
Democracy and the Challenge of the Rules of Law in Developing Democratic Society

Demokrasi ve Gelişen Demokratik Toplumda Hukuk Kurallarının Reddi

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Abstract: The concept of democracy ought to be approached by examining its essentials as contents of the term. It should be known from the outset that democracy expresses both principles and ideal. That is, principles, which those who believe in democracy wish to be given practical expression in the laws and institutions of the society; and ideals which provide goals toward which man in society should constantly aspire for the betterment of the society. From the fore-going, the focus of this paper shall not be adhered or centered on the definition of democracy alone but rather on the essence and significance of the rule of law on which the practice of democracy as a political ideology and system stands and rests. Meaning that, it is to thematize that without an implementation of a functional rule of law, such democratic system becomes a sham and pointless. And for proper insight of this paper, therefore, its methodology shall be purely expository, critical and analytical. This idea and ideal of the rule of law in any democratic society, if given a priority will portray good governance in human society.

Keywords: Democracy, law, the rule of law, democratic society, ideals.



Democracy: A Brief Analysis

The concept of democracy indicates both a set of ideals as well as political system. It is also seen as a set of institutions and as a system of government. Democracy is harder to pin down because it has never become identified with a specific ideology or doctrine like Marxism, communism and socialism. Rather, it is a product of the entire development of western civilization. Little wonder, therefore, Bello avers that the more democracy has come to be a universally accepted term, the more it has undergone verbal stretching and has become the loosest label of its kind (Bello, 1983: 541). The notion and word about democracy to be precise is nebulous and consequently carries with it the unprecedented problem of universally acceptable definition. And in line with the opinion of Bello, Eboh points out that the notion of democracy is itself a controversial concept. It is one of the most misused terms in human history. It has different meaning to different peoples and ideologies. There is no agreed definition (Eboh, 2003: 68).

The expression that democracy is government by the people in which the supreme power is vested in the people and exercised directly by them or by their elected agents under a free electoral system is derived from the classical definition given by Abraham Lincoln, a one-time American President, that democracy is government of the people by the people and for the people. But it should be noted, however, that democracy is not as simple as this definition suggests. In Robert Dahl's definition, democracy is 'a society in which ordinary citizens exert a relatively high degree of control over leaders' (Dahl, 1956: 3). What runs through the above definitions centers on the issue of citizens but the question now is: who are the citizens? The children? Imbeciles? Lunatics? Are these the set of citizens/people being mentioned? This question is apt here because there is a difference when discussing about people and persons. What demarcates the two set of human beings is the gift of rationality in human persons and not with people. Apart from this difference, there is still the problem that the term is so vague and more importantly, what one person would regard as a paradigm case; another would deny was a democracy at all.

The definition adopted below suits the purpose of this work,



which examines it from the functions of the rule of law as the most essential feature of democracy in the quest for good governance in any society. It is given by the Harveys; they hold that democracy means more than one man one vote. It necessitated settling affairs according to known rules of government, toleration towards minority views, regular elections, and freedom of speech and above all, observance of the rule of law. It does not deny the discretion of government authorities but subjects implementation of the result of this discretion to control (Harveys, 1974: 269). Here, the essentials of democracy shall be examined briefly to examine that without these, the idea about the practice of democracy is meaningless.

One of the key aspects of democratic culture is the concept of a 'loyal opposition'. The term means in essence that all sides in a democracy share a common commitment to its basic values. Political competitors might disagree, but they ought and must tolerate one another and acknowledge the legitimate and important role that each has to play. The place of an organized opposition cannot be over-emphasized because of its importance in any democratic society. It means equal political opportunity for all and the rejection of inherited political privileges, elitism and classes. All citizens, because of their common humanity; share in the same measure an intrinsic moral worth and should, therefore, have equal chance and opportunity to develop their unique and individual personalities as they feel, wish and as they are able.

William in his article, *The Idea of Equality* quoted by Graham suggested as a starting point is the fact of our common humanity. This common humanity endows all men with a certain dignity and entitles all to a certain kind of respect from others in the community (Graham, 1986: 69). It is plausible as Rawls says that although people may possess capacities in varying degrees... but then, provided that some fairly minimal threshold is reached, this can itself provide the grounds for according equal justice, equal liberty, or whatever (Rawls, 1972: 506). All these point to the fact that justice in any setting should be based on the equality of men of which Rawls canvasses for in his article, *Justice as Fairness*.



The introduction of civil liberties into the concept of democracy and their connection with the rational capacity in human nature seems to be a point of immense importance. Democracy cannot function unless those who seek to exercise those civil liberties recognize the equal rights of others. Mill's work, *Liberty* published in 1859 centers on the defense of freedom of expression. In his words, the subject of the essay is 'moral, social, and intellectual liberty asserted against the despotism of society whether exercised by governments or by public opinion (Mill, 1999: Ch. 1).

Khan quotes from Mill's *Liberty* that his claim for individual liberty is based on utilitarian grounds: I forgo any advantage, which could be derived from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal to all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being (Khan, 1994: 64). This suggests that liberty should be for the greater number of individuals in the society. Consequently, a democratic society ought to provide methods and institutions for the preservation of liberty. These include organs like trade unions, civil liberties organizations, mass and print media among others that have opportunity to challenge those at the helms of affairs in the best interest of the populace.

The principle of consent in democracy is that of the basic rights of the people and the recognition of the basic rights and freedom to dissent and hold contrary views by the minority. Public discussions, free and fair elections are regarded as essentials because they are necessary for achieving consent of the people. The point here is that decisions in administration through majority opinion and election may not always be right since no individual or group has monopoly of truth and knowledge about people and the society in general. Therefore, democracy caters for the views of those in opposition with due respect as those in opposition today might be in the majority tomorrow in order to get the consent of the people. The discussion of the rule of law as the basis of democracy shall now be examined as the most needed ingredient and or essential of democracy.



The Rule of Law as the Basis of Democracy

The rule of law – its definition and attributes, the possibility and conditions for its existence, and its significance as a political value – has long been a subject of scholarly investigation and debate. In recent years, it has emerged from the confines of academic and philosophical discourse onto the wider stage of contemporary political events, transcending national borders, political regimes, and legal systems. So the question is: what is the rule of law? The doctrine of the rule of law is ultimately bound with the practice of democracy. Itse E. Sagay says that “there can be no democracy without the rule of law” (1996: 13) and by common agreement, Albert Venn Dicey in his *Law of the Constitution* exposed the concept of the rule of law as:

When we say that the supremacy or the rule of law is a characteristic of English constitution, we generally include under one expression at least three distinct though kindred conceptions. We mean, in the first place, that no man is punishable or can be made to suffer in body or goods except for a distinct breach of law... every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.... (Appointed government officials and politicians, alike)... and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as if any private and unofficial person (Dicey, 1950: 194).

The summary of the concept of the rule of law as examined from Dicey is under three fundamental headings; firstly, no man could be punished or lawfully interfered with by the authorities except for breaches of the law. Secondly, no man is above the law and everyone, regardless of rank, is subject to the ordinary laws of the land; and thirdly, there is no need for bill of rights because the general principles of the constitution are the result of judicial decisions determining the rights of the private persons. The International Commission of Jurists held in Lagos in 1961 defined the rule of law as:

Adherence to those institutions and procedures, not always identical, but broadly similar, which experience and tradition in the different countries of



the world, often having themselves varying political structures and economic backgrounds, have shown to be essential to protect the individual from arbitrary government and to enable him to enjoy the dignity of man (Busia, 1975b: 456).

This definition shows that the rule of law is an important aspect of democracy in the process and quest for good governance of the society. Without the rule of law, there can be no democratic society. All members including those in authority are subject to the law. The rule of law, according to Iroegbu realizes the constraint of reasonableness by treating all equally as full member of the community without discrimination (1996: 75). The order that the rule maintains is a greater value of interaction in community within which the communal good including the private good of the members are realizable, and without which none of these is realizable. Generally, the rule of law has two aspects; first, the law should rule the people and the people should obey the law; second, the law must be capable of being obeyed, hence, the law must be capable of being ascertained and guiding people's behavior. The two aspects of the rule of law mentioned here are indispensable for the good working of the society (state). The first obviates the danger of legalism, that is, citizens becoming slaves of the law, forgetting the spirit behind the law. Legalism forgets the humane aspect of the law. The second avoids the danger of presumption that one breaks the law all the time and gets away with it, as it is the case in many African nations where those who have violated our laws and morals are celebrated and go unpunished. Here, if those who transgress the law are not punished, the entire system will collapse because those that are following the first aspect will have reason to think that these sets of people are profiting from the system and contributing commensurately to the political community.

The point being made here is that it is imperative that in any democratic society, the rule of law must be inculcated in all the members through education, good example and the consistent application. This is so because it is a *conditio sine qua non* for a good functioning of the political community in the realization of the values of communality and individuality. Here, we cannot discuss the rule of law without mentioning the issue of separation of powers and other characteristics of the rule of law.



The maintenance of the rule of law to which we attach the greatest importance requires particular care that occasion for conflicts among the judiciary, the executive and the legislative arms of government should be reduced to the minimum. Montesquieu found in the principle a guarantee of the kind of restraint on government that given the right setting could assure liberty, that is, a condition in which the laws were appropriate to a well-ordered society and also permitted a considerable degree of individual and group independence. This corresponds to Lockean separation of power into legislative, executive and “federative”. Montesquieu advocates for separation and balancing of powers among the three arms as a means of guaranteeing the freedom of the individual.

It is one thing to accept the rule of law as a democratic principle; it is another thing to provide institutions for its implementation. In a democratic society, the rule of law places limitations on the power of the government in the interest of personal freedom and for this to be effective; there is the need for an independent judiciary. The most elaborate system of substantive, procedural and remedial provisions is meaningless without an independent, impartial and competent judiciary for one reason, which is administration. Without jurisdiction to administer, the law is purely academic and without a proper judiciary, the jurisdiction to administer is purely oppressive.

As an idea about government and the rule of law, the whole essence is that all authority is subject to and constrained by law (Mason, 1995: 114). It is the highest law of mankind and profound truth, which allows the most dangerous predator (man) on the planet to live together in peace and harmony, co-operating for mutual self-interest and progress as in the social contract theories of Locke, Hobbes and Rousseau to rise from the state of nature. It is also the highest intellectual achievement of man, the result of objective consideration of man’s goals; nature, environment, history and survival no one is above the law, which is after all, the creation of the people, not something imposed upon them. The citizens of a democratic society submit to the rule of law because they recognise that, however indirectly, they are submitting to themselves as makers of the law. When laws are established by the people who then have to obey them, both the rule of law and democracy are being served. Supremacy of



law according to Mark Cooray (2005) is a fundamental concept in the western democratic order. The rule of law requires both citizens and governments to be subject to known and standing laws. This must include a distinction between law and executive administration, and prerogative decrees. A failure to maintain the formal differences between these must lead to a conception of law as nothing more than authorization for power, rather than the guarantee of liberty, equally to all.

The doctrine of judicial precedent is at the heart of the common law system of rights and duties. The adherence to precedent helps to achieve two objects of legal order in the first place; it contributes to the maintenance of a regime of stable laws. This stability gives predictability to the law and affords a degree of security for the people's human rights. Second, it ensures that law develops only in accordance with the changing perceptions of the society and therefore, more accurately reflects the morals and expectations of the society. A political system based on precedent will be adaptable to varied and changing circumstances, highly practical and will be composed by the finest minds of many generations as they have in the English laws; and thus, this gradual development of the system will avoid the pitfalls of hasty and counterproductive reforms.

An important part of the rule of law is that it should be applied prospectively and not retroactively. What this means is that someone should not be punished for sin(s) or crime(s) that is not against a particular law when being committed in a retro-active manner. Considering the prospective nature of legislation in a democratic regime, what we are dealing with is the rule that is just and which protects and promotes the societal good. Hence, it must be consistent in treating similar cases similarly not minding the status of individual being involved. At this juncture, it should be known that law is based on morality. An important question should be raised here that: if law is not based on morality, on what can it be based? The rule of law must rest on the morality and ethos of the community; meaning that the law evolves from the community of men as in the social contract theories where all combined to have a common voice. This is to safeguard the whole community against selfish interests of individual persons. There are other rules, which are unwritten like honesty, integrity, and respect for democratic procedures. All these and others call for



moral standards and good behaviors from all the people in the state. The point in discussion is that people's character determines the moral standard on how the rule of law will be based. If people were not well brought up, the rule of law of such community would be shaky.

The Rule of Law and its Implication in Developing Democratic Societies

The evidence of problem in developing societies, which is in the non-implementation of a functional rule of law could be seen in the disregard and manipulation of the national constitution; election and electioneering fraud; abuse of political power; legal and judicial perversions; low regard for the electorates among others. All these emanate from less respect for the rule of law in the society! Busia in his paper *Democracy and One Party System* says that every democratic community must have effective checks on its rulers. Democracy rejects the view that the leader and the group around who lead the single party always infallibly seek the interests of the people, or embody the will of all. Every human being who is mortal is equally fallible; therefore, it implies the right of the people to oppose and their right to choose and to change their leaders. The political institutions must provide democratic outlets for the exercise of those rights (Busia, 1975a: 466). But this is a mirage in many developing democratic societies especially in Africa where the electorates are left with nothing but to succumb to the whims and caprices of the "selected" few because there is arbitrary disobedience to the proceedings of the judiciary by the executives. Here, the judiciary is not independent and autonomous; in practice, it is subject to the whims and caprices of those in power. Irremovability at will is a cardinal principle of the rule of law, which must guarantee security of the tenure till retirement at an age, fixed by statutes or death. There must be safeguards against the arbitrary removal of judicial persons and such should take place under exceptional circumstances and then, only after the matter has been lawfully considered by a body of judicial commission.

The rule of law is an effective valuable in democracy because it promotes the following: responsibility, reciprocity and trust because these values basically embody what good governance and democracy stand for. Hayek in his book, *The Constitution of Liberty* writes that the belief in indi-



vidual responsibility... has always been strong when people firmly believed in individual freedom (Hayek, 1960: 71). The issue of individual is a cause that affects personal responsibility. It is not enough to have democracy unless it guarantees individual freedom and collective fraternity. When it is accepted that liberty is an essential feature of democracy, this does not guarantee the citizenry the absolute rights in all its forms. Responsibility ought to be an effect of such liberty accorded the people. People have to be responsible for whatever form of liberty given to them. Responsibility will not be complete until those in authority are accountable to the electorates. Agbaje writes that accountability... connotes managerial responsibility, efficiency and economy of operation as well as managerial responsibility for effectiveness. It is only when the leaders are accountable and transparent that responsibility as a value in democratic system could be ascertained (Agbaje, 2004: 80).

Reciprocity is a value that the rule of the law promotes in democracies in the quest for good governance. This (reciprocity) will allow individuals in the society to perform their duties to the state in the intendance of law and order like the paying of necessary taxes and dues to the coffers of the state; abide by the rules and regulations guiding the state among others. In response to this, reciprocity comes in, as those at the helms of affairs ought to provide necessary amenities and resources for the progress, growth and development of the state. For the singular reason that the people have consented to the leadership of those at the top, the rule of law here promotes that value of reciprocity in the leaders to the masses (electorates) and vice versa in their own realms.

Respect for the norms, rules, laws and regulations (shared values) are a matter of reciprocity in the society. The rule of law incapacitates all and even the leaders to respect the laws of the land because no man is above the law and everyone regardless of rank is a subject to the norms, rules regulations and laws of the land. Reciprocity as a value promoted by rule of law is an order of greater value in which social interaction is realizable in two ways, namely: obligation and norms (shared beliefs). The obligations (duties) are vice versa, that is, from the electorates to the state and from the leaders to the masses (Olatunji, 2005: 73-74).

It is not enough to itemize the essential features of democracy when



there is no trust in those who govern the state. It is the rule of law when it is properly implemented and a functional one that puts trust in the minds of the ruled. Trust could only come when the leaders are being guided by a functional rule of law in the spirit of ensuring good governance for the state. The characteristics of the rule of law: separation of powers, judicial precedent, and prospective legislation among others will never guarantee trust in the people except as it is stated, that it must be functional. For instance, the Nigerian case is an aberration because the electorates have no trust in those who rule even when there is a constitution to follow, then, jeopardizing the quest for good governance in the society. From the situation as examined on the importance of trust from the citizens to their leaders, it is observed that the leaders have no moral probity to allege and or accuse any member of the society just because they are also not trusted, and even when they do, they are just camouflaging and exercising their authority when they are also vulnerable of the actions. And in a democratic society like ours, it is only a functional rule of law that will promote trust as a value in the leaders from the governed.

Conclusion

This piece has been able to examine and argue on the basis that the rule of law stands out and it is the most fundamental essential in democracy of which without its functional implementation, democracy and democratic praxis become meaningless. Here, African and other developing nations' democratic practice will contribute to the growth and development of both the state and society when and only if functional rule of law is implemented. It is on its hinge that democracy and good governance could be preserved and sustained. The benefits of the rule of law are innumerable; it proposes that government should have restraints, not possessing discretionary powers. There should be legal controls over government activities and no one including those at the helm of affairs should be above the law. These principles if successfully implemented within the state will result in national stability of which will guarantee good governance and security of individuals.

The application of the rule of law is a situation in which everyone, both in authority as well as those whom they govern, respects the law and



the rights of others under the law. The question arises; why is observance to the rule of law so important? It is the most fundamental requirement for a stable democratic society (civil society). The importance of the rule of law lies partly in the power it limits those in the society and in the discipline to which it subjects all authority. The power and discipline are conditions, which in a democratic society, come from the community. The emphasis on the rule of law as part of developmental initiatives stems from the widespread belief that the rule of law is a pre-condition for economic development. Therefore, a functional rule of law is considered an important characteristic and a pre-requisite for democracy to work in developing societies.

References

- Agbaje, E. (2004). Corruption, Accountability and Good Governance. *International Review of Politics and Development*, 2 (2).
- Bello, I. B. (1983). Democracy in Nigeria: A Myth or Reality. *Proceedings of the National Conference on Nigeria since Independence* (J. Atanda, & A. Aliyu). Zaria.
- Busia, K. A. (1975a). Democracy and One Party System. *Readings in African Political Thought* (eds. M. Mutiso & S. Rohio). London; Heinemann Educational Books.
- Busia, K. A. (1975b). The Ingredients of Democracy. *Readings in African Political Thought* (eds. M. Mutiso & S. Rohio) London: Heinemann Educational Books.
- Cooray, D. M. (02.2005). The Rule of Law. <http://www.ourcivilisation.com/cooray/btof/chap189.htm>.
- Dahl, R. (1956). *A Preface to Democratic Theory*. Chicago: University of Chicago Press.
- Dicey, A. V. (1950). *Introduction to the Law of the Constitution*. London: Macmillan.
- Eboh, S. O. (2003). Democratic Culture, The Church and Democratisation in (West) Africa. *Church and Democracy in West Africa* (eds. F. Nwaigbo & al.) Port-Harcourt: CIWA Publications.
- Graham, K. (1986). *The Battle of Democracy*. Sussex: Wheatsheaf Books.
- Harveys, J. & M. (1974). *Government and People*. London: Macmillan.
- Hayek, F. (1960). *The Constitution of Liberty*. Chicago: University of Chicago Press.



- Iroegbu, P. (1996). *The Kpim of Politics: Communalism Towards Justice in Africa*, Owerri: International Universities Press.
- Khan, R. F. (1994). J.S Mill; Ethics and Politics. *Routledge History of Philosophy*. London: Routledge.
- Mason, K. (1995). The Rule of Law. *Essays on Law and Government 1: Principles and Values* (ed. P. D. Finn). Sydney: The Law Book Company.
- Mill, J. S. (1999). *On Liberty*. Ontario: Broadview Press.
- Olatunji, F. O. (2005). *A Philosophical Idea of Democracy as Good Governance*. PhD Thesis. Ibadan: University of Ibadan Department of Philosophy.
- Rawls, J. (1972). *A Theory of Justice*. London: Oxford University Press.
- Sagay, I. E. (1996). The Travails of Democracy and the Rule of Law. *Democracy and the Rule of Law*. Ibadan: Spectrum Books.

Özet: Demokrasi kavramına, onun terim içerikleri olarak özsel özellikleri incelenerek yaklaşılacaktır. En baştan beri, demokrasi-nin hem ilkeleri hem de idealleri açıkladığı bilinir. Yani, demokrasiye inanan kimselerin toplumun kuralları ve kurumları konusundaki pratik açıklamaların verilmesini istedikleri şeyler olan ilkeleri ve de toplumdaki insanın toplumun daha iyi duruma gelmesi için sıkça arzu ettiği şey yönündeki hedefleri sağlayan idealleri. Yukarıda da belirtildiği üzere, bu yazının odak noktası, siyasi bir ideoloji ve sistem olarak demokrasi-nin uygulamasının durduğu hakkındaki hukuk kuralının esas ve öneminden çok, yalnızca demokrasi tanımına bağlı kalmak ya da onu merkeze koymak değildir. Bunun anlamı, işlevsel bir hukuk kuralı yürürlüğe koymaksızın onun konuşturulmasıdır, böyle bir demokratik sistem, yapma ve amaçsız olur. Bu yazının yerinde kavrayışı için, öyleyse, onun metodolojisi bütünüyle açıklayıcı, eleştirel ve çözümleyici olacaktır. Herhangi bir toplumdaki bu hukuk kuralı düşünce ve ideali, eğer bir öncelik verilmişse, insan toplumunda iyi bir yönetimi resmedecektir.

Anahtar Kelimeler: Demokrasi, hukuk, hukuk kuralı, demokratik toplum, idealler.

