[312] in the *Ndili* case. A less activist or passive judge would have washed his hands off the case like Pontius Pilate and upheld the preliminary objection in the guise of the rule of law.

[312] For further reading, see B. Obinna Okere, "Judicial Activism and Passivity in interpreting Nigerian Constitution", *Current Legal Problems in Nigeria-Proceedings of the Anambra State Law Conference 1986, 1988.*

7. Enabling Strongmanism

Mr. Vice-Chancellor, ladies and gentlemen, since the beginning of this lecture, I have thus far tried to justify my choice of its title. The summary of my disputations is that there can never be any good governance outside the rule of law; that when the rule of law is cast aside in the governance of any domain, what obtains is the rule of man. And the rule of man enables the emergence of strongmen. The strongman is a law unto himself. He has no regard for time and space; hence he operates at anytime, anywhere. For the avoidance of doubt a strongman is not the person with great physical strength performing feats of might for entertainment, but the person who rules by threats, force, violence or any form of intimidation or harassment.[313]

Strongmen can be found at every level of governance and at every nook and cranny of this country. They are enabled by the apparent absence of the rule of law. On the roads of this country, for instance, many motorists, in particular commercial drivers, are law unto themselves. They have no regard for road traffic laws because the police and other law enforcement agents who should keep the law are seemingly hamstrung by, among other factors, the apparent influence of gratification.

Indeed, one can imagine numerous examples of strongmanism operating in our system, showing failure of governance, all because the governors themselves tend to disregard the rule of

[313] See *Concise Oxford English Dictionary, op. cit.,* p.1430

law. The many cases cited in this lecture buttress this point. The siren personality, for instance, is a strongman, so also the ruler who assumed power via vote rigging. The question then revolves on who and how to uphold the rule of law to bring about good governance and avoid collapse of government.

The rule of law as we know is an abstraction, which can only be enforced and obeyed by human beings. We make up the rulers and the ruled. In a democracy, it is the governed who elect the governors who hold the government in trust for all of us within our political domain. A foremost and fundamental aspect of this trust is the obedience of the rule of law. It, therefore, behoves the ruled to put in government those who are fit and proper to govern them. Where they fail to do this, as it seems in present political dispensation in Nigeria, then the governed would be blamed for putting strongmen in power. This tends to have multiplier effects as everyone tends to become a strongman in his own sphere of influence.

There is, however, this argument that the electorate may be so intimidated by the corruptive influence of strongmanism that they prefer to shy away from exercising, or appropriately exercising, their franchise to elect fit and proper persons in government. Perhaps, the greatest factor of this intimidation of the electorate lies in the absence of security of the basic things of life -safety, food, healthcare, education, etc. In this situation, the poor, hungry, and fearful electorate may not be in the position to prevent strongmanism in the polity. This seems to be the crux of the problem.

The foregoing opposing debates may have their merits; if we accept them, it may seem that this country is in a quandary;

indeed, in a political quagmire, making one to ask the crucial question, *quis custodiet ipsos custodes* i.e. who shall guard the guards; who shall keep the keepers themselves?[314] The answer, certainly, is that the rule of law will guard the governors and they will guard the rest of us. Let me use an aspect of governance to give additional answer to who will guard the guards. For instance, in employment law, if the facts show, as in *Olufeagba* case, that the agent-employee vice-chancellor disregarded the rule of law to punish employees under his charge to satisfy his love for strongmanism, then he should not only be dismissed from service, but also be made to pay for the cost of the litigation which his employer expended in pursuit of the avoidable lawsuit. This will not only enhance security of employment, but will also compel governance at this level in whatever institution or establishment, to respect the rule of law. This example can also apply to other levels of governance in this country, which I believe was what prompted this notable pronouncement from Olatawura, JSC:

> It is not out of place to sound [a] note of warning to public servants generally on the execution of their duties. Many a time some of them go out of their way by resorting to methods that will embarrass the government or their employers in carrying out simple duties. *No government anywhere should condone the violation of its own laws.* The breach on the law, which sometimes leads to payment of damages, is a sad reflection on those who are employed and paid to assist in the implementation of the rules and regulation made under the law. *Those who think that might is right and*

[314] *The Lexicon Webster Dictionary*, Vol. II. 1981, p. BT46.

> *that the government can do no wrong should better have a second thought.* We have long passed that stage. Public servants who behave as if they are above the law, believing that their actions will be approved by the government are not better than those who deliberately set out on a collision course with the law…. *Time has come that a copy of judgement wherein erring officials who set out to serve their personal interests should now be sent to the government so that those who mislead the government should be surcharged for damages incurred by the government because of their ill-advised action. Over-zealous public servants must be made to pay for their actions. The laws, rules and regulations for public servants are designed to guide them in the discharge of their public duties. No laws place them above the laws of the land.*[315]

This very important dictum should be an article of faith of the governors of this country. Justice Olatawura made this pronouncement in a case of trespass to the plaintiff's land, leading to the destruction of his property therein by public officials. The case reveals another dimension of governance that operated outside the rule of law. I consider the dictum holistic because I believe that it applies to all aspects of governance, whether political, administrative or bureaucratic. In it the learned jurist impliedly condemned strongmanism and recommended that strongmen should be punished for their impunity. His Lordship's dictum should now serve as a new principle in employment law in such cases as in *Robinson*

[315] *Osho v. Foreign Fin. Corp.* [1991] 4NWLR (pt. 184) 157, at p. 202. Emphasis added.

Iwuoha v. FRCN and Eddie Iroh[316] where strongmanism was exhibited. In that case, the plaintiff was, against the rule of law, removed from office by the second defendant agent-employee, Eddie Iroh. The court held, among others, that the plaintiff, Robinson Iwuoha was entitled, to his pension and gratuity in accordance with the terms of his contract of employment.

In the final analysis, no one is above the law, and the supremacy of law guards everyone, the governor and the governed. That is the only path to good governance, devoid of political jaywalking and legal jiggery-pokery.

8. Conclusion

Mr. Vice-Chancellor, ladies and gentlemen, there is time to begin something and there is time to end it. The time has come for me to end this lecture, which I consider open-ended because of its politico-moral undertone. It is trite, I believe, that legal disputations with underlying religio-political elements may never have a note of finality, more so when issues under discussion are in a state of flux and are appreciated from different perspectives. But this lecture may have succeeded in whetting the appetite for further research into the rule of law in the governance of Nigeria.

As I was concluding this writing, the news media were awash with unfolding politico-legal matters that require the attention of the rule of law and its place in the governance of Nigeria.

[316] Suit No. FHC/EN/CS/24/2005 delivered on Tue. 22/6/07, by A.L. Alogoa, J, with necessary corrections made at the Federal High Court, Ado-Ekiti on 13/10/09 by His Lordship. The defendants have appealed in App No CA/IL/51/2010. The appeal is yet to be decided at the time of going to the press.

For want of time and space, I shall mention just a few. We can recall the mind-boggling revelation by Malam Sanusi Lamido Sanusi, the Governor of the Central Bank of Nigeria (CBN), of the fabulous earnings of the federal lawmakers, showing that "the National Assembly spends 25 per cent of the nation's funds"[317] on itself. In the words of the CBN Governor:

> I have figures from the Budget office and overhead is #536.2 billion while NASS [National Assembly] overhead is #136,259,768,102, which is exactly 25.41 percent of federal government overhead.[318]

Again, we can recall the attempt by the executive arm of government to give statutory recognition to presidential aides, ministers and other political appointees as automatic delegates eligible to vote in party primaries, thereby making nonsense of democratic principles that should guide election of party delegates.[319]

Again, we can recall that the federal legislature conceived the "Right of First Refusal", which means that serving lawmakers should have automatic rights to get nominated for re-election except they voluntarily waived the right.[320] Furthermore, the federal legislators conceived an idea to make themselves automatic members of their different parties' national

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[317] *The Guardian,* Thur., Dec 2, 2010, p.1, 4. See also *Daily Sun,* Thur, Dec 2, 2010, p.1, 7; *Vanguard,* Thur, Dec 2, 2010, p.1, 7; *Vanguard,* Thur, Dec 2, 2010, p.1, 5.

[318] *The Guardian,* Thur., Dec 2, 2010, p.1. See further "Financial Vanguard", *Vanguard,* Mon., Dec 6, 2010, pp.21-23

[319] See "Daily Sun Comment", *Daily Sun,* Tue. Dec. 14,2010, p. 18.

[320] *Loc. cit.*

executive committee (NEC) so as to give them the advantage to decide the fate of aspirants to various political positions.[321]

These instances clearly show selfish intention by both the Executive and the Legislature to amend the Electoral Act 2010 to suit their political interests without regard to the needs of the electorate. It goes to prove my hypothesis of primary or pre-election fraud involving enactment of electoral statute to enable vote-rigging, ostensibly under the rule of law.[322] But the unconscionable attempts to manipulate the electoral process as above exemplified failed because of overwhelming outcries of the public.[323]

There is no gainsaying the fact that sometimes futile and sometimes successful attempts of politicians to use the Legislature to statutorily serve the self in the name of governance is no more than a palpable display of political egotism. It speaks volumes of politicians who are supposed to exercise governance in trust for the people. They seem to live up to an aspect of the dictionary meaning, which describes politicians as persons who act in a manipulative and devious way to gain advancement.[324] This definition agrees with the unfolding $182 million Halliburton bribe-for-contract story in which it was alleged that several top officials of the federal government under the charge of erstwhile President Olusegun Obasanjo had their palms greased by that multinational

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[321] *Loc. cit.*
[322] See fn 192, *supra*
[323] See *The Guardian,* Fri., Dec 17, 2010, pp 1-2; Wed, Dec. 15, 2010, pp.1-2; *Daily Sun* Wed, Dec 15, 2010, pp 1,3,7; *Vanguard* Wed, Dec. 15, 2010, pp. 1,5.
[324] *Concise Oxford English Dictionary*, *op.cit,* p. 1110

company. The officials are currently undergoing criminal trial.[325]

The allegation revealed further that the ruling Peoples Democratic Party was given $5million by Halliburton for the 2003 general elections.[326] All this goes to show the manipulative and devious way to gain advancement by politicians.

This lexicon definition, however, may and cannot be true of all politicians, for there are those who are duly elected and selflessly serve the people. The problem lies with the manipulative politicians who rigged themselves into offices. It is an open secret that very many of those in governance since the present democratic dispensation began in 1999 were not elected in free, fair and credible elections. So, they can afford to govern shamelessly, deceitfully and selfishly, since they do not seem to owe allegiance to the electorate and the rule of law. Is it not a wonder that universities in the South-East of Nigeria, as I am writing, are closed down for over six months since July 2010 to January 2011, and the politicians in charge of these states are strangely seeking for re-election to continue their graceless governance?

Mr. Chairman, sir, this discourse should not necessarily be seen as a lamentation of an agonized citizen, but as a critical appraisal of the governance of a beloved country apparently overwhelmed by political jaywalking and legal jiggery-pokery.

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[325] See "The Halliburton Matter", Sunday Sun Comment, *Sunday Sun,* Dec. 26, 2010, p. 6; *The Nation*, Mon. Dec 27, 2010, p.4.

[326]See *The Guardian,* Thurs., Dec.23, 2010, p.3. See further *Vanguard,* Thurs. Dec. 23, 2010, p.3; *The Nation*, Tue., Dec. 28, 2010, pp.1-2.

I do not believe that all hope is lost, for the Scriptures say "that all things work together for good for those who love God, who are called according to His purpose."[327]

The way forward is for our politicians to understand these two basic realities about life: first, there is God, and, secondly, they are not Him. They should avoid the temptation to play God in politics. Therefore, it behoves them to be God-fearing and human loving. This will enable them eschew the Nigerian politician's characteristics of shamelessness, deceitfulness and selfishness. This in turn will allow internal democracy as opposed to selectocracy[328] to operate in different political parties. Ultimately, this will improve democracy, strengthen our institutions and conduce to good governance.

Let me state for the umpteenth time that poor governance breeds weak institutions and this in turn breeds strongmen. All this is as a result of the disregard for the rule of law. When the Executive and its apparati, such as the bureaucracy and the police are weak, the Legislature is weak, and most regrettably the Judiciary is weak, then that is an open sesame for strongmanism. The inevitable consequence is an insecure and unsafe country where strongmen such as kidnappers, armed robbers and political touts prowl the domain. This seems to be the lot of our dear fatherland today.

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[327] *Holy Bible,* Rom. 8:28

[328] *I e, the act of selecting, especially lackeys or unpopular persons, by a political party, often influenced by its strongmen, to ironically contest democratic elections.*

The clarion call is that all of us must wake up to the reality that the self, yes the self in you and I, is indisciplined and corruptive. Until the rulers and the followers do what is right and proper, influenced by the fear of God and love of human beings, we will continue to have what I consider 40 per cent bad rulership and 60 per cent foolish followership. This may be a disputable hypothesis; but time and space would not allow me to even adumbrate its thesis, antithesis and synthesis. Nonetheless, the refusal to be foolish followers has throughout history ignited either constitutional or unconstitutional changes of bad rulership. A very recent typical example is the Tunisian uprising of January 14, 2011, leading to the collapse of the corrupt and bad government of President Ben Ali. On that day the President unceremoniously fled the country to Saudi Arabia, after 23 years of the rule of man in Tunisia.

I believe that the issue of bad governance in Nigeria lies with the governed sleeping on their rights, gnashing their teeth in self-inflicted impotency, wringing their hands in silent despair, and hoping against hope for who would bell the cat. The governed should collectively bell the cat now that the 2011 general elections are imminent by appropriately exercising and defending their franchise to vote out bad governance wherever it exists in Nigeria. The truth remains that as the electorate make their bed so shall they lie on it.

Thank you distinguished audience, thank you for your quality time, and thank you for patiently listening to my professorial nonsense. I do hope you make sense out of it.

God bless you all!

AKNOWLEDGEMENTS

Vice-Chancellor, sir,

May I use this opportune moment to acknowledge with deepest gratitude the people, including those I may not remember, who in one way or the other helped me in life, as Dean of Law, and made it possible for me to attain my present position and or to deliver this inaugural lecture in good health.

As a creation of God, I must appreciate Him for giving me life and good health to continuously praise Him, thank Him and adore Him. Notwithstanding my failings, the good Lord endowed me with abundant blessings, some of which I now count one by one in these acknowledgments.

The blessings of sleeping and waking, two everyday miracles I take for granted. I slept last night and woke up this morning to deliver this lecture.

The blessings of my late parents, Sir John (Sr.) and Lady Maria (Sr.) Amadi. My parents were humble, industrious, large-hearted and religious couple; they were strict disciplinarians who saw to the education of their children, including numerous relations.

The blessing of my Ubomiri community, an ancient town in Mbaitolu Local Government Area of Imo State of Nigeria. The town that celebrated my father as a pathfinder, the first Ubomiri lawyer.

The blessings of my siblings, ten of us –five males and five females; but only six of us are living, and they are Patricia, Stella, Emmanuel (British citizen by birth), John (Jr.) and Maria (Jr.). The blessings of their wives and husbands.

The blessings of my maternal grandmother, *Ma k'ukwu*, Gracey Nwokeforo, and my maternal uncle Lazarus Nwokeforo, all of blessed memory. It was *Ma k'ukwu* who, as a traditional paediatrician, saved me from certain death in 1961, soon after my mother joined my father in England in the quest for the proverbial Golden Fleece. It was my uncle, *dee* Lazor, with whom I lived, that saw to my education until the return of my parents from England in 1965. In addition, I am grateful to my uncle's wife, aunt Florence Nwokeforo. I DEDICATE this inaugural lecture to grandma Gracey Nwokeforo and uncle Lazarus Nwokeforo. The good Lord used them to prepare me for today.

The blessings of Augustina and her husband and my numerous paternal and maternal cousins, nephews and nieces and their parents, including aunt Martha Igbo, my mother's only surviving sibling and Mrs. Christina Eze.

The blessings of my secondary schools that shaped me for university education: Ascension High School, Eleme (1965-1967), Holy Ghost College, Owerri (1970-1971), Hope Waddell Training Institute, Calabar (1973-1974). The blessing of my Holy Ghost College Old Boys' Association, Enugu Branch, of which I am a proud member.

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The blessings of my 1978 classmates of this faculty and 1979 at the Nigeria Law School for attending this inaugural lecture for a maiden reunion since our great departure from our Alma Mater over 30 years ago.

The blessings of my former and present students, now in their thousands, products of over 27 odd years of teaching and research. Without them, I may have professed nothing. Some of them became my informal research assistants while writing this lecture. In particular, Emmanuel Wingate (now in the law school), and my learned friends Herbert Umezuruike, Pontian Okoli, Chukwunweike Ogbuabor, Clara Obi-Ochiabutor, 'Nonso Mmuozoba, Malachy Ugwummadu and Sylvester Anya. They all assisted me with relevant materials that made this work come to fruition. Also the blessings of my numerous former and current postgraduate students. I am enriched intellectually supervising their masters dissertations and doctorate theses. They are the pride of my calling as a teacher.

The blessing of our Vice-Chancellor, Professor Bartho Okolo cum his administrative team for his untiring efforts to improve the human and material resources of this university, and for graciously approving this 57th Inaugural Lecture. And the blessing of his predecessor in office Venerable Professor Chinedu Nebo for reviving the University of Nigeria Inaugural Lectures.

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The blessing of my blessings, my wife Dr Mrs. Chikanele Caroline Amadi, my children Nnanna, Adaugo (both in the Nigerian Law School), Kemdirim (a medical student) and

Chisom, the baby of the house, an SS3 student. I do not discuss my family, but permit me to say a few words about my better half. She is a humble woman of intellectual, moral and spiritual substance. I call her Chily, an acronym for "Chika, I Love You!" Today, in addition, I call her *Obidiya*, literally meaning "the mind of her husband". Since I presume that you know that these two pet names speak volumes, I speak no more.

Finally, the blessing of this distinguished assembly. You are all a blessing to me for graciously honouring the invitation to come and listen to my inaugural lecture. Thank you!