

## **STEMMING IMPUNITY IN APPOINTMENTS IN NIGERIA: A CASE OF THE SACK OF SERVICE CHIEFS**

**By**

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### **Abstract**

The term rule of law and constitutionalism echoed into the subconscious of ordinary Nigerians under the fourteen years of democracy simply because of assaults of the paradigm of law and contempt for the laws, just as the term dictatorship assumed wider popularity when military heads of state held sway, more especially under late General Sani Abacha. What exactly are the rule of law and constitutionalism and what do they guarantee for the society that upholds these concepts were explained in a thematic form by identifying their major features. These concepts were put into text on Monday, 1<sup>st</sup> July, 2013 by Justice Adamu Bello of an Abuja Federal High Court when his judgement sent shocking waves around the polity when he ruled that the unilateral appointment of service chiefs by the president is unconstitutional and by implication nullified the appointments of those appointed as same. The honourable justice gave the verdict while delivering judgement on a five year old suit instituted by Lagos lawyer, Mr. Festus Keyamo. Keyemo had sued the administration of the late president Umaru Yar'Adua for failing to get the consent of the Senate before appointing the service chiefs. The late president Yar'Adua, had followed the stead of his predecessor, chief Olusegun Obasanjo, by appointing service chiefs, including chief of Army staff, chief of naval staff, chief of Air staff, and Director of the State Security Service without recourse to the National Assembly. This nullification brought with it a lot of reactions. While some applauded the judgement as one of the best springs to lift-up democratic governance and the rule of law in the polity, others have knocked it down, positing that is capable of chaos and undermining the presidency, particularly as it affects security. Others yet viewed it as a double-edged sword empowering democracy and also capable of doing damage to the military establishment. The big questions, however, are: is the judgement actually incongruity? What are its political and security implications? This paper seeks to address these issues. The author goes on to use the major indices of the rule of law and constitutionalism to evaluate their practice in Nigeria using specific instances to add currency to this position. Patron-client politics of elite theory swerves as its theoretical perspective. The article concludes by positing that the rule of law and constitutionalism are ideals in Nigeria which are difficult to attain in their totality.

**Key Words:** Rule of Law, Constitutionalism, Civil Liberties, and Human Rights, Due Process, Constitution, Governance and Democracy.

### **Introduction**

Constitutionalism and the rule of law have a variety of meanings. In a poplar parlance, the former refers to a complex of ideas, attitudes and patterns of behaviour elaborating the people that the authority of government derives from and is limited by a body of fundamental laws (the constitution). The later takes over from where constitutionalism stops. It is a legal term, which includes a number of interrelated principles (predominance of regular laws as apposed to arbitrary law, equality before the law and protection of human rights and individual liberties). These two interrelated concepts have gained currency since Nigerian returned to civil rule in 1999. Most of the debates are centered on how to enforced and

reinforce them so that due process mechanism became part and parcel of governance in the polity.

Since 1999, the rule of law and constitutionalism and due process was always mentioned as key aspects of governance, but the practice of governance itself shows very little linkage to the general demands of constitutionalism and the rule of law. A foremost example is the civilian regimes penchant for disregarding and outright disobeying of court orders and judgments. The presidency has advised members of the public to disregard insinuations in some quarters that the sack of army service chiefs, the director general of the State Security Services (SSS) and the Inspector General of Police by President Goodluck Jonathan was politically motivated.

Jonathan in a surprise move effected major changes in the top hierarchy of the army and security agencies. The changes led to the appointment of new service chiefs: Maj-Gen. Onyeabo Azubike Ihejirika (Army); Rear Admiral Ola Saad Ibrahim (Navy) and Air Vice Marshal Mohammed Dikko Umar (Air Force). Alhaji Haffiz Ringim became acting inspector-general of police while Mr. Ita Ekpeyong was appointed the new director-general of the SSS.

However, some political monitors and observers had in 2010 said that the president's action was informed by his deliberate move to consolidate his political grounds in preparation for his 2011 presidential bid. But responding to the insinuation then, senior presidential aide told *LEADERSHIP* that the insinuation is not correct. The insinuation that the sack of army service chiefs and heads of the police and the SSS was politically motivated is not correct, he said.

The service chiefs served their full term; this is the first time it is happening for a very long time. When President Goodluck Jonathan assumed office, he was under suffocating pressure to sack them. But he resisted the temptation and allowed them to finish their term. Their term ended in the first week of August this year (Odaudu, 2007:2).

The presidential aide said the president's action was based on the need to consolidate ongoing professionalisation of the army and prepare them for their huge role in the sustainability of democracy. The presidency advised those pending the rumour not to drag the army and security agencies into partisan politics. According to him, "*President Goodluck Jonathan on his part will make sure that they are not dragged into politics*" (Odaudu, 2007:2).

Meanwhile, Festus Keyamo, recently said he was vindicated on the need for legislative approval for appointment of service Chiefs. He noted that the statement of the spokesman to President Jonathan relieving the service chiefs of their appointments and announcing the new appointees stipulated that the appointments will only take effect subject to approval by the National Assembly. Keyamo said, "*I have shouted myself hoarse in the last few years that the previous appointments of service chiefs without legislative approval is patently illegal*" (Ige & Fadeyi, 2013:1).

His case challenging their appointments is still pending at the Federal High Court, Abuja. The letter which he wrote August 31, 2008, was ignored. The content of the letter indicated the illegality of the appointment of service chiefs by the president on August 20, 2008. The then president, Umar Musa Yar'Adua had announced the appointment of new service chiefs. Air Marshal Oluseyi petinrin (Air force), Major General A. Bello Dambazau (Army), Rear Admiral Isaiah Ibrahim (Navy). Which was approved with immediate effect. He said the powers of the president to appoint service chiefs is provided for in section 218 (1,2,3,and4) of the Nigerian 1999 Constitution which states that the powers conferred on the president by sub section1 of this section shall include power to appoint the heads of any armed forces of the federation as may be established by an Act of the National Assembly.

Does the president have the powers to appoint service chiefs without recourse to the National Assembly? That was the question Lagos lawyer, Festus Keyamo, put to a federal high court in Abuja, presided over by Justice Adamu Bello. The first part of the paper is introductory, it tries to explain the concept of “constitutionalism”, the second part attempts an operational definitions of “constitutionalism” and the third section evaluates the practice of “constitutionalism” in Nigeria, using specific instance of the recent sacking of service chiefs and the implications/lessons Nigeria can learn from the sack. The final section offer recommendations and concludes the paper.

### **Thematic clarification of concept: Constitutionalism**

Defining Constitutionalism is a matter of great philosophical debate and cannot be exhaustively covered in this paper. However, the implication of constitutionalism is that in exercising its powers conferred by law, the government should be limited by law. Its authority over the people is dependent on its observance of the tenets of constitutionalism set out by the Constitution, as the Supreme law of the land. When such tenets are disrespected or violated by a governmental action or inaction, it undermines the very essence of constitutionalism and the basis of legitimate governance.

There are two major contending perspectives to the understanding of the concept of constitutionalism. These are the descriptive and prescriptive usages. Used descriptively, the concept refers primarily to the historical struggle for constitutional recognition of the people’s right to “consent” and certain other rights and civil liberties and privileges. Used prescriptively, its usage incorporates those features of government seen as the essential elements of the constitution (Fellrenbacher, 1989:1)

One example of constitutionalist’s descriptive use is offered by Schwartz (1980) complication of sources seeking to trace the origin of the Federal bill of rights. Beginning with English antecedents dating back to the Magna Carta (1215), Bernard Schwartz explores the presence and development of ideas of individuals’ freedoms and privileges through colonial charters and legal understandings. Then in carrying the story forward, he identifies revolutionary declarations and constitutions, documents and judicial decisions of the confederation epoch and the formation of the Federal Constitution. Finally, he turns the debates over the federal constitution’s ratification that ultimately provided mounting pressure for a federal bill of rights. While hardly presenting a “straight line, the account illustrates the historical struggle to recognize and ensure constitutional rights and principles in a constitutional order (Wikipedia, the free encyclopedia).

Used descriptively, the concept of constitutionalism can refer chiefly to the “historical struggle for constitutional recognition of the people’s right to “consent” and certain other rights, freedom and privileges: (Casper, 1986:473).

As described by political scientist and constitutional scholar Fellman (1974:485)

Constitutionalism is descriptive of a complicated concept, deeply imbed in historical experience, which subjects the officials who exercise governmental powers to the limitations of a higher law. Constitutionalism proclaims the desirability of the rule of law as opposed to the rule by the arbitrary judgment or mere fiat of public officials.... Throughout the literature dealing with modern public law and the foundations of statecraft the central element of the concept of constitutionalism is that in political society government officials are not free to do anything they please in any manner they choose; they are bound to observe both the limitations on power and the procedures which are set out in the supreme, constitutional law of the community. It may therefore be said that the touchstone of constitutionalism is the concept of limited government under a higher law.

In contrast to describing what constitutions are, a prescriptive approach addresses what a constitution should be. As presented by Canadian philosopher Wil Waluchow (2007:4) Constitutionalism embodies:

The idea that government can and should be legally limited in its powers, and that its authority depends on its observing these limitations. This idea brings with it a host of vexing questions of interest not only to legal scholars, but to any one keen to explore the legal and philosophical foundations of the state.

Whether reflecting a descriptive or prescriptive focus, treatments of the concepts of constitutionalism all deal with the legitimacy of government. One recent assessment of American constitutionalism, by Fritz (2008:1), for example; notes that the ideas of constitutionalism serves to define what it is that grants and guides the legitimate exercise of government authority.

One of the most salient features of constitutionalism is that it describes and prescribes both the source and the limits of government power (Wikipedia free encyclopedia). William Hamilton has captured this dual aspect by noting that constitutionalism “is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order” (Hamilton, 1934:255).

From the above theses, constitutionalism deals with the rule of law. What this means is that a government which a constitution sets up should conduct itself in accordance with the rules of law - that is according to agreed procedures. Any government set up by a constitution has limits to its powers. Constitutionalism says that not only should these limits be recognized and accepted by government, the fundamental human rights and civil liberties of the citizens should also be recognized and guaranteed. Dictatorship and constitutionalism do not go hand in hand. Nigerian constitutionalism would be more correctly defined as the doctrine that states that government must act within the confines of a known constitution, whether this is written or in part of an unwritten constitution or convention. The table below captures the major Tenets of Constitutionalism in Nigeria

**Table 1: - Tenets of Constitutionalism in Nigeria**

S/N	Tenets (Principles)	Explanation	Examples of How and Where it is achieved	Comments
1	Limited Government	Constitutionalism, has never meant government enfeebled by divisions within itself; it has meant government limited by law. Constitutionalism suggests the existence of a constitutional government, a government which derives its authority from a constitution and which administers state affairs in accordance with a constitution. Constitutionalism, simply put, means the constitution is a supreme law and it binds every state authority established and exercising power under the constitution including the power to enact legislations. The effect of this is that any law passed by the legislative arm of government or any action of other governmental authorities shall	Section 1 of the Constitution is on Supremacy of the Constitution: The constitution provides that its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria; if any other law is inconsistent with the provisions of this Constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void.	A government is limited by law when all the levels and arms or branches of government observe the limitations imposed on their functions and powers by the Supreme law of the land; when they respect the tenets of constitutionalism; and comply with the requirements of the rule of law or due process of law as opposed to arbitrariness or abuse of power.

be declared null and void to the extent of its inconsistency with any provisions of the constitution or if it violates any of the constitutional limitations.

2 Popular  
Sovereignty

Ultimate power and final authority rest with “we the people” or all the citizens.

The Preamble to the Constitution of the Federal Republic of Nigeria, 1999 provides that: We the People of the Federal Republic of Nigeria: Having firmly and solemnly resolved; To live in unity and harmony as one indivisible and indissoluble Sovereign Nation under God dedicated to the promotion of inter-Africa solidarity, world peace, international co-operation and understanding; And to provide for a Constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of Freedom, Equality and Justice, and for the purpose of consolidating the Unity of our people; Do hereby make enact and give to ourselves the following Constitution.

Constitutionalism holds that the process by which the constitution is made, is as important as its content. As with many other African countries, the constitution in Nigeria was not made by the people in an inclusive, participatory, transparent, informed and representative process of all stakeholders as opposed to a document drawn up by a few elites (military and civilian). This flawed process of constitution making is largely part of the fundamental weaknesses of constitutional democracy in countries like Nigeria as opposed to South Africa. It should be noted that Sovereignty ultimately belongs to the People, as declared by Section 14(2)(a) Nigerian Constitution, from whom government through this constitution derives all its powers and authority.

3 Federalism

Federalism is that form of government where the component units of a political organisation participate in sharing powers and functions in a cooperative manner though the combined forces of ethnic pluralism and cultural diversity, among others, tend to pull their people apart. Federalism demands forms of government which have the characteristics usually associated with democratic or free government”. The major attributes of federalism include territorially-based, though centrally enforced power and resource distribution, ‘a centre with limited responsibilities’, shared rule and self-rule; pragmatic and flexible leadership and rules of the game etc. it is hardly possible to maintain, let alone consolidate, a legitimated federal system without due and strict observance of the foregoing attributes.

Section 2 of the Constitution provides that: - (1) Nigeria is one indivisible and indissoluble Sovereign State to be known by the name of the Federal Republic of Nigeria. (2) Nigeria shall be a **FEDERATION** consisting of States and a Federal Capital Territory (36 States and Abuja as the FCT as well as 774 LGAs/Area Councils as defined in Section 3 of the Constitution). The Legislative, Executive and Judicial Powers of the Federal Republic of Nigeria are vested in the Federal and State Governments. While legislative powers of the Federal Government are vested in the National Assembly (Senate and House of Reps), the State Legislative powers are vested in the State Houses of Assembly (Section 4). The Executive Powers of the Federal Government are vested in the President, exercisable by him directly or through the Vice President and Ministers or other public servants of the Federation while that of the States are vested in the Governor and exercisable by him or through the Deputy Governor, Commissioners or other public servants of the States. The Judicial Powers of the Federal Government are vested in the Federal Courts while in the States Courts are vested Judicial Powers of the States. Section 7(1) of the Constitution provides that the system of local government by democratically elected local government councils is under this Constitution guaranteed; and accordingly, the Government of

The essence of federalism **lies not** in the legal terminology, constitutional or governmental structure, but in the social, economic, political, cultural, and religious factors that necessitate the formation of a Federation. Hence the nature, form and scope of Federations must necessarily differ. In a Constitutional Federalism like ours, a Federal system of government means what the Constitution says it means. Basically however, there are certain common features, which exist or must exist in all constitutional or functional Federations: - Existence of multi-ethnic peoples of diverse religious, cultural, historical, political backgrounds; voluntary submission of some powers of the federating units to the central government; cooperation among various levels of government;

division of powers between the federal, state and local governments, and between the executive, legislative and judicial arms of government; independence and autonomy of the federating units without undue interference or control by the other; balance in size and allocation of power; Supremacy of the Constitution and independent judiciary

4	Fundamental Rights	Fundamental Rights are guaranteed as Constitutional Rights under Sections 33-43.	<p>every State shall, subject to section 8 of this Constitution, ensure their existence under a Law which provides for the establishment, structure, composition, finance and functions of such councils.</p>	<p>The fundamental rights guaranteed under chapter 4 of the Constitution are largely civil and political in nature and scope. Section 44 provides for compulsory acquisition of property; Section 45 is on the circumstances for restriction on and derogation from fundamental rights; Section 46 confers special jurisdiction on a High Court. There is no explicit provision on economic, social, cultural, environmental and development rights as well as the rights of vulnerable groups. However, the African Charter on Human and Peoples' Rights, Cap. A.9, LFN 2004 supplements the Constitution though in a class of its own as a legally binding treaty. Further, the Child Rights Act, 2003 sufficiently covers for children as a vulnerable group in society.</p>
5	Fundamental Objectives	Fundamental Objectives and directive principles of state policy are entrenched in chapter 2 as Constitutional objectives to be realized at all levels of governance in the Federation.	<p>Sections 13-24 provides for the following: Fundamental obligations of the Government; The Government and the people; Political objectives; Economic objectives; Social objectives; Educational objectives; Foreign policy objectives; Environmental objectives; Directive on Nigeria cultures; Obligation of the mass media; National ethnics; Duties of the citizen.</p>	<p>All persons and authorities exercising legislative, executive and judicial powers are under fundamental obligations to ensure the progressive realization of the fundamental objectives listed under Sections 15-20 of the Constitution (Section 13). This is necessary because the primary purpose of Government as declared by Section 14(2)(b) Constitution is to promote the security and welfare of the people. Cap. 2 is said to be non-justiciable by virtue of Section 6(6)(c) of the Constitution which declares that judicial powers of courts shall not extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental objectives and</p> <p>Directive Principles of state policy set out in Cap. 2. However, the trend today is to read the relevant provisions of Caps 2 and 4 together (purposive interpretation) in order to give effect to the Constitutional objectives. (India as a case study).</p> <p>More importantly, item 60(a) in the Exclusive Legislative list of the 1999 Constitution seems to make nonsense of Section 6(6)(c) above in relation to non-justiciability of Cap. 2 by giving the NASS Power to make laws with respect to the establishment and regulation of authorities for Nigeria or any part thereof, to promote and enforce the observance of the Fundamental</p>

			objectives and Directive Principles.	
6	Separation of Powers	Constitutional Powers of a Government are divided among the three separate organs or branches of government: Legislative, Executive and Judicial.	Section 4 of the Constitution vests the power to make laws in the National and State Legislatures. Section 5 vests Executive Powers in the President and State Governors. Section 6 vests Judicial Powers in the Federal and State Courts of Law.	This is one of the constitutional devices used by Anglo-American systems of government to protect the rule of law and prevent exercise of arbitrary power by government.
7	Checks and Balance	Each arm of Government has certain controls (checks) over the other two arms.	Sections 80-89 confer powers on the National Assembly for control over public funds. Also, the President is removable from office by the Legislature in accordance with the conditions and procedure laid down by sections 143-144. The lawmakers are also empowered to confirm key political appointees or cabinet ministers etc of the government, same applies at the state level.	The doctrine of separation of powers posits that the guarantee against abuse lies in establishing mutual checks among the legislative, executive and judicial arms of government. Obviously such checks become more meaningful where these functions and powers are allocated to distinct organs. The fusion of governmental power in an organ is a recipe for arbitrariness and abuse. This has been clearly demonstrated by successive military dictatorships in Nigeria. The Constitution is therefore careful to ensure that powers are not kept in watertight compartments, but balances the distribution of powers by a complex web of linkages among the organs of government.

**Source:** Ladan, M.T., (2013:3-8), “The Tenets of Constitutionalism”, Being a paper presented at a 3-day training workshop on constitutional powers of the legislature for members of the National Assembly Committees on Justice, Judiciary, Human rights and Legal matters, Speakers of State Houses of Assembly and Attorneys-general of States organized by the National Institute for Legislative Studies NASS, Abuja, Nigeria between 21-24 March, 2013, at Kwara Hotel, Ilorin

### **Theoretical Perspective**

The theoretical foundation of this article will rest on elite theory. Parry (1977) defined elites as the small minorities who appear to play an exceptionally influential part in socio-political affairs. They exercise preponderant influence within that collectivity by virtue of their actual or supposed talents. In political science, the theory is basically a “class” analysis approach to the understanding of political phenomena. The term has history that dates back to the writings of Vilfredo Pareto, Gaetano Mosca, Kind Robert Michels and observations made by them with regard to (1) the elite as distinguished from the non-elite groups within a social order and (2) the divisions within the elite as between a governing and a non-governing elite.

Furthermore, Mosca Gaetano (1939) noted that the distinguishing characteristic of the elite is the “aptitude to command and to exercise political control”. The conceptual schemes postulated by elite theorists comprise the following generalization:

In every society, there is, and must always be, a minority which rules over the rest of society. This notion is quite compatible with Robert Michel’s observation in his “political party” who posits that organization says oligarchy”. Mosca Pareto also says that in all human societies, be it capitalist or socialist, simple or complex, there is a ruling elite which rules all others member of society.

The classical elite theorists posit that elites derive almost invariably the original power from coercive sources through the monopoly of military factor. The minority, either “political class” or governing elite compose of all those that occupy political power or those that influence governmental decisions. This minority undergo changes in its membership and composition. These changes may ordinarily be by recruitment of new members of society.

Sometimes the change is by incorporation of new social groups and accordingly a complete replacement of ousted elite by counter elite through revolution. The last form of change comes about when elite refuses to respond to the first two changes.

Elite theorists also talked about what they called the “circulation of elites”. This can be explained as a situation where by one set of elites (political executives) is replaced by another possessing similar traits. This is what Mosca Pareto was describing when he generalized that “history is a graveyard of aristocracies”. This statement shows the inevitability of change when the elite facet. This change can take different forms: (1) between different categories of the governing elites itself (e.g. from the non-governing elite) or between the elite and the rest of the population and while such changes go on, they affect merely the form but not the structure of rule which remains at all times minority dominated (Oligarchy).

The application of this theory to this article posits that elites consist of those successful persons who rise to the top in every occupation and stratum of society. For example; we can talk of elite of lawyers or Senior Advocates (SAN), elite teachers (Professors), politicians (god fathers, elected and appointed officials) among others.

The elite own political structures which return the god sons to office, bribes the judiciary or electoral umpires to decide cases in their favour. They equally provide financial resources to the non-governing elites to oil their political machine.

As Eme (2010) noted in a case exclusively reported by *The Guardian*, on Monday June 2, 2008, titled “General in Court, Queries Service Chiefs Appointments” the Yar’Adua administration has refused to comply with section 18 of the Army Act (2004), which provides that Service Chiefs must be confirmed by the National Assembly before they can assume office. The issue came to light in 2008 through a retired General’s quest for justice against the military authorities that never confirmed the appointments of service chiefs that allegedly retired him.

Section 18 of the Armed Forces Act CAP A20 Laws of the federation, 2004 Provides in Sub-section:

1. The President may after consultation with the Chief of Defence staff and subject to confirmation by the National assembly, appoint such officers in this Act referred to as the service Chiefs as he thinks fit, in whom the command of the Army, Navy, and Air Force, as the case may be, and their Researches shall be vested.

Subsection 2 states: The Service Chiefs shall be known:

- (a) In the case of the Nigerian Army, as the Chief of army Staff
- (b) In the case of the Nigerian Navy, as the Chief of Navy Staff, and
- (c) In the case of Air Force, as Chief of Air Staff.

It would be recalled that this paper noted that, the National Assembly had confirmed no service chief since 1999, when this democratic dispensation began, not even since 2004. And the ones that the President Yar’Adua appointed shortly after the revelation of the lacuna in court in 2008 have not been confirmed till date. No names were submitted to the National Assembly. Inquiries too to the President of the Senate and the Speaker of the House on why they have not asked the President to send his nominees to the National Assembly for confirmation has not received any response since 2008. This explains how the elites have circumvented the constitutional provisions on issues pertaining to the appointment of service chiefs in Nigeria since 1999. The analysis on the next section of the paper will add currency to the thesis.

### **Sack of the Service Chiefs: The Background and the Verdict**

On Monday, July 1 Justice Bello threw shock waves around the polity with his landmark ruling which nullified the unilateral appointment of service chiefs by the president. The first civilian president of the Fourth Republic, Chief Olusegun Obasanjo, had



commenced the practice in 1999 when he appointed his service chiefs. He continued the trend all through his eight years as president. His immediate successor, the late President Umaru Yar'Adua, continued in the same way, appointing service chiefs, including the Chief of Defence Staff, Chief of Army Staff, Chief of Naval Staff and Chief of Air Staff. Keyamo picked up his muse and headed for the court. He listed as defendants, the president, the attorney-general of the federation and all the service chiefs. The suit, which had lingered since 2008, came to an end on July 1 2013 when the court ruled that the appointment of the military top brass was illegal and not in accordance with the provisions of the law.

In the contentious suit with reference number: FHC/ABJ/CS/611/2008, Keyamo had asked the court to determine: whether, by the combined interpretation of the provisions of Section 218 of the Constitution of the Federal Republic of Nigeria, 1999 and Section 18 of the Armed Forces Act, Cap. A.20, Laws of the Federation of Nigeria, 2004, the president can appoint the service chiefs of the federation without the confirmation of the National Assembly first sought and obtained.

And whether Section 18 (1) and (2) of the Armed Forces Act, Cap. A.20, Laws of the Federation of Nigeria, 2004 is not in conformity with the provision of the 1999 Constitution so as to fall within the category of existing laws under Section 315 (2) of the Constitution of the Federal Republic of Nigeria, 1999, that the President, may, by order, modify its text, to bring it into conformity with the provisions of the constitution. The judge, Justice Adamu Bello, which frowned at the breach of the 1999 Constitution (as amended) also, issued a separate order restraining "the President from further appointing service chiefs without first obtaining the confirmation of the National Assembly."

Yar'Adua had inherited the illegality from his predecessor. President Jonathan had also towed their path when he was elected to office. The suit, which specifically faulted the practice, was, however, not regime specific and time bound. By implication, all such appointments made before now without the confirmation of the National Assembly were affected by yesterday's verdict of the court. Keyamo had argued that the practice of sidestepping the constitutional requirement of getting the consent of the National Assembly in the appointment of service chiefs was unconstitutional. He said he was worried because the provisions of the organic law of the land were being breached with impunity. Keyamo had in the suit marked: FHC/ABJ/ CS/611/2008 sought a determination of the following questions:

\* Whether by the combined interpretation of the provisions of Section 218 of the Constitution of the Federal Republic of Nigeria, 1999 and Section 18 of the Armed Forces Act, Cap. A.20, Laws of the Federation of Nigeria, 2004, the President can appoint the service chiefs of the federation without the confirmation of the National Assembly first sought and obtained.

\*Whether Section 18 (1) and (2) of the Armed Forces Act, Cap. A.20, Laws of the Federation of Nigeria, 2004 is not in conformity with the provision of the 1999 Constitution so as to fall within the category of existing laws under Section 315 (2) of the Constitution of the Federal Republic of Nigeria, 1999, that the President, may, by order, modify its text, to bring it into conformity with the provisions of the Constitution. He also sought the following orders:

\*A declaration that the appointment of service chiefs for the Federal Republic of Nigeria by the President, without the confirmation of the National Assembly is illegal, unconstitutional and void.

\*A declaration that Section 18 (1) & (2) of the Armed Forces Act, Cap. A.20, Laws of the Federation of Nigeria, 2004, is in conformity with the provisions of the 1999 Constitution so as not to fall within the category of existing laws under Section 315 (2) – of the Constitution of the Federal Republic of Nigeria, 1999, that the President, may, by order, modify its text, to bring it into conformity with the provisions of the Constitution.

\*An order restraining the President from further appointing service chiefs for the federation without first obtaining the confirmation of the National Assembly. Parties to the suit had filed written briefs on the legal issues raised and adopted same (Adisa, 2013:4-5).

In the judgement, Justice Bello upheld Keyamo's arguments and determined all the questions in his favour even as he granted him the two declaratory and one of the injunctive reliefs sought. The lawyer secured the court's nod on the two questions, with the judge giving further orders, including a declaration that "Section 18 (1) and (2) of the Armed Forces Act, Cap. A.20, Laws of the Federation of Nigeria, 2004, is in conformity with the provisions of the 1999 Constitution so as not to fall within the category of existing laws under Section 315 (2) - of the Constitution of the Federal Republic of Nigeria, 1999, that the president, may, by order, modify its text to bring it into conformity with the provisions of the constitution an order restraining the President from further appointing service chiefs for the federation without first obtaining the confirmation of the National Assembly.

According to the judge, the appointment of service chiefs without the clearance of the Senate was illegal, null and void. He also restrained the president from further appointing service chiefs without first seeking and obtaining the confirmation of the Senate. While Keyamo's suit was subsisting, there was thinking within the government circles to the effect that the president could write the Senate for confirmation of service chiefs. On assumption of the role of acting president in February 2010, President Goodluck Jonathan had toyed with the idea of sending letters to the Senate for the confirmation of service chiefs. It was learnt then that the process was to start with the appointment of the Inspector-General of Police. Sources, however, stated that the government could not locate a constitutional provision to back up the bid and the president had to jettison the plan (Adisa, 2013:5).

The Presidency on the judgement, however, said it had yet to get a copy of a Federal High Court Abuja ruling that declared the appointment of service chiefs solely by the President as unconstitutional, illegal, null and void. Special Adviser to the President on Media and Publicity, Dr. Reuben Abati, said this in a telephone interview with our correspondent. Abati said it would be wrong for the Presidency to comment on a ruling that was yet to be in its possession. In a swift reaction, the President and Commander-in-Chief of the Armed Forces, Dr Goodluck Jonathan, has said the Minister of Justice and the Attorney-General of the Federation to obtain the copy of the judgment, study it and then advise whether the Presidency would accept the verdict or proceeds to the appellate court. He however said upon receipt of a copy, the Ministry of Justice would study the ruling with a view to advising the President appropriately. The presidential spokesman said: "*no serious person will comment on a ruling he has not seen. We are yet to see a copy of the ruling. By the time we receive it, the Ministry of Justice will study it and advise the President accordingly*" (Adetayo & Chiedozie, 2013:2).

Since the case was instituted during the era of the late President, Umaru Yar' Adua, all those directly affected had ceased being in office but no doubt, the verdict is binding on the President especially when next he is considering appointing new service chiefs. Speaking with defence focus, an impeccable presidency source said, it would be dangerous for the President to rush the names of the incumbent service chiefs to the National Assembly for the approval instead this is because the Senate is not compelled to approve all the names sent by the Presidency. And this could constitute a threat to the security of the country. According to this source:

I read the judgment on the pages of newspapers this morning (Tuesday) and I was taken aback that a case instituted in 2008 had been pending before the Federal High Court until this week. Justice delayed is justice denied, as they say. Those who were in office when the case was instituted are no more there and we don't even know what (Barrister) Festus Keyamo was after, for example, if he did not want a particular officer to be that ruling has failed. But

be that as it may, it would be dangerous for President Jonathan to rush to the National Assembly to seek their approval. If they reject any name, that becomes a problem. Instead, the Presidency should appeal the ruling and exploit every opportunity available to the apex court by then, all the service chiefs would have completed their tenure (Oladeji, 2013:4).

The source explained further that appealing the ruling will also help in standardise the ruling and the judicial system would be better for it. According to him, “most of the rulings of the lower courts have been overturned by the Supreme Court and this might be another one. What I can tell you now is until the matter gets to the Supreme Court; the last has not been heard. What would follow first is to ask for a stay of execution of the ruling then we proceed to the appellate court.” A security source who spoke with defence focus on the same issue corroborated the presidency source. According to him, “*you can sack the service chiefs because of the ruling and if the verdict is not appealed then their appointments have been nullified and whatever they are doing become illegal and unlawful. And with the state of insecurity we are in, that ruling must not be allowed to stand*” (Oladeji, 2013:4).

Checks showed that it was only former President Shehu Shagari that sought the appointment of all his service chiefs from the National Assembly and it was this loophole that led Keyamo to institute the case.

### **The Implications of the Judgement**

The implication of Justice Bello’s judgment is unmistakable. First, the president should re-present the names of the service chiefs for approval/ratification by the National Assembly. Otherwise, their appointments are null, void and of no effect, as pronounced by the court. Secondly, all key appointments by the president that require confirmation by the National Assembly must henceforth be presented to it for approval.

In the present instance, it will serve the public interest and the image of the government better, if this judgement is accepted in good faith. The government must decline all entreaties to appeal against the decision of the court. The relevant sections of the Constitution on the nomination and confirmation of service chiefs are unambiguous on where the power of the President begins and stops, and where that of the legislature takes off.

The implication of the case is simply that under the military resume the head of state and commander in chief can run a one-man show but in a constitutional democracy as we operate, where the doctrine of separation of powers and checks and balances are firmly rooted and the principle of the rule of law is the pivot on which the constitutional democracy stands, the presidency cannot run a one-man show. Such appointment must set a constitutional imprimatur of the Senate as part of the senate’s oversight constitutional responsibility.

The judgement is valid until it is overturned. What it seeks to address really is the unnecessary arrogation of the power that does not belong to the presidency to the president. If a constitution says that make reference to the National Assembly, it is unheard of, it is unreasonable and least expected that a president would not heed such constitutional requirement; in that wise, the judgement is valid. It is not saying that the Service Chiefs are not entitled, it is only saying that procedure must be proper and that the culture of impunity while is what act of seek end to in on system. If ordinarily there is a requirement that he can appoint so, so person into a particular office, he must follow certain procedure, to the extent, the appointment of the service chiefs by the presidency is null and void. And I think that the most significant thing for a government that believes in the rule of law to do is to recall the appointees and forward the request to the National Assembly for ratification. Pending their ratification, the presidency may even call them acting. This is the own was the rule of law can be enhanced and the integrity of our constitution protected.

What makes it more nebulous is that the government has not responded to the judgement. It is incredulous that a government that has an Attorney-General would just

ignore the judgement of a court without winking. This position confirms the hypothesis that their regime does not believe in the rule of law like its predecessors. Since the beginning of the Fourth Republic, it has been one breach of the right of the people or the other. The policemen and the military men have remained untamable and terrible bastardized human dignity. Last year, there was a very peaceful protest over fuel subsidy removal and what the government did was to send troops to the streets of Lagos.

### **Way Forward**

The way forward is for is to develop a culture of allowing the law to rule and comply with due process in all we do we need from president who will have the will and capacity to effect this change.

The path of honour in this matter is for the presidency to study the judgment carefully and do the needful: Go back to the Senate for its express approval of the appointment of the service chiefs. It takes candour and strength of character for a leader to acknowledge that a mistake has been made, and rectify it.

There is no way Nigeria, or any country at that can make any meaningful progress in governance if its constitution and other laws is breached, abused or relegated to the background. Both the wielders of power and ordinary citizens must respect and obey the laws of the land especially orders of competent courts. Nations and peoples make progress when and where laws are obeyed in observance and not in breach.

Nigerians must now begin to be exposed to and taught the culture of constitutionalism and human rights education from the earliest human rights education from the earliest stages of their education. This has become extremely necessary to re-orientate the people, especially the younger generation of Nigerians who have been given to military culture due to long years of military incursion into the governance in the country especially as the new democratic order is yet to extinct itself completely of the grips and the vestiges of the military dispensation. Of course, this should not be to the abandonment of general education.

There is no doubt that the greatest abuses of the constitution or human rights of citizens have always been carried out by, through or with the active connivance or acquiescence of the security agencies, especially the Police, the Military and the SSS. It is therefore the writer's recommendation that an intensive orientation of these institutions and their officers should be

### **Conclusion**

The recent nullification of the appointment of all the service chiefs in the country by the Federal High Court, Abuja Division, is instructive. It boldly underscores the fact that the president cannot lawfully appoint service chiefs without the express approval of the Senate. The judgement also highlighted the need for the president to always follow the due process of law in his appointments, as provided for in the Nigerian constitution. Obedience to the laws of the land is paramount, if the president is to avoid embarrassment of this nature. Presiding judge, Justice Adamu Bello, had on July 1 declared the appointment of the present service chiefs unconstitutional, illegal, null and void, in a suit filed by human rights lawyer, Mr. Festus Keyamo. The service chiefs are the Chief of Army Staff, Lt-Gen. Azubuike Ihejirika, Chief of Air Staff, Air Vice Marshal Alex Badeh and Chief of Naval Staff, Real Admiral Dele Ezeoba.

This judgment is also a clear indictment of the National Assembly for its failure to enforce its constitutional right to perform oversight function with regard to the appointment of service chiefs, by approving the president's nominees. The Senate's failure to perform this function, either out of neglect or ignorance, made the president to operate above the law relating to the appointments. In this case, the lawmakers turned a blind eye to an obvious breach of the law on such sensitive appointments by the president. President Goodluck Jonathan ought to have obtained approval for these appointments from the National

Assembly. Section 218 (2) of the Constitution which confers the power to appoint service chiefs on the president says this power will be exercised ‘as may be established by an Act of the National Assembly.’ Sub-section (4) of this section states that “The National Assembly shall have power to make laws for the regulation of (b) the appointment, promotion and disciplinary control of members of the armed forces of the federation.”

It is regrettable, therefore, that the Attorney-General of the Federation and Minister of Justice, Mohammed Adoke, as chief legal adviser to the Government of the Federation, and the president’s legal aides, failed in their duty to advise the president properly. We commend Keyamo for putting up a strong and courageous fight to ensure that due process is adhered to in this matter. His effort in instituting the case for proper interpretation of the relevant sections of the constitution regarding the process for the appointment of service chiefs by the president, and the role of the National Assembly in such appointments is laudable. Keyamo filed this suit against the president, the Attorney-General of the Federation and all the service chiefs in 2008. The relief sought by the plaintiff, Mr. Keyamo, is fundamental for our democracy.

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