

The Role of the Judiciary in a Military Non-Constitutional Situation

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Between the time of the Nigerian army take-over of the Government of the Federal Republic of Nigeria on 15 January 1966 and the passage by the Federal Military Government of the Supremacy and Enforcement of Powers Decree No 28 of 1970, it was safe to assert that the courts in Nigeria had a power of review over the Decrees and Edicts of the Federal Military Government.

The high water mark for this attitude was reached in the famous judgment of the Supreme Court in E O Lakanmi and Another v. The Attorney-General, Western State and Others wherein the court declared as invalid the decree of the Federal Military Government on forfeiture of assets of public officers and characterised the Federal Military Government as a continuation of a civilian government which has ceased to function through the intervention of the military on 15 January 1966.

The reaction of the military government under General Gowon was quick and swift. The judgment of the court in the Lakanmi's case was annulled by a decree which also spelt out the true nature of the military intervention of the 15th day of January 1966 describing same as a revolution and not a transfer of power from the civilian authorities to the military.

Thus the popular notion of a constitutional transfer of power to the military suffered a demise and thereafter the legal foundation for the military regime in Nigeria is to be found in the text of a decree styled the Federal Military Government (Supremacy and Enforcement of Powers) No. 28 of 1970 which goes thus:

"Whereas the military revolution which took place on 15 January 1966, and which was followed by another on 29 July 1966, effectively abrogated the whole pre-existing legal order in Nigeria except what has been preserved under the Constitution (Suspension and Modification) Decree 1966; and whereas each military revolution involved an abrupt political change which was not within the contemplation of the Constitution of the Federation 1963 (hereinafter referred to as the 'Constitution of 1963'):

And whereas by the Constitution (Suspension and Modification) Decree (1966 No. 1) there was established a new government known as the 'Federal Military Government' with absolute powers to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever and, in exercise of the said powers, the said Federal Military Government permitted certain provisions of the said Constitution of 1963 to remain in operation as supplementary to the said Decree:

And whereas by section 6 of the said Constitution (Suspension and Modification) Decree 1966, no question as to the validity of any Decree or any Edict (in so far as by section 3(4) thereof the provisions of the Edict are not inconsistent with the provisions of a Decree) shall be entertained by any court in Nigeria:

And whereas by Schedule 2 of the said Constitution (Suspension and Modification) Decree 1966 the provision of a Decree shall prevail over those of the unsuspended provisions of the said Constitution of 1963:

Now therefore, the Federal Military Government decrees as follows:

1. (1) The preamble hereto is hereby affirmed and declared as forming part of this Decree.
- (2) It is hereby declared also that:
 - (a) for the efficacy and stability of the government of the Federation, and
 - (b) with a view to assuring the effective maintenance of the territorial integrity of Nigeria and the peace, order and good government of the Federation, any decision, whether made before or after the commencement of this Decree, by any court of law in the exercise or purported exercise of any powers under the Constitution or any enactment or law of the Federation or of any State which has purported to declare or shall hereafter purport to declare the invalidity of any Decree or of any Edict (in so far as the provisions of the Edict are not inconsistent with the provisions of any of a Decree) or the incompetence of any governments in the Federation to make the same is or shall be null and void and of no effect whatsoever as from the date of making thereof.
- (3) In this Decree -
 - (a) 'decision' includes judgment, decree or order of any court of law, and
 - (b) the reference to any Decree or Edict includes a reference to any instrument made by or under such decree or Edict.

Professor Abiola Ojo formerly of the Faculty of Law in the University of Lagos has this to say about the event then in his book titled "Constitutional Law and Military Rule in Nigeria":

"It is the author's view that the Supreme Court was mistaken in its assessment not only of the factual events but also of the legal situation. The view that government was transferred to the Army was misconceived because the 1963 Republican Constitution made no

provision for such a transfer of power. And the events which transpired between the group of Ministers and the armed forces could not be regarded as a voluntary transfer of power but an unavoidable abdication of power by the remaining Ministers left in the Cabinet. And even assuming that such a 'transfer' was possible under the old Constitution, there was no validly constituted Cabinet to do it. Neither the Prime Minister nor an acting one participated in the meeting. What took place was a deliberately contrived illegal exercise un contemplated by the old Constitution".

Professor Ojo supported his view by what Kelsen said in the "Pure Theory of Law" 1934-1935 LQR Vols. 50 and 51 thus:

"A revolution ... occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is, in a way not prescribed by the first legal order itself. It is in this context irrelevant whether or not this replacement is effected through a violent uprising against those individuals who so far have been the legitimate organs competent to create and amend the legal order ... From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated".

It is sufficient to say here that not many members of the legal profession share that view of events. Some historians certainly defer from Professor Ojo in their assessment of what happened in 1966 but the point about a change to a new legal order after every successful coup d'etat was underscored recently by a Decree of the Federal Military Government No. 13 of 1984 entitled Supremacy and Enforcement of Powers Decree which text reads as follows:

- (i) that the military revolution which took place on 31 December 1983 effectively abrogated the whole pre-existing legal order in Nigeria except what has been preserved under the Constitution (Suspension and Modification) Decree 1984;
- (ii) that the military revolution aforesaid involved an abrupt political change which was not within the contemplation of the Constitution of the Federal Republic of Nigeria 1979;
- (iii) that the Constitution (Suspension and Modification) Decree 1984 established a new government known as the 'Federal Military Government' with absolute powers to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever and, in exercise of the said powers, the said Federal Military Government permitted certain provisions of the said Constitution to remain in operation;
- (iv) that by section 5 of the said Constitution (Suspension and Modification) Decree 1984, no question as to the validity of any Decree or any Edict (in so far as the provisions of the Edict are not inconsistent with the provisions of a Decree) shall be entertained in any court of law;

- (v) that by section 1(2) of the said Constitution (Suspension and Modification) Decree 1984 the provisions of a Decree shall prevail over those of the unsuspected provisions of the said Constitution.

But the Decree contains a provision which is new in the history of the military regime in Nigeria. It says in section 1(2) of it as follows:

"that for the efficacy and stability of the government of the Federal Republic of Nigeria and with a view to assuring the effective maintenance of the territorial integrity of Nigeria and the peace, order and good government of the Federal Republic of Nigeria, (i) "that no civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if any such proceedings are instituted shall abate, be discharged and made void". And as if enough damage had not been done to the Rule of Law, it further provides that that (ii) "the question whether any provision in Chapter IV of the Constitution has been, is being or would be contravened by anything done or proposed to be done in pursuance of any Decree or Edict shall not be inquired into in any court of law and, accordingly, no provision of the Constitution shall apply in respect of any such question."

From all these the question might be asked what then is the nature of the military government in Nigeria? The answer for this was given by a distinguished senior advocate of Nigeria in the person of Chief Rotimi Williams thus:

"Military government in Nigeria, as we have come to know it since the coup in January 1966, is not a system of government in which a despot or a military oligarchy operating above the law exercises absolute power. It is rather a system of government which after coming into existence by overthrowing the existing legal order, replaces it by a new legal order. No military government in Nigeria has ever wiped out the entire provisions of the constitution which it overthrew..."

In such a situation what chance has the court to develop constitutional law under the military government in Nigeria? Or to put the question another way, has constitutional law developed in Nigeria since the army take over in 1983? If so, what is the evidence of it?

In the pages that follow, I shall within the constraint of time at my disposal show such evidence. Before going any further I might point out that over a number of years now the Nigerian courts have developed important interpretative techniques in dealing with factual situations where Decrees or Edicts passed by the various military governments have been challenged.

The first technique of interpretation that has been developed can be said to go as follows:

Where a decree or an edict had been enacted by a military government the court does not inquire into whether it had been validly passed or

not but nevertheless it can say and has said in some cases that a law purported to be made under a Decree or an Edict was not so made and therefore ultra vires of a Decree or the Edict under which it was purported to have been made. Similarly, an action purported to have been done under a Decree was either done under such Decree or not so done under the Decree as the case may be.

The second technique which had been developed is that the courts had been jealous of their jurisdictions and had always watched that enactments taking away their jurisdiction had been done in very clear and unambiguous way; see the case of Federal Civil Service Commission v. Seida Garba.

The third technique follows directly from the second and it can be broadly stated thus:

That the courts have the responsibility to protect the citizen from those who tend to regard the taking away of the jurisdiction of a court as a shield from judicial inquiry into arbitrary or capricious use of power. The court has always held that to do otherwise would be to create a regime of lawlessness wherein a body created to act within the law would claim immunity from the control of the law if it was to act outside the law that created it, see the case of Port Decongestion Committee v Moosa Yacubu Farm (Nigeria) Limited and Others.

As you would have observed these interpretative techniques are not new nor had they been developed by the courts to meet the circumstances of Nigeria under the military rule which seem to occur cyclically in the political history of the country.

The first technique mentioned above has now become part of Nigerian Law. Whenever the military regime appears on the stage the courts abandon the attitude of striking down the enactments of a legislature that runs contrary to the provisions of the Constitution, that which they have been used to doing during the civilian regime. It is, I suggest, the failure of the then Supreme Court of Nigeria in 1966 to make this necessary mental change that led to the conflict between it and the military government of General Gowon in 1970 which led to the annulment of the judgment of that court in the case of Lakanmi and Others v The Attorney-General of Western Nigeria.

In retrospect it is an understandable conflict between a group of men who over a decade have been used to striking down enactments of the legislature when they conflicted with the provisions of the Constitution and a new group of men who paid scant attention to the due process of law and fundamental rights of citizens. It is not as the critics of the courts said at that time that the court was out "to encourage fraud by legal technicalities". The court was concerned in that case to uphold high values and respect for human dignities. As if to anticipate its critics on this point the court said in the penultimate paragraph of its judgment in that case, that

"We are in no doubt that the object of the Federal Military Government, when it engaged in this exercise, is to clean up a

section of the society which had engaged itself in corrupt practices - those vampires in the society whose occupation was to enrich themselves at the expense of the country. But if, in this pursuit, the Government, however well-meaning, fell into the error of passing legislation which specifically in effect, passed judgment and inflicted punishment or in other words eroded the jurisdiction of the courts, in a manner that the dignity and freedom of the individual, once assured, are taken away the courts must intervene. Every case, we reiterate must be considered on its own facts and the materials placed before us in this matter lead to no other conclusion than that the provisions in the Decree No. 45 of 1968 are such as not reasonably necessary to achieve the purpose which the Federal Military Government set out to fulfil. This appeal will therefore be allowed and both the Edict No.5 of 1967 and the Decree No. 45 of 1968 are declared ultra vires; they are null and void".

The second technique of interpretation mentioned above is so familiar and had been so developed over the years that it does not need a military regime for its deployment. It is used against the enactment of any government be it civilian or military. Therefore we need not waste much time saying much about it.

The third technique of interpretation which flows directly from the second as I have said earlier, is beneficial to the military regime itself because the regime always seek justification for its action in the various Decrees and Edicts it has enacted. In so doing it keeps the image of arbitrariness or capriciousness of the regime out of the body politic. It is also useful to the general public given the tendency of officials in administrative positions in Nigeria to be high-handed and callous in their dealings with the members of the public during the period of the military rule.

Having thus stated the various interpretative techniques that are commonly used by the courts during the period of the military regime in Nigeria, the rest of this paper would be devoted to the application of these techniques to the specific areas of fundamental human rights that have come in factual situations before the courts. The areas that we shall touch here are the freedom of the individuals that has been guaranteed by a section of the constitution; freedom of expression also so guaranteed; that property shall not to be taken away from the individual without adequate compensation which has also been guaranteed; the presumption of innocence of a person accused of criminal offences; the security of employment for officials of the government, just to mention a few areas. These areas that I have mentioned have come under some form of modification by the various decrees promulgated by the military regime in Nigeria.

Another feature of the military era is the enactment of retrospective legislation; legislation that takes away the jurisdiction of the courts; legislation that excludes the fundamental human rights as enshrined in the constitution; legislation that shifts the onus of proof of particular facts to the individual who is before the various tribunals that have been established for various offences under various Decrees.

During a military regime the establishment of tribunals to adjudicate some specific matters is very common. Normal courts are left with the

administration of laws dealing with civil matters, some criminal matters, and property. The tribunals that are set up are quasi military in their composition and have dealt with such problems as the investigation of assets of public officers, exchange control matters and related currency problems, drug trafficking, armed robbery and other miscellaneous offences.

One encouraging feature of trial by tribunals is the provision made for persons who appear before them to be represented by lawyers of their choice. Another hopeful feature about the tribunals is in their composition in that they are presided over by High Court Judges still on the Bench or retired. Another encouraging feature is the provision for appeals from judgments of the tribunals to a special appeal tribunal headed by retired Justices of the Court of Appeal. All these encouraging features in the trials by tribunal have been brought about by the activities of the Nigerian Bar Association. An aspect of trial by tribunals is that the judgments and sentences are subject to confirmation or variation by the Head of State and not by the Supreme Court, a clear departure from the Rule of Law.

After a successful military take over of a civilian regime, the first casualty of the fundamental rights enshrined in the Constitution is the freedom of the individual. The real and imagined enemies of the military regime are put in prison or under house arrest. These are usually members of the ousted regime. Their detentions are effected by means of detention orders issued under a decree. In Nigeria the decree is the State Security (Detention of Persons) No. 2 of 1984. The Decree empowers the Chief of Staff to issue a detention order on any person who has recently been engaged in activities prejudicial to the Security of the state or have contributed to the economic adversity of the country. Many members of the former civilian regime and other people who are not in politics but suspected to have contributed to the economic adversity of the country by activities such as false invoicing of goods, exchange control falsification and all other false bank documents leading to the drainage of monies out of the country were also detained under the Decree. This Decree had gone beyond what previous Decrees with the same object in a mind had done. The detention of persons under it is not only for political offences but also for economic crimes that have prejudiced the state - see the case of Wang Ching-Yao and others v. Chief of Staff Supreme Headquarters and Others.

Under this Decree the court has not jurisdiction to question any challenge to a detention made under it. It also abolished the application of fundamental human rights to the person detained and also directed that no action can be entertained in court regarding the legality of the detention and if there are proceedings in court challenging the legality of such detention or anything purported to be done under the Decree on or after the commencement of the Decree such proceedings shall be declared null and void and of no effect.

Before the promulgation of this Decree the attitudes of the court to detention orders have been to construe the document detaining the persons very strictly against the authority who has responsibility for the detention. The court had always employed the provisions of the Evidence Act to determine whether the original documents of the detention were before the court and if not to declare such duplicate documents

authorising the detention as inadmissible. The court has also questioned the genuineness of the signature of the person who has signed an order, not dated, or a detention order which does not correctly describe where the detainee is to be detained. The court also would hold the detention order invalid if the reasons for the detention are vague or ambiguous. The invalidation of such detention orders are well illustrated in the following cases i.e. Commissioner of Police v Alhaji A M F Agbaje; - Re Mohamed Olayori; Onwundiwe v Commissioner of Police; Eyo v. Chief of Staff.

But under the present decree, that is the State Security (Detention of Persons), detention orders have been held to be subsidiary legislation and not public documents under the Evidence Act. The provisions of the Evidence Act are not applicable to them - see the case of Wan Ching Yau v Chief of Staff Supreme Headquarters.

Professor Ojo has commented on this Decree and related Decree

"But need the government completely bar judicial questioning of any act, matter, or such thing purported to be done under or pursuant to any Decree or any edict? Should government protect what might be illegal act under the cloak of a Decree or Edict? The fact of unlimited legislative power does not necessarily preclude illegality. Might it have been better for the government to completely abrogate all fundamental rights and say so clearly----. These provisions are just a step removed from complete emasculation of the adjudicatorial role. The summation of all these is that not only legislative and executive acts of government are shielded from questioning but also the judiciary has been disfunctionalised".

As I will show, I do not think the situation is that helpless for the courts. The courts have been up to it and have used interpretative techniques which I have described above to get over some of the difficulties that these Decrees may seem to have presented.

Under a military regime freedom of expression is limited not necessarily by law but by common sense. Fundamental political issues are hardly subjects for discussion. Nobody in his senses would get up and advocate that political parties that have been banned should begin to function. The Press becomes circumspect in what is reported or commented upon. However a military regime leaves no room for any chance. In Nigeria under the Buhari regime a Decree entitled Public Officers (Protection against False Accusation) Decree was enacted, but this was quickly repealed by the Babangida government after the overflow of the Buhari regime. But before it's repeal a newspaper named the Guardian carried news about persons who had been appointed to diplomatic posts in foreign countries. The Buhari government then contended that the report was false and prosecuted the newspaper, the editor and the reporter. Under the Decree it was a duty cast upon the defendant to show that what was published by them was not false. They failed to do so and they were duly convicted by a tribunal that handled the matter. There was no appeal under the Decree that set up the tribunal that created the offences. A challenge however was made in the High Court as to the validity of the exercise of power under that Decree. That challenge also failed. There was an appeal to the Court of

appeal but in between that and the hearing of the appeal the Babangida administration repealed the Decree and declared that anything done under it was void and of no effect. The sentence of imprisonment and fines imposed on the journalists and the press were quashed. Thus there was no opportunity to know what the attitudes of the court would have been to what was then regarded as a denial of freedom of expression.

You may recall that what caused a confrontation between the military governments and the Supreme Court in Nigeria in the famous case of Lakanmi and others versus The Attorney-General of Western Nigeria and others was the order of forfeiture of the public officer concerned. After a tribunal had investigated the asset of the public officer, Mr Lakanmi, the Supreme Court struck down the Edict validating the forfeiture of Mr Lakanmi's property on the ground that it contravened provisions relating to fundamental human rights. However the court said it sympathised with the broad intention of the government then to clean up the society from corruption and other ill-gotten gains. It held that the government was going about it in the wrong way in the case. You will also recall that that judgment of the Supreme court was nullified by a Decree by the government in 1970. But it appeared the military government thereafter heeded the admonition of the court and set up a Code of conduct bureau; promulgated a code of conduct for public officers; and established a tribunal to investigate the asset of public officers who come before it. The tribunal set up under the Decree known as Recovery of Public Property (Special Military Tribunal) is to follow broadly the procedure laid down in the Criminal Code. The onus is on the public officer to explain any excess of income which is found on him and which exceeds his known income which he had declared. The public officer is to bring out facts before the tribunal to establish that the excess of income had been legitimately and not corruptly acquired. This shifting of the usual onus is another example of a departure from the Rule of Law. In matters of this nature the tribunal is not to observe provisions of the constitution relating to the presumption of innocence of persons who are accused of corruption who are being tried or investigated.

There are three cases among many that have been tried by tribunal which call for comment here. My comment relates to the application and eventual discharge of the persons concerned regarding the onus of proof under this Decree. The cases are those of three former civilian governors and the issue of security monies voted by a state legislature which came into their hands. The money involved in each case ran into millions of Naira for the security expenditure of the state. The Governors were tried by tribunals. At their trial, it was conceded by the state that they had a right to draw the money for the purpose of security of the state. The former governors did not deny receiving the money but claimed that they expended the same for the security of the state.

In the case of Alhaji Attah, the governor of Kwerra state in Nigeria, he claimed that members of the legislature got money from him and signed for the money received. He gave the money to them in order to buy support for his measures and bills in the state legislature. The tribunal held that this was not sufficient explanation to satisfy it that the governor concerned was not corrupt and that money was not ill-gotten gains. He was duly convicted and sentenced to terms of imprisonment.

The other two cases are those of Chief Mbakwe of Imo State and Chief Okilo of River State. Chief Mbakwe claimed that the amount received by him was spent to lobby the then President of Nigeria and other officials to site a petro-chemical industry in the State. He also claimed that the money was spent in buying judges new cars for their official duties. Chief Mbakwe claimed that he spent the money he received as a security measure to gather information about his political opponents.

In the case of Chief Okilo he explained that that he had to spend the money to build barracks for the Nigeria Police, set up a security organisation of his own, finance students and market women unions in the state. The tribunal discharged and acquitted both governors for offences of ill-gotten gain and corruption on the grounds that there was no guideline statutory or otherwise for how the security vote was to be used and that the governors had given an account of the disbursement of the money to the satisfaction of the tribunal.

In my view, to say the least the reasons given by the tribunals are very disturbing. Granted there are no guidelines on what "security vote" is to be, but what are the reasons for discharging them when the purposes for which the monies were spent often did not meet security needs? The more fundamental objection to the judgments of the tribunal lies in the fact that the prosecution should not have been brought under a law relating to the recovery of property declared to be illegally or corruptly acquired. The monies the governor had were not income but monies given for a purpose which in the particular circumstances of these cases were to be applied to such purpose. The simple question here is whether they have been so applied or not. What had been received by them is not excess income as gives rise to the presumption of corruption. The courts in Nigeria have not had the opportunity to make a pronouncement as to what the requirements of the law should be for an explanation in matters relating to corruption and ill-gotten gains.

Therefore it will be premature to say whether such judgments that the tribunal have handed down can be regarded as satisfactory on this burning issue of corruption and ill-gotten gains which seem to have plagued the Nigeria society even before army take-over of the civilian government. The judgments of the tribunal are very conflicting and until there is a right of appeal to the normal courts of the land we shall forever live with these contradictory judgments and pronouncement which cannot be reconciled one with the other.

In 1975, after the military government of General Gowon had been overthrown, the military government that took over dealt a severe blow not to the politicians but to members of the Public Service, army, police, universities and other public institutions. Prominent and less prominent members of these institutions were compulsorily retired from their posts with loss of retiring benefits. The criteria for such retirement exercise were corruption, old age, declining productivity, divided loyalty.

The statutory bodies dealing with discipline, promotion and retirement of members of the public service were not used in the process. It has been revealed recently by General Obasanjo that over 10,000 people lost their jobs.

I am not aware that any due process of law was resorted to in carrying out this retirement exercise at that time, or even now. I am also not aware of any challenge in court by any of the public officers who were retired.

After another army take over in December 1983, the military government of General Buhari repeated the same exercise of retirement of public officers as was done in 1975.

The military government brought out a Decree entitled Security of Employment of Public Officers and Public Officers (Special Provisions) No. 17 of 1984 in April 1984 but made retrospective from 31st December 1983. Its aim was to legalise the dismissal of public officers that had taken place and was going on at the time. It was also to abate any pending proceedings in court with regard to dismissal of such public officers.

Under the Decree, an appropriate authority can enforce the Decree. In the context of Nigeria, the appropriate authority is the President or the Armed Forces Ruling Council, or the Governor of a State who can summarily dismiss a public officer or compulsorily retire him if satisfied that such retirement would facilitate the improvement of the department or the service to which the officer belong. The employment can also be terminated summarily if the authority is satisfied that by reason of age or ill-health or due to any other causes the public officer has been inefficient in the performance of his duties or he has been engaged in corrupt practices or has in any way corruptly enriched himself or any other person or his general conduct in the performance of his duties would not be in the public interest. There is power under the decree for the appropriate authority to delegate the exercise of his powers. The decree has rendered the disciplinary powers of the Federal Civil Service Commission, State Civil Service Commission, Police Service Commission and other Statutory Institutions redundant.

The security of employment of a public officer is based on the fact that before he is sacked from his post he must be accused of an offence and be given an opportunity to defend himself. The decree does not seem to protect this time honoured remedy. The appropriate authority need only be satisfied before he acts. How he is to be satisfied is not prescribed. Must the satisfaction be objective or subjective? These are questions for the court to determine whenever there is a challenge to the authority. But such challenge seemed to be ruled out by sections 1(2) and 3(3) of the Decree which states:

Sec. 1(2) For the avoidance of doubt, it is hereby declared that any act or thing done at any time between 31st December 1983 and the making of this Decree by the appropriate authority in respect of

- (a) dismissal, removal from office or compulsory retirement of any public officer or
- (b) the conduct of any inquiry into any aspect of the exercise shall be deemed to have been done pursuant to this Decree.

Sec. 3(3) No civil proceedings shall lie or be instituted in any court for or account of or in respect of any act, matter or thing

done or purported to be done or purported to be done by any person under this Decree and if any such proceedings have been or are instituted before, on or after the making of this Decree, the proceedings shall abate, be discharged and make void.

The Supreme Court of Nigeria had the opportunity to make its attitude clear to this Decree in a judgment, Seidu Garba v. Federal Civil Service Commission, the facts of which are as follows:

The Appellant was a Fire Officer. On 24th January 1983 there was a fire incident at NECOM House building in Lagos City. The fire according to the Appellant was put out by him and men under his department. Two persons died in the building while more than six hundred other lives were saved. On 31st January 1983 the Appellant was charged with nineteen other persons for the murder of the two persons who died in the fire. On 16 February 1983 upon the appellant's application, the High Court of Lagos quashed the indictment. On 21st February, the Appellant was interdicted. The letter of interdiction was renewed on 6th April 1983. On the 25th May 1983, the Appellant challenged these two letters of interdiction by proceedings in the High Court as being void for non-compliance with the Federal Civil Service Rules. The action was still pending when the military coup took place in December 1983. The new military rulers proceeded to have a mass purge of civil servants of all categories from High Court Judges to messengers. To legalise such dismissals and retirements, the Military government enacted this Decree on 27th June 1984 with retrospective effect to 31st December 1983.

On 11th April 1984, the appellant was dismissed from the public service. On 19th July 1984, the Respondent filed a motion in the High Court objecting to the continuation of proceedings. The High Court ruled against the Respondent, continued the case and ruled that the Decree does not affect the question of interdiction of the Appellant. The Respondent appealed to the Court of Appeal.

In the Court of Appeal, the Court ruled that the abatement section of the Decree covered the matter and that the issue of interdiction of the Appellant had been subsumed into the subsequent dismissal on the principle of DE MINIMIS. In allowing the appeal, the Supreme Court rejected the proposition put forward by the Respondent that the Decree created a regime of a public officer not being worthy of his hire! Eso.J.S.C. said thus:

"I shudder to think that the Decree was ever contemplated to be penal or that a regime that comes in corrective stance and legislates to correct the ills and stamp out the corrupt practices and inadequacies of the past regime, would mean Decree No. 17 to create a regime that would reduce a public officer to a status of not being worthy of his hire! With utmost respect to the learned counsel for the Respondents, I cannot accept that proposition. I think the tenor is to safeguard the Military Government from an avalanche of litigation that might necessarily follow acts of dismissal,

removal or compulsory retirement of the Public Officers affected

On the Decree itself, the court applying the technique of construction that preserves the jurisdiction of the court if even words depriving it of jurisdiction are used, construed S.1 (2) of the Decree to mean that the Decree would only apply to any act or thing done in after 31st December 1983. Any act of interdiction that took place or any legal proceedings after such an act of interdiction before December 31st December 1983 is not affected by the Decree. Also, the power of the appropriate authority is limited only to dismissing, or summarily removing, the public officer from his office and does not extend to interdicting the public officer. The Court then applied the NOSCITUR A SOCIS rule of construction to the abatement of proceedings contained in S3(3) of the Decree and removed any obscurity from its meaning by saying that what is abated could only be proceedings which are in respect of any act, matter or thing done or purported to be done under the Decree i.e after 31st December 1983.

During the trial in the High Court, MR GARBA was dismissed from the public service. The Court dealt with this aspect in the following words. Again Eso. J.S.C. said:

"What remains now is an examination of the act of the Respondents in dismissing the Appellant from office during the pendency of the action. Such action, I think is contemptuous of the judiciary, which has been seized with determination of Civil right under the constitution and which has been left unscathed by all military coups. For the judiciary, a powerful arm of government to operate under the rule of law, full confidence, and this must be unadulterated, must exist in that institution. It must indeed be demonstrably shown especially if it is the other arms of government that are involved. In civil days, both the Executive and the Legislation must show to the entire nation their demonstrable confidence in the judiciary. The responsibility is greater during military rule. The military in coming to power is usually faced with the question as to whether to establish a rule of law or rule of force. While the latter could be justifiable a rule of terror, once the path of law is chosen the mighty arm of government, the militia which is an embodiment of legislature and executive must in humility bow to the rule of law thus permitted to exist.

MR GARBA was ordered to be re-instated into the Civil Service.

I would like to end the narration of this episode by a few comments. Security of employment of a public officer is an important matter in developing countries of the world. Nothing contributes less to stability than to have members of the Civil Service that live in fear. The purge of the service that happened during the military regimes had not been in the best interest of the service. Its image had been dented and the public service has lost its lustre.

One important issue before I conclude this survey and that is, the reaction of the military regime to orders by the courts over laws passed by it. Put shortly in the context of what I have been saying about Mr Garba, can the

order to re-instate him be carried out by the Federal Civil Service Commission? The rule of law enjoins that the executive organs of the state should not only respect the orders of the court but help to enforce it. The military regime like most governments in the world today does not hesitate to make its annoyance known if and when the court makes an order which it regards as unacceptable to it. Such an order or judgment is just set aside by a Decree or Edict or it may be ignored by failing to carry out the order.

We can now come to some conclusions about the subject matter of this paper. The Military government in Nigeria is a government established by law after a successful revolution. It is not a government of a group of persons. It is a government that rules partly by the Decrees or Edicts it promulgates and partly by the provisions of the Constitution of 1979 that have not been suspended.

The ^{sys}un~~s~~suspended provisions of the constitution can be suspended at any time by a Decree or Edict which under a military regime is a superior law to any of the provisions of the constitution of 1979. The validity of a Decree or Edict is not a matter to be enquired into in any court of law in Nigeria. A Decree or Edict is not informed by norms of constitutionalism in the sense that such a decree or edict must conform and not infringe basic principle of the Rule of Law and of a person's Fundamental Human Right.

The courts under the military regime have developed the law by the usage of well known rules of statutory interpretation and the employment of weapons from the ancient armoury of prerogative orders and declaratory actions.

The courts have by their judgments and orders upheld the dignity of man and the stability of Nigeria.