

## LEGAL MEASURES TOWARDS REVERSING NIGERIA'S EPILEPTIC POWER SUPPLY

Fodil Olanrewaju Mohammed-Noah\*

### *Abstract*

*This study examines efforts deployed by successive governments in Nigeria towards reversing power epilepsy militating against the country's growth and development. These efforts geared towards achieving electricity security (availability, accessibility, affordability and reliability of electricity supply) have been largely ineffective due to continuous disregard of the constitutional provisions governing electricity management and control. Although, previous studies focused on adequacy of investment as panacea to achieving stable supply of electricity, however, the role of law in bringing desired change in the Nigerian Electricity Supply Industry (NESI) has not been adequately investigated. This study appraised how continuous disregard of the Basic Norm (Constitution of the Federal Republic of Nigeria, 1999) is impacting the realisation of electricity security in Nigeria. Hans Kelson's Pure Theory of Law provided framework of this study, while doctrinal method was adopted. Notwithstanding state actors' humongous spending on fixing power epilepsy in NESI, security of electricity supply still eludes Nigerians. Legislation governing reforms in NESI has been ineffective due to a centralised governance structure contrary to the 1999 Constitution (as amended). Certain provisions in the Electricity Act, 2023 conflict with extant provisions of the 1999 Constitution thereby inhibiting the fruit of uninterrupted supply of electricity that Rule of Law has to offer. Stakeholders in the Nigerian Electricity Supply Industry should play by the Basic Norm in order to successfully address the perennial problem of power epilepsy in Nigeria.*

**Keywords:** *Legal Regime, Power Epilepsy, Power Sector Reform, Rule of Law, Stable Electricity.*

### 1.0 INTRODUCTION

That only few Nigerians are aware of the magnitude of challenges militating against security of electricity supply in the power sector cannot be overemphasised; in the light of this seemingly shocking reality: **only 29% of Nigerians is aware of the state actors' efforts at reforms in the power sector**<sup>1122</sup>. This reality forms part of findings which emanate from a survey conducted by Power Sector Reform Programme (PSRP)

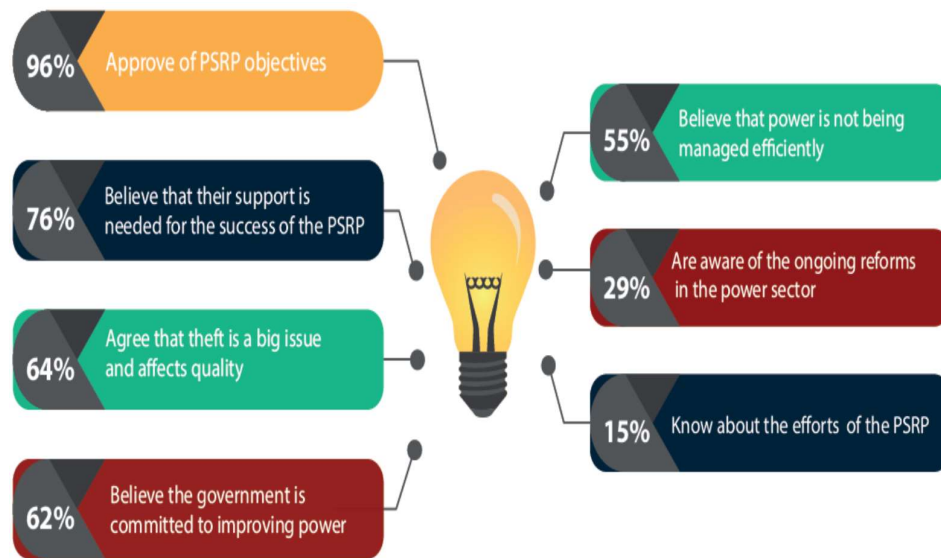
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<sup>1122</sup> PSRP Newsletter, Vol.1, Issue 1 of January, 2018, page 3-the finding was as a result of a survey conducted by PSRP Implementation Committee in the six geo-political zones of the country with cities of Lagos, Port Harcourt, Aba, Abuja, Kano and Bauchi as objects of survey. The survey deployed the use of quantitative and qualitative techniques to collect data from over 1,200 respondents in at least 200 households per city (each city representing the six geo-political zones of Nigeria) and 18 maximum demand consumers.

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Results emanating from the survey provide vital inputs to technical content of the power sector reform programme. Outcomes of the survey are reproduced in Figure 1 thus



**FIGURE 1: 2018 SURVEY OF POWER SECTOR REFORM PROGRAMME  
(PSRP)**

**IMPLEMENTATION COMMITTEE**

**SOURCE: PSRP NEWSLETTER, 2018**

No wonder why the NEPA spirit refuses to leave the psyche of average Nigerians. The thunderous sound of ‘UP NEPA’ rents the air at the sudden sight of a restored light; even from those whose birth did not witness the existence of NEPA.

Power sector reforms in Nigerian Electricity Supply Industry (NESI) pose a great deal of challenges to virtually all stakeholders in the industry<sup>1</sup>. Modelled after the United States of America, the Nigerian power sector reform options seek to, among other things, unbundle vertically integrated utilities into separate generation, transmission and distribution entities<sup>2</sup>, while its national utilities were unpackaged into smaller franchise areas<sup>3</sup>. The call for reforms in NESI was perceived to have stemmed out of inadequate electricity supply, low generation capability, ineffective regulation and high technical losses, out-dated power facilities, inefficient consumption of electricity, inadequate investment capital, amongst others<sup>4</sup>. This perennial epilepsy in the electric power sector has compelled Nigeria to gain the notoriety of an energy deficient nation with the greatest unmet needs, and one with the highest number of untapped resources. The country has taken over as the nation with the highest number of extremely poor people. Before now, India used to hold the position with a population of 1.3 Billion persons in contradistinction to Nigeria’s population of a little below 200 Million people<sup>5</sup>.

It is therefore posited that the tool most essential to stemming the tide of poverty lies in the abundant level of electric power inputs available to stimulate industrial activities, generate jobs, transportation, commerce, micro enterprises and agricultural outputs. It is of crucial importance to take note that successive governments’ efforts at reforming the NESI are geared towards one goal; uninterrupted supply of electricity.

## **2.0 POWER SECTOR REFORM PROGRAMME**

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<sup>1</sup> OI Okoro, etal 2007, Power sector Reforms in Nigeria: Opportunities and Challenges, *Journal of Energy in South Africa*, Vol. 18, No. 3 Cape Town 52 – 57, [www.researchgate.net/publication/237825169](http://www.researchgate.net/publication/237825169), accessed on 15<sup>th</sup> September, 2018

<sup>2</sup> All the vertically separated Distribution Companies (DISCOs); Transmission Company of Nigeria, Plc.(TCN); Generation Companies (GENCOs) represent the structural changes that take place in NESI.

<sup>3</sup> All the 11 DISCOs and the 6 GENCOs represent a distinct franchise area.

<sup>4</sup> Ibid at 53

<sup>5</sup> See [www.vanguardngr.com](http://www.vanguardngr.com) assessed on 25/6/2018

Power sector reform in Nigeria has elicited numerous false dawns. The earliest comprehensive reform programme dates back to the seventies when both ECN and NDA merger resulted in the formation of NEPA. Nigerian Government had allowed inefficiency and disregard for Rule of Law define electricity industry in the last 40 years because there was no real challenge to do things differently. After all, the most populous nation was awash with easily realisable petro-dollar<sup>6</sup>.

Since the end of 80s, over \$2 Billion<sup>7</sup> per annum had been invested in NEPA infrastructure to no avail. Generating capacity had been stagnant, transmission and distribution infrastructure had been deteriorating to a point where actual generating capacity evacuated to the grid hit all-time low of 1,700MW in 1998 despite installed capacity of 6,000MW. In 1998, another round of reform came to the rescue of the power sector. The Federal Government partially deregulated the power sector by allowing a limited number of private participation in electricity generation through Independent Power Producers<sup>8</sup>. As observers would agree with the writer that the problems bedeviling Nigerian Power Sector did not just materialise at the turn of the new Millennium; the situation had been compounded over the last 40 years by the inaction of several state actors who came, who saw, but refused to conquer the raging menace of epileptic supply of electricity.

This sad narrative engendered a socio-economic development constantly entwined in the perennial nightmarish darkness brought on by Nigeria's epileptic power supply. Despite successive governments' rhetoric in changing the status quo and building a strong and virile electric power sector for Nigeria, the realities on ground indicate that the tempo of reforms had been so sluggish and unappealing to investors from the private sector; entrepreneurs who still regard Nigerian electricity industry as a high-risk venture<sup>9</sup>. Although, this problem is also exacerbated by the paucity of scholarly works on the legal framework employed to reform the electric power sector and surmount the challenges relating to regular supply of electricity in NESI, the fundamental problem engendering power epilepsy in Nigeria largely concerned the total disregard for

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<sup>6</sup> SA Caulcrick, 2018, *Power in Nigeria: Will there ever be light?* Joe-Tolalu & Associates, Lagos, 9-15

<sup>7</sup> CSL Research 2014, *Nigerian Power Sector*, CSL Stockbrokers, Lagos, 46-47

<sup>8</sup> Ibid @ 47

<sup>9</sup> Yemi Oke, 2012 *Beyond Electric power sector Reforms: The Need for Decentralized Energy Options (DEOPs) for Electricity Governance in Nigeria*, *The Nigerian Journal of Contemporary Law*, Vol. 18 (1) 67 - 92

constitutional provisions<sup>10</sup> governing electricity management and control. Hence, the need for this paper becomes more apt.

Given the critical role electricity plays in socio-economic development of any nation and the development of all sectors of its economy, successive governments had resolved to implement far-reaching and structural-changing reforms in the power sector. Such recent reforms date back to April, 2001 when National Electric Power Policy was adopted under the able leadership of Chief Olusegun Obasanjo, GCFR. Through, his Roadmap for Power Sector Reform Policy, Dr. Goodluck Jonathan, GCFR followed suit<sup>11</sup> with the unbundling and subsequent privatisation of electricity generation and distribution companies in 2013; leaving the transmission unit of the value chain unbundled.

Although, the Electric Power Sector Reform (EPSR) Act of 2005<sup>12</sup> and the Roadmap for Power Sector Reforms of 2010 serve to facilitate a competitive, efficient, and private-sector led power sector, the sector still faces infrastructure, liquidity, and governance crises that necessitate specific strategic interventions by reform drivers.

These challenges therefore necessitated another round of reform by the immediate past administration; led by President Muhammadu Buhari. Coming at a time when the power sector was in a state of emergency, Muhammadu Buhari, GCFR initiated some policies, through his Economic Blue Print<sup>13</sup>. One prominent policy document that attempted to address challenges facing the power sector is the May, 2016 Roadmap for Incremental, Stable and Uninterrupted

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<sup>10</sup> See Paragraph 13 of Item F, Part II, Second Schedule to the 1999 Constitution (as amended) in the 2023 alterations which stipulates that the Federal Legislature may enact laws for the Federation or any part thereof with respect to: (a) electric power and the establishment of electric power stations; (b) the generation and transmission of electric power in or to any part of the Federation and from one state to another state; (c) the regulation of the right of any person or authority to dam up or otherwise interfere with the flow of water from sources in any part of the Federation; (d) the participation of the Federation in any arrangement with another country for the generation, transmission and distribution of electric power for any area partly within and partly outside the Federation; (e) the promotion and establishment of a national grid system; and (f) the regulation of the right of any person or authority to use, work or operate any plant, apparatus, equipment or work designed for the supply or use of electric power

<sup>11</sup> FRN 2010, *Roadmap for Power Sector Reform (a Customer-Driven Sector-Wide Plan to Achieve Stable Power Supply)* Presidential Task Force on Power, Abuja. A Foreword written by President Goodluck Ebele Jonathan (2009-2015)

<sup>12</sup> By the presidential assent made to Electricity Bill on 8<sup>th</sup> day of June, 2023, the 2005 Act became obsolete and gave way to a new Electricity Act, 2023

<sup>13</sup> FRN, 2017, *Economic Recovery & Growth Plan 2017-2020*, Ministry of Budget & National Planning, Abuja, 1-140

power supply. The 2016 Road map dovetails into a comprehensive electricity market intervention by the Buhari regime, with its related milestones; like the sector governance, metering implementation, eligible customers, mini-grid regulation as well as the Fifth Alteration Act (No. 17) of 2023 which altered paragraph 14(b) of Part II, Second Schedule to the 1999 Constitution by deleting after the word ‘areas’, the words; not covered by a national grid system. This reform initiative is referred to as Power Sector Recovery Programme (PSRP). The PSRP was designed on this basis and aims to reset the NESI, while enhancing the 2016 Roadmap.

It is important to note that efforts made so far by Chief Olusegun Obasanjo, in his attempt to reform the Nigerian Electric Power Sector for purposes of achieving greater efficiency, eradicating poverty, developing the economy and engendering national security; vis-à-vis Chief’s penchant for his disregard to Rule of Law shall be the primary focus of this paper. It is also important to note that significant strides (though failed to yield the desired results) were recorded in the power sector during the reign of Presidents Jonathan<sup>14</sup> and Buhari<sup>15</sup> as successive reform drivers. Although, President Bola Ahmed Tinubu assented to the Electricity Bill<sup>16</sup> on the 8<sup>th</sup> day of June, 2023 to birth the new Electricity Act, 2023, however, the focus of the paper will not be directed at the new Act. This is because its implementation is still at the gestation period.

### **3.0 OBASANJO’S NEEDS PROGRAMME ON POWER SECTOR REFORM**

As the first President who governed Nigeria in three distinct rows<sup>17</sup>, Chief Olusegun Obasanjo played a far-reaching role in the restructuring of the power sector. His second bite at the presidential cherry witnessed the country go through a period of social, political, and economic decline. In responding to the developmental challenges, Obasanjo launched a policy<sup>18</sup> document called the National Economic Empowerment and Development Strategy (NEEDS). Replicating

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<sup>14</sup> See FRN 2010, *Roadmap for Power Sector Reform (a Customer-Driven Sector-Wide Plan to Achieve Stable Power Supply)* Presidential Task Force on Power, Abuja

<sup>15</sup> See FRN, 2017, *Economic Recovery & Growth Plan 2017-2020*, Ministry of Budget & National Planning, Abuja

<sup>16</sup> Which repealed the old Electric Power Sector Reform (EPSR) Act, 2005

<sup>17</sup> The first row was between 1976 to 1979; the second row was between 1999 to 2003; while the third row was between 2003 to 2007

<sup>18</sup> IMF 2005, *Nigeria: Poverty Reduction Strategy Paper-National Economic Empowerment and Development Strategy*, IMF Publication Services, Washington, DC, 1-101

same policy documents, some state governments designed, as necessary complements to NEEDS, their own State Economic Empowerment and Development Strategy (SEEDS).

In achieving its goal of prosperity for all, NEEDS focused on four key strategies, to wit: value re-orientation; poverty reduction; wealth creation; and employment generation. The plan's key strategies are predicated on the idea that achieving the desired goal requires creating an atmosphere conducive to business growth, an atmosphere where people are better equipped to take advantage of the new sources of income that the plan aims to promote, and the government is oriented to providing basic services<sup>19</sup>.

Realising that Nigeria's infrastructure fails to meet the needs of the average investor, stifling investment and raising the cost of doing business, the NEEDS document recommends that the government delegate routine business management to the private sector and focus its efforts on providing adequate infrastructure and a business-friendly regulatory framework<sup>20</sup>.

The most essential infrastructural necessity for the private sector to progress is electricity. It's also worth noting that the energy supply sector is capital-intensive, world over, and cannot be sufficiently supported by the government on its own. In order to encourage private sector engagement, the industry has to be overhauled.

Before the overhaul was carried out, Nigeria's electricity grid was so inefficient that it stifled economic growth and social development. The electricity grid was so unstable that it could not keep up with the demands that were placed on it. The neglect of the electricity industry underscored the following facts:

- a) Between 1990 and 1999, no new power plants were constructed; between 1990 and 1999, no major plant overhauls were performed; in 1999, just 19 of the 79 generating units were operational;
- b) In 1999, real daily generation was below 2000MW;
- c) Since 1987, there have been no new transmission lines constructed.
- d) Between 1980 and 2000, government spending steadily declined.

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<sup>19</sup> Ibid @ ix

<sup>20</sup> Ibid @ 58-59



However, with improved funding which took place between 2001 and 2003 the power sector began to see a face lift. Generation rose gradually to about 4,000MW/hour on a daily basis. These improvements occurred largely as a result of President Obasanjo's determination to turn around the power sector fortunes. New funds and capacity were injected into the now defunct NEPA and a set of mandates was outlined towards overhauling the power sector. The Presidential mandates<sup>21</sup> include timely execution of the electricity sector reform package; 10 Gigawatts generation target from existing plants, new host generation, and IPPs with reasonable costs; enhancing transmission and distribution capacity for the increased output; exploring other available fuel-source, such as wind, solar, bio-mass, coal, and hydro; renewing attention to tariff issues; deregulating the electricity industry to engage more private sector.

Above highlighted presidential mandates call for expanded system capacity via generation, transmission, and distribution, as well as liberalisation of the electricity industry in order to encourage involvement of the private sector and simultaneously attracting investment. To the administration of Chief Olusegun Obasanjo, deregulation of the power sector promotes: alternative sources of energy development; usage; and cost reflective tariffs. In order to achieve all these goals, regulatory intervention<sup>22</sup> is required.

The NEEDS document proposes timelines within which the power sector reform can realise its objectives before 2007. These timelines are itemised thus:

- I. purposefully increase the power plant's capacity from 4200MW to 10,000MW;
- II. increase transmission capacity from 5,838MVA to 9,340MVA;
- III. increase distribution capacity from 8,425MVA to 15, 165MVA;
- IV. raise collection volume of tariff from 70% to 95%
- V. lower the rate of losses in transmission and distribution from 45% to 15%;
- VI. ensure at least 30% reduction in controllable expenses
- VII. right size to around 15% reduction in employee strength;
- VIII. establish 11 semi-autonomous commercial entities;
- IX. make the transmission entity a semi-autonomous unit;

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<sup>21</sup> Ibid @ 60-62

<sup>22</sup> N El-Rufai 2013, *The Accidental Public Servant*, Safari Books, Lagos, 98

- X. Complete the unbundling of generation segment in NESI by 2004 fourth quarter.

Despite President Olusegun Obasanjo's determination to achieve the set targets, power sector reform appears to be yielding unsatisfactory results after 2007 when the President handed over the mantle of leadership to President Umaru Musa Yar' Adua. One may ask: why the problems militating against the power sector defy solutions. President Olusegun Obasanjo was quick to blame the administration of President Umaru Musa Yar' Adua on the apparent failure of the NEEDS strategy when he said:

*But more importantly, we prepared NEEDS II, which was thoroughly discussed with the incoming administration, but reversed in favour of a half-baked seven-point agenda<sup>23</sup>.*

In another breath, President Obasanjo did lament his ordeal and frustration over his sudden realisation of the mess that permeated the whole value chain of the electricity industry which makes it difficult to reform. After his eight-year tenure, Chief Olusegun Obasanjo realised that the plagues of the power sector are: corruption, past neglect and dereliction. He did make a lengthy statement to give a graphic picture of this mess in his book: *My Watch-Political and Public Affairs*<sup>24</sup>.

From President Olusegun Obasanjo's lengthy Treatise, one can decipher the following points:

- 1) President Olusegun Obasanjo did not know that NEPA was riddled with corruption from top to bottom until when he was briefed few years after he was elected as President of the Federal Republic of Nigeria in 1999;
- 2) President Olusegun Obasanjo was overwhelmed with the shocking revelations of corruption, fraud and outright stealing in NEPA to the extent that it almost became a nightmare to bring anybody to book or seriously sanction any official;
- 3) Between the year 1982 and the year 2000, there had been no investment in power generation;

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<sup>23</sup> Obasanjo, O. 2014, *My Watch-Political and Public Affairs*, Volume Two, Kachifo Limited, Lagos, 425

<sup>24</sup> Ibid @ 337-338

- 4) Even with the availability of all the moneys required to reform the power sector, eight years is not enough to achieve the desired goal;
- 5) President Olusegun Obasanjo grossly underestimated the extent of decays underlining the power sector and such singular act makes it difficult to find solution.

May be President Olusegun Obasanjo would have solved the myriads of problems facing the power sector if the system allows him to employ the use of Decrees as he did between 1976 and 1979 when his reign lasted as Head of State. Probably, he would have employed the use of Decrees to execute those officials who allegedly engaged in ‘shocking corruption’. Little did the President realise that his past actions and inactions as a representative of military institution contributed immensely to the present state of affairs in the polity and the power sector in particular. The President should be reminded that he was once told that the institution in which he represents actually ‘slaughtered the sacred cows of the rule of law’<sup>25</sup>. If not for the demise of the rule of law under the military<sup>26</sup>, those officials who allegedly engaged in such fantastic corruption and outright stealing in the defunct NEPA and elsewhere should have been brought to book-without much ado-by the institutions established for that purpose. Of course, President Olusegun Obasanjo demur-very forcefully- to virtually every point of criticism raised by Folarin Shyllon in the book they both co-authored.

#### 4.0 THE RULE OF LAW DEBATE

Whenever the term: rule of law arises as object of public discourse in Nigeria, some questions like: is there law in Nigeria? Is there rule of law in Nigeria? Why are laws not being properly enforced? In order to provide response to these questions, an erudite legal practitioner succinctly argued: *there is no doubt that there is law in Nigeria but what is lacking is the culture of enforcement*<sup>27</sup>. Nigeria has, in abundance, legislations on every conceivable issue of law but many of these legislations only exist in archives. It is not in contention that both governments and the

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<sup>25</sup> Folarin Shyllon, and Olusegun Obasanjo, 1980, *The Demise of the Rule of Law in Nigeria Under the Military: Two Points of View*, Institute of African Studies, University of Ibadan, Ibadan, 3

<sup>26</sup> Folarin Shyllon, and Olusegun Obasanjo, 1980, *The Demise of the Rule of Law in Nigeria Under the Military: Two Points of View*, 1-55 The book was an outcome of a debate on the Rule of Law between Folarin Shyllon and General Olusegun Obasanjo (rtd.) with selected commentaries from other four distinguished scholars of the time.

<sup>27</sup> Folarin Shyllon, and Olusegun Obasanjo, 1980, *The Demise of the Rule of Law in Nigeria Under the Military: Two Points of View*, 1-55

governed habitually break Nigerian laws. Rule of law seldom governs the affairs of men in Nigeria; arbitrary use of power by the privileged in the society does. How did Nigerians arrive at this sorry state of affairs? Who is responsible for this level of indiscipline? Where and when did we get it wrong? Plausible answers to these recurring questions are rooted in history.

It all started like a monologue when Folarin Shyllon presented a paper on *the Demise of the Rule of Law in Nigeria under the Military* on the 5<sup>th</sup> day of December, 1979 until General Olusegun Obasanjo joined the Institute of African Studies; and he was asked if he could comment on the paper presented earlier. His acceptance of that request led to a second discussion on the earlier paper which came up in January, 1980 as *The Demise of the Rule of Law in Nigeria Under the Military-Another Point of View*. While the duo of Folarin Shyllon and Olusegun Obasanjo co-authored the book, other selected scholars made some comments to further enrich the discourse. Their views shall be considered in turn.

#### 4.1 FOLARIN SHYLLON

In his point of view on the military's role in the decline and eventual demise of the rule of law in Nigeria, Shyllon opined that the Military did promulgate, on many occasions, Decrees that suspend the provisions of the Constitution of the land. He cited Section 6 of the Constitution (suspension and Modification) Decree of 1966 which also deliberately oust the jurisdiction of the courts to play its traditional role of adjudication and interpretation of the law<sup>28</sup>. This was achieved either by vesting special tribunals with exclusive jurisdiction or by denying a citizen his right to appeal the decisions of the special tribunals. He also cited the Military rejection of the Supreme Court decision in *Lakanmi & another v A.G. (West) & others*<sup>29</sup>.and its subsequent promulgation of the Supremacy and Enforcement of Powers Decree No. 28 of 1970 by which the judiciary was subjugated.

In that case, the Appellants were amongst the persons whose assets were investigated by the Tribunal of Inquiry set up by the Western State Government under Edict No.5 of 1967 wherein the Tribunal made an order dated 31<sup>st</sup> day of August, 1967 under Section 13(1) thereof; prohibiting the Appellants from further dealing with their properties except with the permission of the Military

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<sup>28</sup> Ibid @ 4

<sup>29</sup> (1970) 6NSCC, 146 @ 164

Governor, Western State. The order provided that all rents from the properties should be paid into the State's sub-treasury pending the determination of the issues involved in the investigation. The Appellant thereupon applied to the High Court for an order of Certiorari to quash the order on the ground that it contravened SS.22 and 31 of the 1963 Constitution of Federal Republic of Nigeria and that it was also contrary to Public Officers (Investigation of Assets) Decree No.51 of 1966

The High Court dismissed the application on the grounds that Decree No.51 was not in operation in the Western State when Edict No.5 of 1967 was made, and that Section 21 of the Edict had ousted the jurisdiction of the High Court. The Appellants appealed to the Court of Appeal of Western Nigeria. While appeal was pending, the Federal Military Government passed three (3) successive Decrees; which are: No. 37 of 1968; No. 43 of 1968; and No. 45 of 1968, all of which were calculated to validate the order of the Tribunal. The Appellants were expressly named in the Schedule to Decree No.45, which also prevented the courts from inquiring into the validity or otherwise of anything done thereunder, and provided that the provisions of Chapter III of the 1963 Constitution should not apply to any matter arising under the Decree. The Court of Appeal of Western Nigeria consequently held that it had no jurisdiction and dismissed the appeal. On a further appeal to the Supreme Court, it was argued, inter alia, whether the Federal Military Government was a constitutional interim government deriving its powers from the constitution whose decrees therefore could abrogate the provisions of the constitution only to the extent and in so far as the necessity of the situation warranted; or whether it was a revolutionary government deriving its powers from the fact of the revolution. The Supreme Court held, among others, that the invitation by the Council of Ministers, which validly met in January 1966 and which was duly accepted, to form an interim Military Government was unprecedented in history, and it was obvious that the Government thus formed would uphold the constitution and would only suspend certain sections of it as the need arose.

Hence, appeal allowed; order of the Tribunal quashed; Edict No.5 of 1967 and Decree No. 45 of 1968 declared ultra vires, void and of no effect<sup>30</sup>. It must be noted that the above judgment was rendered ineffective by the Constitution (Supremacy of Enforcement of Powers) Decree No.28 of

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<sup>30</sup> Folarin Shyllon, and Olusegun Obasanjo, 1980, *The Demise of the Rule of Law in Nigeria Under the Military: Two Points of View*, 1-55

1970. Arbitrariness in the Military, through the exercise of its legislative and executive powers, was no longer really subject to judicial review, and by so doing it continues to indulge in retroactive legislation which nullifies judicial order. An instance of this retroactive legislation is the Counterfeit Currency (Special Provisions) Decree which was promulgated on the 29<sup>th</sup> day of May, 1974 but was deemed to have come into operation on the 1<sup>st</sup> day of January, 1973<sup>31</sup>.

It was the learned scholar's position that the 1975 sweeping compulsory retirement of public officials which was extended to Judges of Superior Courts was not only a violation of Civil Service rules which created security of tenure but also the rules of natural justice. While he argued that there is no alternative to the rule of law, he concluded by quoting Justice Alagoa's obiter in Amakiri's case thus: *the fruit reaped by respect for the Rule of Law is stability, efficient administration, economic progress and satisfaction amongst the citizens*<sup>32</sup>. Indeed, Military regime possesses none of the benefits that the Rule of Law offers.

#### 4.2 OLUSEGUN OBASANJO

In forceful demur to the position canvassed by Professor Folarin Shyllon on the Demise of Rule of Law under the Military, Chief Olusegun argued that the rule of law principle that states that no one is punished until he commits a specific violation of the law, as determined by the usual legal process before the ordinary courts, is solely applicable in criminal law; that the principle, as practised in Britain exempts as a general rule, restraining order, property compulsorily acquired by the State and executive orders that are directly enforced. He argued further that the legal principle that all persons have equal rights and duties before the law are of doubtful general value and validity, especially when it affects public officials who inevitably had powers conferred on them that an ordinary person does not have<sup>33</sup>. In his defence of the Military suspension and/or modification of the constitution through promulgation of Decrees, he argued that when Military took over the reign of government in Nigeria, there was virtually nothing left of the kernel of the rule of law except arson, murder, robbery and general insecurity of life and property. In absolute terms, there was no law, no order and no security<sup>34</sup>. He argued further that those promulgated

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<sup>31</sup> Ibid @ 8

<sup>32</sup> Ibid @ 17

<sup>33</sup> Ibid @ 21

<sup>34</sup> Ibid @ 23

Decrees had only provided the Military with the means by which they could run the affairs of the country in much the same way the constitution provides framework for the operation of civilian administration<sup>35</sup>. To Chief Olusegun Obasanjo, if the existence, security and orderly process of the society are threatened, it is the responsibility of the governing authority to take necessary measures to save the society from self-induced destruction. In his response to the 1975 massive dismissal and compulsory retirement of public officials, Chief Olusegun Obasanjo argued that the situation of the country is one of paralysis which requires shock therapy to bring it to active life again. Rather than accuse the Military of sowing the seed of lawlessness and violating human rights in the polity, it should be commended for introducing the duo of Public Complaint Commission and Legal Aid Scheme; he opined. He further affirmed that the Military arrived at Nigeria's political landscape as a child of necessity and had done more than their civilian predecessors in maintaining stability and sanity, security, law and order and the rule of law. Other selected commentators include the following:

#### 4.3 CHIEF LATEEF ADEGBITE

**While he conceded that Military regime is abnormal, Chief Lateef Adegbite contended that the abnormality that comes with the regime must be recognised and concessions made to its measures<sup>36</sup>. As a corrective regime, the Military could not but employ unconventional methods to prosecute its objectives. He however outlined areas where the Military had gone overboard in the discharge of their corrective measures. These include: resort to retroactive legislation; ouster of jurisdiction of the courts; negation of separation of powers; breach of judicial independence; and expropriation of private property<sup>37</sup>.**

#### 4.4 BAYO ADEKSON

As an expert in civil military relations, Adekanye, fondly called Adekson, situated the Rule of Law debate within the context of his research and teaching interests. The point that Rule of Law is of English derivation and therefore irrelevant to the needs of Nigerians, holds no water. It does not follow that because a concept is of foreign derivative, it is therefore bad and irrelevant<sup>38</sup>. The

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<sup>35</sup> Ibid @ 24

<sup>36</sup> Ibid @ 37

<sup>37</sup> Ibid @ 39

<sup>38</sup> Ibid @ 43

debate succeeded in bringing to fore, the familiar relationship of contradictory compatibility between the two concepts of authority and power known to political theory and application of those concepts to the comparative civil-military sphere<sup>39</sup>.

#### 4.5 CORNELIUS OYELEKE ADEPEGBA

While the erudite scholar conceded to the validity of the military rulers making laws in order to rule effectively, he considered as undesirable the laws made to be administered retroactively. Also considered undesirable is the manner in which the military acted on certain issues without any regard to law<sup>40</sup>. If the acts of the military are defended on the effectiveness of their results, then no one wishes the country well by endorsing a replica of American Constitution for Nigeria. A constitution based on the way the military had effectively ruled Nigeria for years would have been ideal. Although, the Military came to power as a result of some disturbances in the country, the disintegration out of which it has produced unity was caused by the Military itself; there was no secession or civil war until the military came to power. The general economic advancement made was a coincidence of oil boom, rather than the result of anybody's serious effort. Then the order maintained in the society was achieved partly by force and partly by the constant promise of the Military returning to the barracks.

#### 4.6 PROFESSOR R.G. ARMSTRONG

In his candid opinion, the Professor of Linguistics in the Institute of African Studies stated that on the record, and looking around the world, it has usually taken a civil war or conquest of some kind to establish a state of any importance<sup>41</sup>. Federal Republic of Nigeria was established by British conquest in the 1890's, and its existence was confirmed by a 30-month civil war. Nigeria is now a very important nation for the future of the continent of Africa. It is big enough to have very important economic resources, and it has the largest black population of any state in the world. It has a strategically advantageous location, and it has a serious possibility of escaping-at least somewhat- from the entanglements of neo-colonialism. Any attempt to divide Nigeria now would simply mean colonialism again. It would mean intervention by one or more of the great imperial powers and would weaken Africa when the need is to strengthen it.

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<sup>39</sup> Ibid @ 44

<sup>40</sup> Ibid @ 49

<sup>41</sup> Ibid @ 47



In 1966, Nigeria had only one really national institution: the Nigerian Army. In 1970, after the successful conclusion of the civil war, the same situation prevailed; and the Federal Military Government faced the task of building a national economy, a national educational system, a national judiciary and even a national government. No democratically-minded person likes a military government; but sometimes, the alternative is breakdown of all law, whatsoever. Military justice is rough justice. And it is vulnerable to abuses of various kinds. Nigeria is fortunate in that its Army is broadly representative of the population and in that the Army preserved its taste for the rule of law throughout its years of mild-dictatorship. In the end, it reinstated elected, civilian government; and in the period when the country is still convalescing from old wounds and is busy trying new systems, it is well to watch our language while making necessary criticism. Let us not forget the tens of thousands of brave men who gave their lives to preserve the nation that makes possible an open-university debate on the rule of law in its recent past.

Viewed from these highlighted debates, it is no gainsaying the fact that the institution<sup>42</sup> that allegedly ‘slaughtered the sacred cows of the rule of law’ ended up becoming its own casualty. Like J. P. Clark Bekederemo’s prophetic poem, *the Casualties*<sup>43</sup>, those who started the fires of under development, poverty, insecurity; and cannot put it out are also the casualties<sup>44</sup>. In the immortal words of Professor Armstrong, Nigeria, as at 1966, had only one really national institution: the Nigerian Army. In 1970, after the successful conclusion of the civil war, the same situation prevailed; and the Federal Military Government faced the task of building a national economy, a national educational system, a national judiciary and even a national government<sup>45</sup>. It was this task of nation building that the Nigerian Army failed to accomplish for over thirty (30) years until 1999 when the institution grudgingly turned over the reins of power to a civilian administration.

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<sup>42</sup> Folarin Shyllon and Olusegun Obasanjo, 1980, *The Demise of the Rule of Law in Nigeria Under the Military: Two Points of View*, 47

<sup>43</sup> JP Clark-Bekederemo, 1970, *The Casualties: Poems 1966-68*, Longman, London, lines 1-42. Armstrong referred to the Nigerian Army as the only ‘really national institution’ that survives the Nigerian civil war,

<sup>44</sup> Ibid lines 12-13

<sup>45</sup> Opcit @ 47

## 5.0 CONCLUSION

The magnitude of Nigerian power epilepsy is quite troubling<sup>46</sup> when the Africa's most populous nation's System Average Interruption Duration Index (SAIDI) and its System Average Interruption Frequency Index (SAIFI) are observed. While the SAIDI figure was not less than 1,000 hours per year (which is approximately 42 days within the entire year cycle), the SAIFI figure was not less than 600 interruptions per year.<sup>47</sup>

That Nigeria does not have security of electricity supply is certainly not just the paucity of fund in its power sector. The amount spent so far can provide the needed stable power if state actors, including President Olusegun Obasanjo, give due regards to Nigerian laws; especially the constitutional provisions governing the management and control of electricity in Nigeria. President Olusegun Obasanjo is just a sign post of how an average Nigerian obeys his municipal laws. Certainly, Nigeria has, in abundance, legislations on every conceivable issue of law; but many of these laws only exist in archives. It is not in contention that both governments and the governed habitually break Nigerian laws.

It is important to note that the worst form of corruption, in Nigeria, is the violation of the Constitution of the Federal Republic of Nigeria, 1999 which gave the federating units the exclusive preserve to manage and control, within its state, the distribution side of the power value chain. It is also important to note that stakeholders' respect for Rule of Law in the power sector can only reap one beautiful fruit: uninterrupted supply of electricity without *UP NEPA*. No amount of task force-other than the force of law- can salvage the power sector from eventual collapse.

Until all stakeholders in the power sector agree to implement the provisions of Item F, Part II, 2<sup>nd</sup> Schedule to the 1999 Constitution, their strenuous efforts at addressing the problems of power epilepsy will go to naught.

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<sup>46</sup> C Etukudor, *etal*, 2015, 'The Daunting Challenges of the Nigerian Electricity Supply Industry', *Journal of Energy Technologies and Policy*, Vol. 5, No. 9, 2015 [www.iiste.org](http://www.iiste.org) accessed on 15<sup>th</sup> September, 2018

<sup>47</sup> Nigeria's SAIDI/SAIFI Dichotomy was extremely high and totally unacceptable when respectively compared with internationally acceptable standards of 90–180 minutes duration of one interruption and 1 – 2 frequency of interruptions per year.