

**WE THE PEOPLE V THE NIGERIAN CONSTITUTION:  
AND THE GRUNDNORM IS...?**

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**INTRODUCTION**

The quest for a grundnorm raises an inquiry into the concept of legal theorising and dovetails into the presage of the normative value of law in society. Such quest cannot be rendered without considering the defining essence of a norm since its very validity lies in the existence of its normative functionality and as such it cannot exist in vacuo due to some transcendental conferment or logical manipulation. Hence, a solid foundation for a proposed analysis necessarily begins with a constructive introduction on law, not as the beauty of philosophy, renaissance of literature or as an instrument of sociological necessity but as an objective norm rendering an insightful perusal into the existing link between the legal system and the society creating such system. The Kelsenian grundnorm theory affords a rhetoric platform for raising the discourse as it flirts with an objective form of reasoning which engages a methodology that views the legal system (in this case, the Constitution) as a product of a much higher norm.

Any effort directed at affirming such link and reconciling the legal system to the society must necessarily confront the complexity of "what is law" with a resolve to provide a rhetoric of the least controversial sort. This paper attempts to commence with a dialogue from the Greek era of civilisation, a conversation between Alcibiades and Pericles from Xenophon's reminiscence of the intellectual sagacity of the Socratic age. The dialogue presents an examination of the law in quest for itself, not in abstraction but with an evaluation of possible societal circumstances where the law may not render such link between the system and society. In such instances, must the system conflict with society? In emphatic terms, should the 1999 Nigerian Constitution (the Constitution) be a higher norm or must it be subject to the people that render its meaning so that in instances of conflict, where the Constitution does not reflect the will of the people, it ought to be construed subject to the spirit of the people. A classic paradigm relates to the nature of welfare rights contained in the Constitution as directives of State policy which are non-justiciable for the people. If therefore an administration installed by the people goes against the directive policies (which forms the fundamentality of

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the existent social contract), should the judiciary construe the Constitution as supreme or refer to a higher norm from which the existing norm derives? This paper renders an analysis with strong inclination for a purposive evaluation of the link between the legal system and the society.

### THE DIALOGUE BETWEEN PERICLES AND ALCIBIADES<sup>1</sup>

- [1] **Alcibiades:** Please, Pericles, can you teach me what a law is?
- [2] **Pericles:** To be sure I can.
- [3] **Alcibiades:** I should be so much obliged if you would do so. One so often hears the epithet 'law-abiding' applied in a complimentary sense; yet, it strikes me, one hardly deserves the compliment, if one does not know what a law is.
- [4] **Pericles:** Fortunately there is a ready answer to your difficulty. You wish to know what a law is? Well, those are laws which the majority, being met together in conclave, approve and enact as to what it is right to do, and what it is right to abstain from doing.
- [5] **Alcibiades:** Enact on the hypothesis that it is right to do what is good? Or to do what is bad?
- [6] **Pericles:** What is good, to be sure, young sir, not what is bad.
- [7] **Alcibiades:** Supposing it is not the majority, but, as in the case of an oligarchy, the minority, who meet and enact the rules of conduct, what are these?
- [8] **Pericles:** Whatever the ruling power of the state after deliberation enacts as our duty to do, goes by the name of laws.
- [9] **Alcibiades:** Then if a tyrant, holding the chief power in the state, enacts rules of conduct for the citizens, are these enactments law?
- [10] **Pericles:** Yes, anything which a tyrant as head of the state enacts also goes by the name of law.
- [11] **Alcibiades:** But, Pericles, violence and lawlessness – how do we define them? Is it not when a stronger man forces a weaker to do what seems right to him – not by persuasion but by compulsion?
- [12] **Pericles:** I should say so.
- [13] **Alcibiades:** It would seem to follow that if a tyrant, without persuading the citizens, drives them by enactment to do certain things – that is lawlessness?
- [14] **Pericles:** You are right; and I retract the statement that measures passed by a tyrant without persuasion of the citizens are law.

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<sup>1</sup> Xenophon *The Memorabilia* trans HG Dakyns (2004) 15-17.

- [15] **Alcibiades:** And what of measures passed by a minority, not by persuasion of the majority, but in the exercise of its power only? Are we, or are we not, to apply the term violence to these?
- [16] **Pericles:** I think that anything which any one forces another to do without persuasion, whether by enactment or not, is violence rather than law.
- [17] **Alcibiades:** It would seem that everything which the majority, in the exercise of its power over the possessors of wealth, and without persuading them, chooses to enact is of the nature of violence rather than of law?
- [19] **Pericles:** To be sure. At your age we were clever hands at such quibbles ourselves. It was just such subtleties which we used to practise our wits upon; as you do now, if I mistake not.
- [20] **Alcibiades:** Ah, Pericles, I do wish we could have met in those days when you were at your cleverest in such matters.

### **PLEASE PERICLES... CAN YOU TEACH ME WHAT A LAW IS?<sup>2</sup>**

A consensus definition of law has remained as daunting and elusive as a global solution to political crisis. Observing the trend of legal theorising, it is evident that scholars have for centuries defined the law with recourse to societal exigencies.<sup>3</sup> Jurisprudential expositions like pieces of jigsaw have gradually sought to create a perfect picture yet with every conscious effort passed in time, debate, argument and research, the place of theory has remained a distant second to practical pedagogy.

What makes it daunting partly arises from the simple truth that law is beyond literature and the subjectivities of morality.<sup>4</sup> In the currency of this form, one must of necessity understand it with predilections to its institutional dynamics and not approach the subject with naive enthusiasm. An appropriate exposition does not just settle for Aristotle's aphorism that "law is reason free from passion"<sup>5</sup> neither does it conform to the vagaries of Socratic interrogations,<sup>6</sup> even though history has validated the intuitions of these men.

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<sup>2</sup> Xenophon (n 1 above) 15.

<sup>3</sup> M Freeman 'Law and Sociology' in M Freeman (ed.) *Law and Sociology* (2005) 4.

<sup>4</sup> See: HLA Hart 'Positivism and the separation of law and morals' (1958) 71 *Harvard Law Review* 593-629; HLA Hart *The concept of law* (1961); cf. J Raz *The authority of law: essays on law and morality* (2009) 44-45, ML Torre 'Law and morality: a modest assessment' in H Pauer-Studer *Norms, values and society* (1994) 113-130.

<sup>5</sup> E Baker (ed) *The politics of Aristotle* trans E Baker (1946) 146.

<sup>6</sup> See: TL Pangle 'Minos (translated by Thomas L Pangle)' in TL Pangle (ed.) *The roots of political philosophy: ten forgotten dialogues of Socrates* (1987) 53-66.

Likewise, to set the law only on a pedestrian of philosophy would be to subject a discussion on the law to the vagaries of abstract logic. The danger in this would be to consider the law with subjective possibilities. If therefore we cannot adopt a definition founded on syllogisms of reason, how then can we tackle the subject in the currency of its form? The likely answer would be to raise an inquiry from its purpose. In this attempt, it is pertinent to note that the ultimate goal of law is to create a system of order.<sup>7</sup> To deny this purpose would be to settle for the pernicious tendencies of anarchism. Hence in the dialogue between Pericles and Alcibiades in [1], when Alcibiades asked Pericles to tell him “what a law is,” he recognises that there ought to be a purpose and that purpose justifies the normative content of the law.

Pericles’ response in [4] brings to mind the nature of democracy and suggests that laws are decisions by a majority. However, his answer does not set out a definite purpose in justification of the normative content of the law; hence, Alcibiades probes further in [5] that on what hypothesis are these enactments made? On the hypothesis of what is good or what is bad? Pericles, in response, clarifies in [6] “...not what is bad.”

Still, Alcibiades raises yet another crucial concern in light of Pericles explanation that focused on a system of democratic governance which was the Athenian form of governance and according to Donald Kagan, evolved in the “decade before 500 BC.”<sup>8</sup> In [7], Alcibiades questions an inferential point as to whether the system of government should matter in describing the law. In [8], Pericles replied in the negative, concluding that the law is whatever enactment the ruling power makes. Hence, Pericles shifts from the purpose of the law and from the question earlier asked by Alcibiades in [5] on what hypothesis the enactment must necessarily conform to in justification of the normative content of law. Pericles speaks of the “ruling power” that can be qualified in sundry synonymic phrases, such as: a minority over a majority, the fortunate in society over the unfortunate, hence, contradicting his earlier democratic stance. Alcibiades in [9] seemed to wittily tackle his contradictive stance as he sought clarity, stating that: “then if a tyrant, holding the chief power in the State, enacts rules of conduct for the citizens, are these enactments law?”

The primary inference of this question, in an exemplary illustration, brings the nature of the Constitution of the Federal Republic of Nigeria 1999 (the

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<sup>7</sup> LD Barnett *The place of law in society: the role and the limits of law in society* (2011) 3; R Pound *Jurisprudence: volume II* (1959) 5-6.

<sup>8</sup> D Kagan *Pericles of Athens and the birth of democracy* (1998) 1.

Constitution) into a critical discuss at this point. Briefly the history of the Constitution would be discussed, while the validity of Alcibiades question would be argued.

### **THE 1999 NIGERIAN CONSTITUTION: A DECISION OR AN IMPOSITION?**

Before the transition from military to civilian rule in 1999, the military Head of State at the time, General Abdulsalami Abubakar established the Constitution Debate Coordinating Committee (CDCC) for the creation of a new constitution<sup>9</sup> to herald a new phase of democratic rule.

The CDCC was charged with the mandate of consulting Nigerians in the making of a constitution. The draft Constitution bore close semblance with the 1979 Constitution.<sup>10</sup> In justification, the CDCC stated that there had been a consensus agreement by Nigerians that the 1979 Nigerian Constitution, which had also been a military promulgation,<sup>11</sup> should be adopted.<sup>12</sup> The CDCC had barely two months for consultations, which, judging from the Nigerian population estimated at over 108 million at that time<sup>13</sup> was evidently unrealistic. Notwithstanding, in its final report, the CDCC acknowledged consultation with Nigerians in the making of the Constitution<sup>14</sup> even when leading government oppositions were not given invitations to the regional consultations.<sup>15</sup>

Abdulsalami Abubakar, on 5 May 1999, promulgated Decree No. 24 of 1999<sup>16</sup> - the Constitution, which in the nature of its origin has been described as a parting gift<sup>17</sup> from the military after years of brutal military rule.

Besides the point that the constitution was a huge replica of the 1979 Nigerian Constitution, the human rights provisions in Chapter IV of the Constitution is a known replica of the 1950 European Convention on Human Rights.<sup>18</sup>

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<sup>9</sup> I A Ayua & DCJ Dakas 'Federal Republic of Nigeria' in J Kincaid & GA Tarr (eds) *Constitutional origins, structure and change in federal countries* (2005) 247.

<sup>10</sup> C Mwalimu *The Nigerian legal system: public law, Volume 1* (2005) 201.

<sup>11</sup> ME Akpan 'The 1979 Nigerian Constitution and human rights' (1980) 2(2) *Universal Human Rights* 23, 29.

<sup>12</sup> TI Ogowewo 'Why the judicial annulment of the constitution of 1999 is imperative for the survival of Nigeria's democracy' (2000) 44(2) *Journal of African Law* 135,145.

<sup>13</sup> 'Nigeria' [http://www.uneca.org/aisi/nici/country\\_profiles/Nigeria/nigeriab.htm](http://www.uneca.org/aisi/nici/country_profiles/Nigeria/nigeriab.htm) (accessed 1 May 2012).

<sup>14</sup> Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24 of 1999.

<sup>15</sup> JO Ihonvbere 'How to make an undemocratic constitution: the Nigerian example' (2000) *Third World Quarterly* 343, 350.

<sup>16</sup> Constitution of the Federal Republic of Nigeria (n 14 above).

<sup>17</sup> Y Farounbi 'A people's constitution' *Saturday Tribune* 1 May 2010.

Reverting to Alcibiades question in [9], the democratic legitimacy of the Constitution, in light of the circumstances of its birth, is questionable for certain reasons. First, the Constitution relied heavily on the 1979 Nigerian Constitution where members of the constitution drafting committee were handpicked by the military.<sup>19</sup> In furtherance, the process in which the Constitution was made did not reflect the nature of a democratic constitution as a living document that should consider a nation's past but culture its future in a process driven constitutional making approach.

Moreover, judging from the history of Nigerian politics, the military regimes were famous for widespread brutality and dictatorship. The nature of this widespread brutality and resultant consequences of violence and flagrant abuse of fundamental rights made the government detached from the dynamics of reality.<sup>20</sup> In the currency of this systemic avoidance of reality, the military wielded arbitrary power. The level of this detachment was significantly evident in the way in which the Constitution was made,<sup>21</sup> particularly in the low level participation of the masses and eventual assumption of the military that it was reflective of the intention of the masses. However, while these actions may seem like inadvertent omissions, though they are fundamentally fatal, a closer look at the composition of the CDCC reflects that the actions of the military cannot be excused as sheer inadvertence. The members of the CDCC were choicely selected by the military.<sup>22</sup> According to Ihonvbere, "the presence of General Sani Abacha's legal adviser Auwalu Yadudu on the committee served to erode its credibility in the eyes of Nigerians."<sup>23</sup> There were no extensive deliberations and no inclusive participations and this eroded the legitimacy of the Constitution.

Hence, in Alcibiades question, there is a comprehensible wisdom that any law-making-approach outside an open, transparent, genuine, process-driven deliberative approach is an imposition by a tyrant. Therefore it cannot be called law because law ought to reflect a decision by the people and not an imposition by a tyrant. An imposition of an enactment erodes the purpose of the law.

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<sup>18</sup> C Heyns 'African human rights law and the European convention' 11 (1995) *South African Journal on Human Rights* 252, 257.

<sup>19</sup> JO Ihonvbere 'Reconstructing the state: constitutionalism as public policy in Africa' in KA Kalu (ed) *Agenda setting and public policy in Africa* (2004) 248-249.

<sup>20</sup> Ihonvbere (n 15 above) 349.

<sup>21</sup> See: Cyril Obi 'Last card: can Nigeria survive another transition?' (2000) 5(2) *African journal of political science* 67, 79.

<sup>22</sup> AR Mustapha 'The Nigerian Transition: third time lucky or more of the same?' 26(80) *Review of African Political Economy* 277, 288.

<sup>23</sup> Ihonvbere (n 15 above) 350.

However, Pericles in [10] replies Alcibiades stating that even if such law is made by a tyrant, so long as it was enacted, it is law. His response, in light of the discussion, demonstrates a dangerous ignorance on the purpose of law, and Alcibiades in [11] tries to set him on track, inquiring that if he reasons so, how then should violence and lawlessness be defined?

Pericles subsequently retracts his response of [10] in [14] but clearly his subjective ignorance further illustrates the danger of examining the law without an inquiry into its purpose. In such situations where the purpose of law is not made primary justification for the existence of the law, there may be resultant conflicts, subjective interpretations and selective obedience of the law.

The imposition of the Constitution has raised questions on ownership<sup>24</sup> and legitimacy,<sup>25</sup> and has led to calls for reforms<sup>26</sup> which further lends credence to the conversation between Alcibiades and Pericles in [15] and [16] and clearly justifies Pericles assertion in [16] that “anything which any one forces another to do without persuasion, whether by enactment or not, is violence rather than law.” For the purpose of further discourse, the essence of the law would be regarded as a need for protection of societal order and welfare.

**THOSE ARE LAWS WHICH THE MAJORITY, BEING MET TOGETHER IN CONCLAVE –ENACT<sup>27</sup>**

An inference may be drawn from Pericles’ question in [4] which lends credence to the fundamental reason for the creation of the society in terms of Locke’s exposition on social contract.<sup>28</sup> Within this context, the essence of the law as a need for societal order is equally fortified. In line with this reasoning, the abstract thought of an imaginary link between the society and the legal system becomes apparent and less fictional.

An essential theory that unveils this reality is Kelsen’s theory of norms. In [4] when Pericles stated that “those are laws which the majority, being met together in conclave, approve and enact...” he recognises that the law is not the creator of itself rather it originates from the people, hence supporting Kelsen’s postulation on the hierarchy of norms. In this defined context, the relationship between the

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<sup>24</sup> AB Bah *Breakdown and reconstitution: democracy, the nation-state and ethnicity* (2005) 128; J Ibrahim ‘Nigeria: issues in the Constitutional review process’ *Daily Trust* 23 April 2012.

<sup>25</sup> J Azania ‘1999 Constitution remains illegitimate – Adegbuyi’ *Punch* 10 July 2008.

<sup>26</sup> A Akosile ‘Nigeria: Review – stakeholders seek consensus constitution’ *This Day* 8 January 2008.

<sup>27</sup> Xenophon (n 1 above) 16.

<sup>28</sup> See: J Locke *The second treatise of government* (1690).

people of Nigeria and the Constitution would be analysed but first, a concise statement on Kelsen's theory is imperative.

In Kelsen's hierarchy of norms, he elucidates the existence of a higher norm.<sup>29</sup> Kelsen observed that every norm necessarily derives from a higher norm and there comes a point where in tracing the norms one is ultimately confronted with extraneous inquiries.<sup>30</sup> This higher norm, he terms: *grundnorm*.<sup>31</sup> However, the validity of this thinking may be tested simply by referring to the preamble of the Constitution. The preamble reads:

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-African solidarity, world peace, international cooperation 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.

To qualify as *grundnorm*, Kelsen asserts that if it is shown that the basic norm derives validity from a higher norm, then that basic norm cannot be regarded as *grundnorm*. In the currency of Kelsen's theory, the preamble to the Constitution clearly reflects a derivation captioned in the opening lines of the Constitution which states: "We the people..."

A primary question is therefore, what happens when a basic norm conflicts with the *grundnorm*? More definitively, this question arises from the nature of Chapter II of the Constitution – "the Fundamental Objectives and Directive Principles of State Policy" which sets out certain primary welfare rights, which by the provision of section 6(6)(c) read together with the preamble to the Constitution, are non-justiciable<sup>32</sup> on account of the will of the people. The irony of this assertion evidently mocks the contradiction that the people of Nigeria would create a Constitution to exclude the justiciability of primary welfare such as adequate health care<sup>33</sup> and education.<sup>34</sup>

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<sup>29</sup> F Adaramola *Basic jurisprudence* (2008) 129.

<sup>30</sup> D Lloyd *The idea of law* (1964) 194-195.

<sup>31</sup> H Kelsen *Introduction to the problems of Legal Theory* (1992) 56-60.

<sup>32</sup> See: O Okere 'Fundamental objectives and directive principles of state policy under the Nigerian Constitution' (1983) 32(1) *The international and comparative law quarterly* 214-228.

<sup>33</sup> Section 17(3)(d) of the Constitution.

<sup>34</sup> Section 18(1) of the Constitution.

However, while it would be extreme to conceive of the Constitution as an outright joke in this regard, it is imperative to note that the Constitution is one of many other such Constitutions in Africa. Evidently, the point which is significant is that there is a contradiction that needs to be resolved. Hence, a discussion on a way forward would be advanced.

**“SUBTLITIES... TO PRACTICE OUR WITS UPON”<sup>35</sup>**

The pertinent issue in light of the discussion on the way forward is to consider viable options in resolving the contradiction. For this purpose, two solutions would be advanced and discussed in turn.

**DECONSTRUCTING THE CONSTITUTIONAL FIREWALL OF NON-JUSTICIABILITY**

One viable way of resolving this contradiction is constitutional review to ensure justiciability of Chapter II of the Constitution. The Constitution, although rigid is amendable. Section 9 of the Constitution provides for the mode of altering the constitution. By virtue of Section 9(2) of the Constitution, a proposal for an alteration of Section 6(6)(c) of the Constitution

shall not be passed in either House of the National Assembly<sup>36</sup> unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly<sup>37</sup> of not less than two-thirds of all the States.

The Nigerian legislature is saddled with the ultimate responsibility of following through with the process of constitutional amendment; however, as there have been a political culture of public scepticism and mistrust of the legislature<sup>38</sup> and the constitutional drafting committees, it is proposed that for the purpose of amendments, a “check system” should be created for proper guidance and enhanced transparency. This check system would be regarded as a Summit of Savants.

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<sup>35</sup> Xenophon (n 1 above) 17.

<sup>36</sup> The Senate and the Federal House of Representatives constitute the National Assembly of Nigeria.

<sup>37</sup> The nomenclature for the legislative houses of the states in Nigeria.

<sup>38</sup> D Anele ‘National assembly as corruption incorporated Nig. PLC’ *Vanguard* 25 March 2012; ‘Nigeria: National Assembly and allegations of corruption’ *Vanguard* 27 March 2012.

## **THE SUMMIT OF SAVANTS: A KEY INSTITUTION IN FOSTERING THE WILL OF THE PEOPLE**

The primary role of the Summit of Savants (the Summit) would be to advise the National Assembly and the constitutional drafting committee. It is imperative to state that the role of the Summit is neither a duplication of the roles of the National Assembly nor a duplication of the constitution amendment committee.

The Summit should be comprised of people with expertise in those areas of the Constitution that require amendments. It is strongly encouraged that the government should establish the Summit statutorily so that its mandates would be defined. The Summit must be comprised of people with “high moral integrity and relevant expertise.” As the issue of corruption has been a bane to democratisation in Nigeria,<sup>39</sup> members of the Summit should agree to extensive scrutiny of financial and other relevant records before and after the amendment processes. Members of the Summit should be selected based on the principle of federal character<sup>40</sup> to ensure diversity; however, the Summit must be independent of government interferences.

In furtherance, it is imperative to note that the Summit is not to usurp the functions of the National Assembly or the constitution amendment committee; rather it is to provide support, report on progressive measures, provide critical views on the amendment processes, research on the implications of the amendments and separately harness the opinion of the Nigerian public.

In relation to Chapter II of the Constitution, the Summit must be guided by the notion that its primary responsibility is to reaffirm the will of the people and ensure that critical strategies must be contemplated in securing not only the justiciability of welfare rights but also an effective implementation.

### **CIRCUMVENTING THE CONSTITUTIONAL FIREWALL OF NON-JUSTICIABILITY**

Another viable way of resolving this contradiction lies in the controversial principle of judicial activism. Judges in Nigerian Courts have often displayed high level reluctance in exhibiting any tendency that may taint the legacy of judicial conservatism.<sup>41</sup>

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<sup>39</sup> See: IS Ogundiya ‘Corruption: the bane of democratic stability in Nigeria’ (2010) 2 (4) *Current Research Journal of Social Sciences* 233-241.

<sup>40</sup> Section 14(3) of the Constitution.

<sup>41</sup> See: Okogie and others v Attorney General of Lagos State (181) 2 NCLR 350 (*Okogie*); International Bank for West Africa Ltd v Imano (Nigeria) Ltd & 1 Or. (1988) 2 NSCC 245; The Registered Trustees of National Association of Community Health Practitioners of Nigeria & ors v Medical and Health Workers Union of Nigeria (2008) 2 NWLR (Pt. 1072) 575.

In *Fawehinmi v Abacha*,<sup>42</sup> the Supreme Court refused to apply the African Charter on Human and Peoples Rights 1981 (the African Charter) as a result of the Nigerian dualist system in Section 12(1) of the Constitution which requires domestication before application of international law.

Further, in *Okogie*, the Court of Appeal displayed reticence in recognising Chapter II of the Constitution as justiciable stating that the provisions in Chapter II of the Constitution were mere directives of state policy and non-justiciable.

The question of judicial activism has undoubtedly raised schisms. The reason is because controversies stem from perceptive differences as to the function of the judiciary within the society. Protagonists of Judicial restraint hold very strongly the orthodox view that judges are to interpret the law as it is. The crux of their contention visualises the law as a script which the judges are to verbalise in the strict sense. On the other hand, judicial activists<sup>43</sup> recognise the necessity of expanding individual rights, going beyond the precinct of the law so far as such efforts are directed towards social order and a reflection of the people's will.<sup>44</sup> For this assertion, judicial activists have been heavily criticised.

An instance of such tension between activism and restraint is made manifest in the ideological discrepancy between legal positivists in sociological jurisprudence. While, English legal positivists, the likes of Jeremy Bentham, strenuously disapprove of judicial activism, German legal positivists, such as Philipp Heck canvass judicial legislation. Heck's writing suggests that judges cannot afford to be mere robots in a slot machine. Activists argue that the legislator wants to strike a balance within a conflicting society; however he cannot handle the necessary details unless judges assist as active partners.<sup>45</sup> Hence, judges should expand the scope of rules in extensive legal interpretation.

In furtherance, since the Fundamental Rights (Enforcement Procedure) Rules of 2009 (Enforcement rules),<sup>46</sup> made by the former Chief Justice of Nigeria, recognises the African Charter and enjoins the courts to expansively interpret the provision of the African Charter in cases before the courts,<sup>47</sup> the courts can apply

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<sup>42</sup> *Fawehinmi v Abacha* (2000) 6 NWLR (Part 660) 228.

<sup>43</sup> See: SC Brubaker 'Reconsidering Dworkin's case for judicial activism' (1984) 46(2) *The Journal of Politics* 503-519.

<sup>44</sup> See: C Wolfe *Judicial activism: bulwark of freedom or precarious security* (1997) 27.

<sup>45</sup> Adaramola (n 29 above) 262.

<sup>46</sup> Fundamental rights (enforcement procedure) rules, available at <http://www.nigerianbar.org/a/images/NewFREPRules%20.pdf> (accessed 1 May 2012).

<sup>47</sup> See: Preamble & Order II Rule I of the Enforcement rules (n 46 above).

the welfare rights in Chapter II of the Constitution with reference to the African Charter.

## CONCLUSION

Without an incisive understanding of the purpose of the law, it is easy to fall into the vacillating elocution of Pericles. While Pericles was merely entrapped in his wavering eloquence, the actual realities of his wavering positions have – for decades – been constant occurrences in Africa. On the contrary, Alcibiades reasoning posits a reactionary solution to these wavering positions. His inquiry reveals that it is essential to know what the law is and from the dialogue, two reasons stand out clear. First, it is impossible to abide by the law if the law is not understood; secondly, the law cannot be understood without an inquiry into its purpose, the essence of its creation and its focus.

The preamble to the Constitution clearly reflects that the people of Nigeria are the focus of the law. Kelsen's theory in parallel reasoning with Pericles' assertion that "those are laws which the majority, being met together... enact" reverberates the importance of the will of the people. Following from the discourse, any contrary imposition is not law but violence. The nature of this violence is evidently not distant from the violence sought to be avoided by the creation of a social contract. Hence, when certain sections of the law providing for the welfare of the people within the society they created are not legally nor institutionally guaranteed, violence and not law is incited.

The solution, however, is to positively establish the link between the system of society and the will of the people in the society. In relation to Nigeria, there can either be a constitutional amendment of Chapter II of the Constitution or a progressive interpretation of these provisions of the Constitution. The interpretation must take into account the fact that fostering welfare rights preserves the social order of the society.

Nevertheless, the recognition of the will of the people as a higher norm does not lie solely with the Courts. Both the executive and legislative arms of government must ensure that the fundamental objectives and directive principles of state policy are complied with. Hence, in the administration of justice and structuring of political order, the will of the people must be reflected. In this reflection, the purpose of the law in the society is defined.