CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background of the Study

In any democratic political system properly so called, the supremacy of the people is not contested. They make their laws through trusted and elected representatives who in turn are accountable to the people. The enforcement and interpretation of the said laws are exercised by the people through the executive and judiciary enabled by the same people. Hence, in a representative democracy as the type practiced in Nigeria, three arms of government are essentially discernible, the executive, the legislature and the judiciary. Through the political devices of checks and balances[1] added to the democratic doctrine of separation of powers[2] within the ambience of the rule of law, these three arms of government are securely brought into an intimate and co-operative appointment for the common good of the people. As a matter of fact, a democratic state is an organic polity in the sense that its operative organs are all connected and interconnected with each other in the smooth delivery of democratic ideals.

Whenever any of the vital organs of a democracy begins to dominate others or whenever others begin to dominate one, the delicate balance will tilt in favour of anarchy. For instance, the executive may sometimes disregard the legislature and the judiciary because it has the coercive instruments of the state. In this arbitrary isolation of itself against others, the executive turns democracy into a dictatorship to the embarrassment of the entire polity. This affects democracy.

The Nigerian scenario is not different from the above description. In the face of some anti-democratic factors, the Nigerian government had appeared to be grossly undemocratic in practice because of executive usurpation of powers and its refusal to respect the constitutional powers of the legislature and the courts. The situation became worse at those times when the judiciary in Nigeria appeared to have been beaten to submission. Given the circumstance under which it worked during those period, the judiciary, which is supposed to be the hope of the common man and the last resort of victims of injustice, became impotent. A little threat or

[1] *Checks and balances is a concept describing the monitoring device of each of the three organs of government against the other in order check excesses leading to arbitrary use of power.*

[2] Separation of powers refer to the sharing of powers between the three organs of government so as to ensure that the same persons or body of persons should not make laws, enforce them and pass judgment.

financial inducement resulted in volumes of passive judgment[3] by the court (at least the lower courts) and the unjust had their way to the detriment of the common people and our nascent democracy. There is an improvement in the fourth republic. This work observes that these anomalies are occasioned by interference in the exercise of Judiciary functions by the other organs of the government especially the executive. This work therefore, perceives amongst other things, the need for an independent judiciary to curb the interference in the exercise of judicial functions by the other organs of the government.

1.2 Purpose of Study

This study has the following aims and objectives:

a. To examine the concept of separation of powers and how far it is practiced in Nigeria.
b. To determine the roles of the judiciary under a constitutional democracy.
c. To examine the various challenges facing the Nigerian judiciary under a constitutional democracy.
d. To suggest possible and practicable solutions to help address these challenges.

1.3 Statement of Problems/ Research Questions

Due to various factors which hinder the judiciary in their exercise of power especially interferences from the other organs of the government, the judiciary is often times, passive instead of active, in the exercise of their function. Apart from that, there are some constraints which equally hinder the judiciary in their performance of duty.

The study therefore seeks to address the following issues:

a. How is the doctrine of separation of powers practiced in Nigeria?
b. What are the roles of the judiciary under a constitutional democracy from 1999 - 2015?
c. What are the roles performed by the judiciary under the various republics?

[3] It was Lord Denning who described as timorous judges those who lack courage to go beyond the letters of the law and to engage with the spirit of the law; those who are afraid to take generous judicial initiatives in service to justice. The judgment they read is passive in nature as against the active postures of the courageous bench men.

d. Is the Nigerian judiciary in exercise of its functions passive or active?
e. What are the various challenges facing the Nigerian judiciary under a constitutional democracy?
f. What efforts have been made to address these problems/challenges?
g. What possible and practicable solutions can be suggested to help address these problems/challenges.

1.4 Scope and Limitations of the Study

The main focus of this study is the role of the courts under the constitutional democracy in Nigeria from 1999-2015.

1.5 Significance of Study

In every democratic government some separation among the three organs of governmental powers is essential to obviate the arbitrariness that could result in the concentration of power in one arm of government. If the judiciary is unable to limit the powers of the other two organs of government, then regularity of norms, peace, order and good government would much sooner than later yield to arbitrariness, anarchy and disorder with dire consequences for the polity. To this end, this study recommends amongst other things that there should be a judiciary that exercises its functions/powers without interference from the other two organs. The suggestions and recommendations in this study will assist in achieving same.

1.6 Research Method/Methodology

This study placed reliance more on information gathered from library materials, such as textbooks, statute books and law reports, domestic and international journals. Reliance is also placed on internet sourced materials and on line journal articles. The presentation approach will be analytical, critical, comparative and expository.

1.7 Literature Review

This work does not pretend to be a pioneer work on the subject of the courts and constitutional democracy in Nigeria hence reliance is placed on a plethora of already existing works on the subject. Sani[4] in assessing how the judiciary has fared in driving Nigeria along the path of rule of law under a constitutional democracy posits that the judiciary has recently demonstrated uncommon zeal in leading the charge against every form of arbitrariness. And particularly that the Supreme Court has lately been acting with so much spine quite unlike under the military days when the judiciary was treated with contempt. He explained it further by citing a lot of decided cases where the judiciary shows great activism in delivering its judgments. He further posited that despite the euphoria which has greeted the recent judgments of the apex court, thereby once again fostering confidence in the judiciary as the last hope of the common man, there are still some constraints(some of which were inherited from the long period of military rule) which are still inherent in our system. He gave examples as corruption, delay in our justice delivery system, disobedience of court orders by the executive arm of the government. He posited further that the Nigerian state has to embark on a re-thinking of the judiciary and the judicial system. He however recommended the appointment of capable and competent hands to the bench, training of judicial officers, that the appointment and removal of judges should not be at the pleasure of the executive but under the due process of law, and improvement of the working condition of the judges.

Shehu[5] posited that the Nigerian judiciary has come a long way from the colonial era to the present and it ranks among the best having produced some of the finest jurists of the present generation. He stated that it has often succeeded various forms of government that have been witnessed in the country from the first republic to the present time. That although it may be that it did not operate under the popular rule of law environment during the military interregnum, it however stood its ground against dictatorial tendencies of the military dictatorship as epitomized in the judicial interpretation of ouster clauses and other draconian military decrees and edicts. He posits that while the executive and the legislative arms of government were characteristically the first casualties of military interference in governance, the judiciary always remained, though not without some bruises. He insisted that this accounts for one of the reasons for the envious position and prestige of the judiciary until

[4] AM Sani, 'The Nigerian Judiciary Trends Since Independence',(2009) UILJ Vol. 5, No 1 ,218 -235

[5] AT Shehu, 'Suspension of Hon. Justice Isa Ayo Salami: Implications for Rule of Law, Judicial Independence and Constitutionalism' in AI Abikan, et al, (ed), *Nigeria Judiciary: ContemporaryIssues in Administration of Justice*: Essays in Honour of Hon. Justice Isa Ayo Salami (Ilorin:UNILORIN Press,2013) pp 35-59

very recently when some of the malaise of the Nigerian society, corruption in particular and partisanship, surreptitiously crept into the judiciary leaving its prestige, sacredness and independence almost extricated. He however recommended independence of the judiciary as an institution and that of its officers as same is paramount and essential to guarantee effective, efficient and unbiased justice delivery system.

Musdapher[6] in describing the Nigerian Judiciary as the bastion of constitutional democracy posited that the success or failure of our young democracy largely depends on our judicial system. He stated further that there are a lot of challenges that the judiciary grapples with, which include the lack of independence of the judiciary, especially at the state level, in terms of funding, political manipulation of the process of appointment and removal of judges by some state chief executive and their respective Houses of Assembly; delays in the administration of justice occasioned in part by institutional limitations and incapacities; and corruption.

Anton Bosl et al[7] posited that the Constitution regulate and define the distribution of public power among the various institutions of state, whether central, regional or local. Constitution usually determine the limits of governmental authority and regulate interactions between the state and the country' citizens. The motion of the rule of law implies a judiciary sufficiently independent of the legislative and the executive to ensure that the country is governed according to the principles of the constitution. A constitutional democracy exists when these rules and principles are followed consistently.

Busola Ojumu [8]in describing constitutional democracy stated that the authority of the majority is limited by legal and institutional means so that the rights of individuals and minorities are respected. He posited that in this type of democracy, how the people are to be ruled and governed are stated in the constitution. That constitutional democracy is the type which operates from and according to the constitution of the states.

Due to the relevance of the views of the above writers on the topic, their works are copiously relied on by the researcher.

[6] D Musdapher, 'The Nigerian Judiciary: Towards Reform of the Bastion of Constitutional Democray', A paper delivered at the Nigerian Institute of Advanced Legal Studies, Abuja on 10th November,2011, pp. 485-514
[7] A Bosl et al, *Constitutional Democracy in Namibia*,(Windhoek: Macmillian Education Namibia, 2010) p. V
[8] htlps //goggleads.g.doubleclick accessed on 12/9/16

1.8 Definition of terms

1.8.1 Democracy

The word "democracy" is derived from a combination of two **Greek** words "demos" meaning people and "Kratia" meaning "rule" or "government". Democracy is a government of the people, who participate in government either directly or through representatives. Democracy is a representative government.[9] It is however defined in the Blacks Law Dictionary[10] 'as that form of government in which the sovereign power resides in and is exercised by the whole body of free citizen directly or indirectly through a system of representation as distinguished from monarchy, aristocracy or oligarchy'. This definition is too sweeping as it does not prescribe or define the system of representation through which the people exercise their sovereign power. Would a system of representation by nomination and selection, which may satisfy the above definition, qualify a polity where this is practiced as democratic?

The popular definition of democracy is that of President Abraham Lincoln of the United States of America, who defined it as 'government of the people, by the people, for the people'[11]. This definition has not really given a picture of what democracy is. First of all, it does not define the people (whether the minority or majority). Secondly it does not specify the *modus operandi* by which this government is run.

According to E Schattschneider, 'democracy is a competitive political system in which competing leaders and organization define the alternatives of public policy in such a way that the public can participate in the decision making process.[12] In this definition, emphasis is laid more on leaders than the people. Moreover the ways, the alternatives of public policy are defined is not determined. Apart from the failure of the definition to define the public (minority or majority) that would participate in the decision making process, the level of their participation is not also prescribed.

In the Encyclopaedia Americana[13], democracy is viewed 'as a form of government in which the major decisions of government or the direction of policy behind these decisions rest directly or indirectly on the freely given consent of the majority of the adults governed'. This

[9] E Malemi,*The Nigerian Constitutional Law (*Lagos: Princeton Publishing Co., 2006) p.38
[10] BA Garner, *Blacks Law Dictionary* (9th edn, St Paul Minn :West Group Publishing Co.2009) p. 84
[11] P Oluyede, *Constitutional Law in Nigeria* (1ST edn, Ibadan: Evans Brothers Nigeria Publishers Limited 1992) p.15
[12] Y Osinbajo & A Kalu, *Democracy and The Law* (Lagos: Federal Ministry of Justice 1991) p. 3-4
[13] *The Encylopeadia Americana (International Edn, Dandury: American Corporation International Headquarters 1978)* p. 684

definition, although it appears more comprehensive than the others considered above, is lacking in the fact that it has no provision on how this free consent of majority of the adult is given. Would it be by election or selection?

The last two definitions of democracy represent the socialist and capitalist perception of democracy respectively. While the later emphasizes on political freedoms but does not emphasizes on economic justice,[14] the former emphasizes on the ability of the leaders to make policies to guarantee and provide the economic security for the people, without according the people wide political freedom.

The writer therefore defines democracy as a form of government in which major decisions of government or the direction of the policy behind these decisions are made directly or indirectly through election at definite intervals by the freely given consent of the majority of the adults governed. The phrase freely given consent entails that the individual electorate should exercise his free will of choice through free and fair elections without any external influence whatsoever. The implication of the presence of freely given consent draws attention to the difference between ancient democracies which stressed only majority rule as a validating principle and modern democracies which since the birth of the American Republic have stressed the operating presence of inalienable rights.[15] There are various conditions under which it could be inferred that there is freely given consent in a polity. They include: when there is no physical coercion or threat of coercion employed against the expression of opinions; when there is no arbitrary restriction placed on freedom of speech, press or assembly; where there is no monopoly of propaganda by the ruling party; and where there is no institutional control over the instrument or facilities of communication.[16] These are the minimal conditions and in their absence a plebiscite even if unanimous is not democratically valid.[17]

1.8.2 The Court

According to Blacks law Dictionary,[18] court is a governmental body consisting of one or more judges who sit to adjudicate dispute and administer justice.

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[14] Osinbajo, *op cit,* p.4
[15] *ibid*
[16] Encyclopeadia, *op cit, p. 685*
[17] *ibid*
[18] BA Garner, *Blacks Law Dictionary* (9th edn, St Paul, Minn:West Publishing Company, 2009)p.405

In his book[19] Nwabueze gives a broader definition as follows: 'The court refers to the whole body of judges who preside at the courts. The term therefore embraces judges of the superior courts and those of the inferior courts- magistrates and district judges.'

1.8.2a Judiciary

Judiciary may be defined simply as a system of courts of law and the judges. This definition therefore includes, in this regard, any person duly appointed to preside over a cause or matter. It simply means the court system in Nigeria.

1.8.3 Election

Black's Law Dictionary [20]defines election as the process of selecting a person to occupy a position or office. The Advanced Learners' Dictionary of Current English[21] defines the word election thus: the process of choosing a person or a group of people for a position, especially a political position by voting.

The New Webster's Dictionary of the English Language[22] defines election as the act or process of electing especially of choosing by vote. Simply put, an election is the process of determining the person to occupy an elective post. It is the process or act of choosing people for office especially political office by voting.

It is trite law that the concept of "election" denotes processes constituting accreditation, voting, collation, recording on all relevant INEC Forms and declaration of results. The collation of all results of the polling units making up the wards and the declaration of results are therefore constituent elements of an election as known to law.

The courts have defined election in line with the Electoral Act as consisting of so many factors…. Salami JCA in *Ojukwu v Obasanjo*[23] defined election as including "……. Delimination of constituency, nomination, accreditation, voting itself, counting, collation and

[19] BO Nwabueze, *Machinery of Justice in Nigeria (London: Butterworths,1963)* p.262
[20] BA Garner, *ibid* p. 236
[21] AS Hornsby, *Advanced Learners Dictionary of Current English* (6th edn, Oxford: Oxford University Press, 2000) p. 347
[22] M Agnes*, The New Webster's Dictionary of the English Language* (USA: Pocket Books Publishers, 2003) p. 404
[23] *(2004) 1 EPR 626.* Also INEC & ANOR v Ray & Ors (2004) 2 LRECN 37 at 44 CA.

return or declaration of results". In *Ojukwu v Yar' Adua,*[24]the court defined election as a process of selecting a person to occupy a position or office usually a public office. Equally, the word "election" in the context in which it is used in *section 137(1)(b) of the 1999 constitution,* means the process of choosing by a popular vote a candidate for a political office in a democratic system of government.

1.8.3.1 Interpretation of Election

In *section 156 of the Act*,[25]election means any election held under this Act and includes a referendum.

1.8.3.2 General Election

The Blacks Law Dictionary [26]defines General Election as

> an election which is held throughout the entire state or territory for the choice of a national State, Judicial, Municipal, Country or township official required by law to be held regularly at a designated time to fill a new office or a vacancy in an office at the expiration of the full term thereof.

Mohammed, JSC in *Attorney General of Abia State v Attorney General of the Federation* [27] stated that: "The Constitution did not define the word general election, but the Electoral Act 2002 (now 2010 as amended) which governed the election into various political offices defined the term General Election as: an election held in the Federation at large which may be at all levels, and at regular intervals to select officers to serve after the expiration of the full term of their predecessors.[28]

[24] (*2009) 12NWLR Pt.1154) 50 SC 23*

[25] Electoral Act, 2010 (as amended)
[26] BA Garner*, op cit,* p. 536
[27] *9 NSCQR 670 at 791-792*
[28] *Electoral Act, 2010 (as amended)*

1.8.3.3 Primary Election

A primary election is an election by the voters of a ward, precinct, or other small district belonging to a particular political party, of representatives or delegates to a convention which is to meet and nominate the candidates of their party to stand at an approaching municipal or general election.[29]

1.8.3.4 Bye Election

Bye election is a special election held between general elections to fill a vacancy.[30]It is a special election between regular elections.

1.8.3.5 Electoral Dispute

Blacks Law Dictionary[31] defines electoral as a method by which a person is elected to public office, the taking and counting of votes. The Advanced Learner's Dictionary of Current English [32]defined dispute as to question whether something is true and valid.

Electoral Dispute therefore means a controversy, debate, an argument, a difference of opinion, a heated contention that arose out of the process of selecting officers to serve after the expiration of the full terms of their predecessors, controversies that arose out of the process of and conduct of an election.

1.8.4 Political Parties

Political parties have been variously defined by authors and statutes. Edmund Burke defined a political party as a group of men who had agreed upon a principle by which the national interest may be served. It has equally been described as an organized group of individual seeking to seize the power of government in order to enjoy the benefit to be derived from such control.[33] E.O. Ibezim defined political party as a group of people who hold similar

[29] BA *Garner, op cit, p.954*
[30] *ibid p. 234*
[31] *ibid p. 537*
[32] *AS Hornsby,op cit, p. 285*
[33] Izuako Nkem, "Political Parties and Freedom of Assciation Under the 1999 CFRN", Unizik Law Journal (2001) Vol. 1 No. 3 p.63

political ideologies and work very fervently to get the control of government in order to implement their ideologies[34].

According to Ibiyemi Onyeneye, a political party is an organized group of like minded persons seeking to take control of government through constitutional means.[35] While Maurice Duverger defined a political party as "an organized opinion.[36]

According to Mitra's Legal and Commercial Dictionary, political parties are voluntary association for political parties[37].

Finally a political party is "Any association whose activities include canvassing for votes in support of a candidate for election to the office of President, Vice President, Governor, Deputy Governor or membership of a Legislative House or a Local Government Council.[38]

1.8.5 Constitutionality

It refers to the State or Nation being constituted by a (basic) law which lays down rules for the operation of a political system of government. Its code of rules provides normative guidance for the conduct of both government and the entire citizenry. Constitutions are an affirmation of the relevance of the rule of law. To prevent a constitution from being authoritarian it must enjoy the support of the citizens by reflecting their values & virtues. Therefore any modern constitution must enshrine democratic principles, processes & practices. Only a democratically motivated constitution enjoys the broad support of the citizen and can be considered a living constitution.[39]

1.8.6 Constitutional Democracy

It is the type of democracy where powers of the majority are exercised within a frame work of the constitution designed to guarantee the majority right. It is a system of government in

[34] EO Ibezim, *Comprehensive Government for West Africa School*,(Enugu: Hybrid Publishers' Ltd, 1996) p.100
[35] I Onyeneye, *Government Guide Lagos*,(Lagos: Longman Nigeria PLC 1998) p.5
[36] I Onyeneye *op.cit* p.6
[37] AN Saha, Mitra's Legal and Commerial Dictionary, (Calcutta: Easter law House Printers Ltd, 1990) p.105
[38] 1999 Constitution (as amended) s. 229
[39] S Samartya, *The Idea of Justice,* (London: Allen Lane, 2009)

which the limits of political authority are clearly stated and the electorate has the power to remove poor performing government.[40]

Constitutional Democracy is a system of government in which: political authority, that is, the power of government is deemed limited and distributed by a fundamental law called the Constitution; and the electorate in the general voting populace within the political society has elective power of controlling the elected representatives in the government and holding them accountable for the decisions and actions while in office.

It has two essential ingredients: a constitutional ingredient and a democratic ingredient. The Constitutional Ingredient is called constitutional government. This relates to how political authority is defined, limited and distributed by law. Here the Constitution defines all limits and power of government and determine the mode and manner of distribution of political authority among the major organs or parts of government. The Democratic Ingredient is representative democracy and relates to: who holds and exercises political authority; how political party is acquired and retained; and the significance of the later as regards political control and public accountability of these persons who hold and exercise political authority.

[40] B Ojumu *ibid*

CHAPTER TWO

OVERVIEW OF DEMOCRACY IN NIGERIA

Having given the definitions of democracy by various authors, in order to look further into the term and determine the one practiced in Nigeria, the various types of democracy will be considered.

2.1 Types of Democracy

Democracy may be classified variously, such as direct democracy and indirect or representative democracy.

2.1.1 Direct Democracy

Direct democracy is a government where all the adult citizens directly participate in government by gathering in an assembly of the people to take part in the decision making process to govern the city, state or society. This is the early form of democracy when it began in the small Greek city states.[1]

Democracy in this early form with little or no use of representative can only be practiced in a very small community, village, club, association and so forth. There has been a misconception that 'the only genuine democracy is direct democracy in which all the citizen of a community are present and collectively pass on all legislation as was practiced in ancient Athens.[2] This distinction breaks down because literally construed, there can be no direct democracy if the laws are defined not only in terms of their adoption but also in terms of their execution. More so delegation of authority is inescapable in any political assemblage.[3]

2.1.2 Indirect or Representative Democracy

This is democracy as commonly known today. This is the common form of democracy as practiced in Nigeria. With the growth of population and society, indirect or representative

[1] Encyclopeadia, *loc cit*
[2] *ibid*
[3] *ibid*

democracy has replaced direct democracy. Representative democracy is a government where all the persons of voting age are expected to vote to form the government, by electing persons into government, who will represent and act on their behalf, especially in the executive and legislative arms of government. These elected persons are expected to properly constitute all the other organs and agencies of government, and generally manage the affairs of government for the welfare of the people. Having looked at the various types of democracy, the aspect to consider at this point is the conditions of democracy.

2.2 Conditions for Democracy

The crucial questions to be answered in appraising democracy, are not where it is, and where it is not? But what it is, the professed aim and idea, how broad and deep is it? And upon what issues is it really operative.[4] Cohen identified five different conditions of democracy. These are the material conditions of democracy, the constitutional conditions of democracy, the intellectual conditions of democracy, the psychological conditions of democracy and the protective conditions of democracy.[5] These conditions will be examined in details.

2.2.1 The Material Conditions of Democracy

These have to do with environmental (topographical and climatic conditions to democracy), the mechanical (getting participatory materials including ballot boxes, filing cabinets, cars offices, stationeries etc.) and the economical(has to do with some level of well being of the citizenry to enable meaningful participation in the process) aspect of democracy.

2.2.2 The Constitutional Conditions of Democracy

These include political freedoms and freedom of speech, press movement and equal opportunities to participate in decision making, separation of powers and constitutional supremacy to limit the power of the government.

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[4] C Cohen, 'Democracy', quoted by H Galadima, *Understanding Politics* (1st edn, Jos: Plateau Publishing Company Ltd, 1995)
pp.52-53

[5] *ibid*

2.2.3 Intellectual Conditions of Democracy

These include the provision of information, education of citizen and the development of the arts of conferral.

2.2.4 The Psychological Conditions of Democracy

These consist of complex dispositions and attitudes that must be manifested by the individual members of the community if democracy is to function. These are the openness, tolerance, democratic spirit (that is obedience to law and respect for constituted authority), willingness to compromise and self-restraint when holding power.

2.2.5 The Protective Conditions of Democracy

These have to do with the defence of democracy against coups, subversion and intervention internally and externally.

The writer is of the opinion that the social conditions of democracy should be added to this list as the sixth condition. The social conditions include religious, ethnic, linguistic and cultural setting of society.

These conditions for democracy are generally provided for under chapters II and IV of the 1999 Constitution.[6] The favourable disposition of the above stated conditions in a polity determines the depth of its democracy.

Furthermore democracy means the existence of a constitution, usually a written one which is based on the rule of law and is the foundation of the rule of civil law. Democracy means the observance of rule of law by all persons and authorities in a country, the holding of regular and periodic free and fair elections, the existence of a party system in the country, usually in the form of a two party system or a multiparty system, the existence of organized opposition to the government mainly in the form of opposition political parties, civil right groups, non-governmental organizations, labour unions, students union groups and pressure groups. Democracy includes, the equal right of all eligible persons to vote and be voted for, rule or formation of government by the political party that scores the relevant majority votes in the

[6] *Constitution of the Federal Republic of Nigeria 1999 (as amended)*

election, or by a coalition of parties, where the leading party does not record a clear majority vote in the election; respect for the rights of minority people and other disadvantaged groups; equality of all persons before the law; the guarantee and respect for fundamental human rights as entrenched in the constitution; the existence and application of the doctrine of separation of powers and checks and balances in the government; the existence of an upright, active and independent judiciary.

Democracy is attributed to the following: the existence of a free press and the right to freedom of expression; the existence of a responsible, open and transparent government that is accountable to the people; the existence of the right of the people to know about the public affairs of state, for instance by enacting an access to information law; the robust flow of information from the government to the people and vice versa; the openness of government to the criticism, praise, encouragement, and other comments of the people; the limitation of the tenure of office of elected officials, the existence of a smooth, effective and constitutional process of handing over power and changing government by means of election at regular intervals as stipulated in the constitution; the existence of an independent electoral body, which is not appointed by the government of the day but is constituted by persons elected by civil society groups.[7]

2.3 Constitutional Democracy

The concept of a constitutional democracy requires that the elected government should be responsible to the needs of the people, their rights, well-being and safety. It places limits on government power. It evolves in a democratic context and is a way of life based on a democratic culture.[8]

Constitutional democracy involves the notion of limited government, constrained by the constitution in the extent of its power and the methods of exercising them. This form of democracy therefore will balance the guarantee of the fundamental rights of citizens against the maintenance of public security, public order and the common good. Thus it must be rooted in people because it is a way of life based on democratic culture, a culture that regards the constitution as something inviolable and above political struggle for power. Such a democratic culture values fair play, mutual tolerance and rules which promote acceptance and

[7] E Malemi *op cit* p.40
[8] G Onyeacholam, 'Collapse Entity', *Tell*, June 5, 2000, p.21

respect for the wishes of the people as the ultimate authority for government. Without a constitution democracy will not be conducive. It is only when it is practiced based on observance of rules and rights that it becomes efficient.[9] Given the fact that the people as a whole rarely exercise the power of the state jointly, legal structures are enabled via a written or unwritten constitution according to which the people are able to take part indirectly in political decision by means of free elections of representatives who remain in office in a representative capacity for a definite length of time (representative democracy).[10]

2.3.1 Types of Constitutional Democracy

1. Pluralism: This is the type of Constitutional Democracy in which majority of the people are allowed to exercise their view, opinions and idea. It gives room for wide participation of the citizens.

2. Republican Constitutional Democracy: This type of democracy allows for proceedings on issues that concerns states alone. It includes all the people of a state but only on the issue that concern the state alone.

3. Constitutional Direct: This fashion all its progressions and procedures according to the Constitution of the State and allow the direct participation in the political affairs.

A viable democracy makes some demands on both the citizens and the leadership. On the part of the citizens, it requires political maturity, good judgment and readiness to the demands of the common good. It is here argued that when these pre-conditions are fulfilled, then people should not be denied of the opportunity to take part in government in any way at all. On the part of the leadership, it entails ensuring that the elements of a sustainable democratic system are observed.

In his paper[11] Oputa JSC, observed that the distinguishing badge of democracy is 'the acceptance and recognition of the essential equality of all, before the law'. According to the learned jurist, this in turn, 'dictates equality of rights and privileges, be they social, political,

[9] Y Dankofa,' The Fallacy of Democracy in the Absence of Development and Rule of law: The need for the Enthronement of A Constitutional Democracy in Nigeria' (2008) 2 *A.B.U.J.P.I.L*, 161.
[10] W Keber, 'Democracy' in K Baker (ed), *Philosophical Dictionary* (Washington: Gonzaga University Press, 1972) p.89.
[11] C Oputa, 'Towards a stable polity,' A paper read at a workshop organized by the chief press secretary to the head of state at the Sheraton hotel and Towers on 17th and 18th September, 1997 p.7

or religious'. Hence there cannot be any claim to democracy without justice, liberty and freedom. A careful reading of the preamble to the Constitution of the Federal Republic of Nigeria 1999,[12]shows that all these elements of democracy were well intended. There, one finds the firm resolve of Nigerians to engender *inter alia* 'good government and welfare of all persons……. on the principles of freedom, equality and justice…….'[13]

The Constitution further proclaims that the Nigerian State is 'based on the principles of democracy and social justice' and acknowledges the fact that 'sovereignty belongs to the people of Nigeria from whom government through the constitution derives all its powers and authority'.[14]

In all, in the reasoned assessment of most available forms of government, the democratic system is generally taken to be the best of the possible forms of government. Winston Churchill was indirectly making this point when he ironically remarked that democracy is the worse form of government with the exception of all the other forms.[15]

However as a representative government, there are criticisms of democracy which includes the following: That the political parties may nominate and impose candidates who are not the popular choice of the people to stand for election; The elected officials often uphold the interests and directives of their political parties rather than the interests and welfare of the people; democracy with the various political parties campaigning for the votes of the people in order to form the government is competitive and may make some parties to resort to thuggery, arson and rigging in order to win elections; democracy involves dialogue, persuasion, compromise, concession, that is, give and take, lobby and co-operation, and that these may engender corruption in the system; the lobbing, possible corruption, violence and dirty politics that may characterise party politics in a democracy, scares away intelligent, responsible, honest and well meaning persons from politics, whilst giving room for charlatans, dishonest, greedy, unprogressive and visionless persons to take over, plunder national resources and set the state adrift; that democracy as a system of government involves a lot of people and structures which are expensive to maintain, and if unwittingly the electoral process in monetized, politics then means money, more money and much more money. This creates a cash and carry politics, where only the rich can stand for the expensive elections

[12] (as amended)
[13] CF Preamble to the Constitution of Federal Republic of Nigeria, 1999 (as amended).
[14] Constitution of Federal Republic of Nigeria, 1999 (as amended) s.14 (1) (2) (a)
[15] J Oguejiofor, 'In Search of the Democratic Ideal' in O Oladipo *et al* (eds) *Current View Point, A Review of Culture and Society*
(Ibadan: Hope Publishers, 2000) Vo.l 2 nos. 1&2 p.1.

which turn out to be, mere selection rather than elections and that Democracy is a large and unwieldy government, which is slow in taking decision and slow in implementing action and so forth.[16] The researcher will at this point examine the democratic governance in Nigeria since independence.

2.4 Brief Historical Background of Democratic Governance in Nigeria since Independence.

It is indubitable that democracy is a process and not an event. It does not happen, it goes on happening. Most nations of the world that have developed political systems where democracy is lauded achieved it at a great price and through a gradual movement of thesis, antithesis and synthesis. Yet, it is important to place on record that there is nowhere else than in the constitutional history of a nation where developmental institutions of democracy could be found. This is because the best a democracy can achieve is already limited by the constitution. Therefore, in order to reflect on the progress or regress of democracy in Nigeria, it is imperative to look at our various constitutions.

Before independence in 1960, a number of preparatory constitutions have been observed. The Clifford Constitution of 1922 had already begun the journey to an envisioned democracy. Under that Constitution, the elective principle was for the first time introduced, although this was limited to Lagos and Calabar. Secondly, the constitution led to the formation of political parties through elective principles. Thirdly, Nigerians were granted more representations in the legislative council than before. Given the many and sundry demerits of that constitution, most of which bothered on perceived hindrances to more progressive democracy, the Richard Constitution came in 1946. This Constitution gave Nigerians more opportunities for the discussion of their own affairs. Among other merits, the constitution provided a link between the native administration and the legislative council and brought together, members from all over the regions. The shortcomings of the Richard constitution were the reason for the next- the Mcpherson Constitution of 1951. This Constitution brought partial self government into Nigeria. The sizes of both the legislative and executive councils were increased. But the most significant change was that the executive became responsible to the legislature.[17] After the Mcpherson Constitution came the Lyttleton Constitution of 1954. Under this constitutional arrangement, a strong provision for regionalization was made. Both the North and the West

[16] E Malemi, *op cit, p. 41*
[17] S Aderibigbe, *Basic Approach to Government*, (Lagos: Joja Education Publishers, 1990) p.160

headed the House of Chiefs and the House of Assembly. There were executive councils in all the three regions and at the centre there was the executive and legislature councils. According to Segun Aderibigbe:

The Lyttleton's constitution of 1954, the 1957 and 1958 constitutional conferences opened new chapters in the constitutional and political development of Nigeria. The constitutional conference of 1957 was held in London under the chairmanship of Mr. Alan Lennox-Boyd. The purpose was to make advancement and to grant more responsibilities to Nigerian political leaders. This was followed by another constitutional conference in 1958.[18]

These earlier constitutions and the constitutional conferences that followed paved the way to an increased anxiety for much more democratic constitutions and governments to follow. On October 1, 1960, Nigeria became independent as a result of the independence constitution of the Federation of Nigeria, which was enacted by an Order-in-Council of her Majesty the Queen of Great Britain and Northern Ireland. Alongside the 1960 Constitution, the British parliament passed what was regarded as Nigerian Independence Act. In section 1 (2) of the said Act, it was provided that 'no Act of British Parliament after October 1,1960 should extend or be deemed to extend to Nigeria or any part of it'.[19]

By this token, the British Government ceased to have any responsibility over the government/or for the governance of Nigeria or any part of it.[20] It was left for the Nigerian Republican Constitution of 1963 to provide in very clear outlines, the elements of democratic state hitherto absent in the preceding constitutions coming into effect on October 1, 1963, this Constitution 'gave the country a republican status and once and for all times served the monarchial and dominion connection with Britain.[21] One of the significant democratic positions made by this Constitution related to the question of fundamental human rights.[22] The bright promises of democracy made by the 1963 Constitution were quickly eclipsed by the events of January 15, 1966. On that day, Nigeria witnessed its first military coup d'etat led by Major Chukwuma Kaduna Nzeogwu, which took the lives of prominent members of the First Republic. This ushered in the military to the part of government with General J.T.U Aguiyi-Ironsi (the most senior army officer) taking over power. And another military coup d'etat of July, 1966 masterminded by Col. Yakubu Gowon who took over after successfully

[18] *ibid* p. 162
[19] Nigeria Independence Act, 1960
[20] P Oluyede, *Constitutional Law in Nigeria*, (Ibadan: Evans Brothers Publishers, 1992) p.492
[21] *ibid*
[22] P Oluyede, *op cit*, p. 495

removing General Aguiyi Ironsi. Thus came the abrupt end of the First Republic. Regrettably, the military Decree coming after the coup suspended parts of the 1963 Constitution. Decree No. 1 of 1966 having prevented the movement to democracy by suspending and modifying the constitution, further achieved its sordid anti-democracy aim by ousting the jurisdiction of the courts 'not only in relation to itself but also in relation to question as to the validity of any Decree or Edict'.[23]

The Decree[24] clearly destroyed the emerging Democracy. By May 1967, things had gone so bad. The Eastern Region under the leadership of the Col. Chukwuemeka Odumegwu Ojukwu declared itself the independent Republic of Biafra. The Nigerian government started a military campaign against the secession region on July 6, 1967 and went all out to bring the troubled Nigeria to one whole piece again. Unfortunately, the seed of dissatisfaction sowed by the 1966 events soon dragged the nation into 30 months of civil war. It ended in January, 15, 1970, with Biafra's surrender and with General Gowon's introduction of the 'No victor, No vanquish slogan and the 3rs (Rehabilitation, reconstruction and reconciliation of Nigeria's whole system). Shortly after the war, Gowon (the Head of State) was removed by a coup masterminded by Brigadier Murtala Mohammed. While the latter was planning to conduct elections to usher in a civilian rule, his life and regime ended in 1976 by a bloody but aborted coup.[25]

Following the death of Murtala Mohammed, General Olusegun Obasanjo took over and executed the plans on ground. In 1979, he handed over the government to Alhaji Shehu Shagari through a democratic election empowered by the Democratic Constitution of 1979. This, as it were, was to be the resurrection of the spirit of democracy in our nascent nation.

However, before Nigeria had time to savour the comparative advantages of the new democratic government, several military interregnums came. On the 31st December, 1983, Brigadier Sani Abacha announced the overthrow of the Shagari administration with Major General Mohamadu Buhari as the new head of state. In yet another coup announced by Brigadier Joshua Dagonyaro, General Buhari was ousted on 27th August, 1985. The then Chief of Army Staff, Major General Ibrahim Badamasi Babangida took over as head of state but later proclaimed himself President and thus became the first military president of Nigeria. In June 12, 1993, a presidential election was conducted in Nigeria. The two presidential

[23] Decree No. 1 of 1966
[24] *ibid*
[25] E Obi and S Obikeze, *Contemporary Social Issues in Nigeria* (Onitsha: Bookpoint Ltd, 2006) p.8

candidates were Chief M.K.O Abiola for the Social Democratic Party (SDP) and Alhaji Bashir Tofa of the National Republican Convention (NRC). The election which was said to be the freest and fairest election to have been conducted in post independence Nigeria was won by Chief M.K.O Abiola. The government of General Babangida, on June 23, 1993 annulled the election results. General Babangida, due to public restiveness and pressure from within and outside the country, hurriedly packaged an interim National Government (ING) under the leadership of Chief Ernest Shonekan. It was to the head of this government that he handed over to, on August 26, 1993, backed up by an enabling Decree No. 61 of 1993 and the amendments of the 1989 constitution. In November, 1993, , General Sani Abacha, who was the ING'S Minister of Defence, moved swiftly to topple the government and installed himself as the new head of state. Following, General Sani Abacha's death in June 8, 1998, General Abdulsalami Abubakar succeeded him as the new Head of state.

Notwithstanding the ravages of frequent military interventions in Nigeria, especially the effects on ouster of court's jurisdiction in most matters, the hope of a new democracy was made possible by the election of President Olusegun Obasanjo, as President and Alhaji Atiku Abubakar, as Vice President under the Constitution of the Federal Republic of Nigeria 1999 on May 29 1999. This Constitution states in its preamble as follows: 'WE THE PEOPLE of the Federal Republic of Nigeria…….. DO HEREBY MAKE, ENACT AND GIVE TO OURSELVES the following Constitution.[26]

President Olusegun Obasanjo, after two terms as the President of Nigeria (1999-2007), handed over power to Alhaji Musa Yar'adua as the President and Dr. Goodluck Jonathan as the Vice President after emerging winner of the 2007 presidential election. On 5th May, 2010, after a protracted illness, President Musa Yar'adua died. Vice President Goodluck Jonathan was sworn in as President and Commander –in-Chief of Armed forces of Nigeria on 6th May 2010 with Alhaji Namadi Sambo as his Vice, to serve out the rest of the term until elections due in 2011. After the presidential election of 2011, President Goodluck Jonathan handed over power to himself as the President and Alhaji Namadi Sambo as the Vice President, after emerging winner of the 2011 presidential election. After the presidential election of 2015, President Goodluck Jonathan handed over power to Alhaji Muhammed Buhari as the president and Professor Yemi Osinbajo as the vice president, after emerging winner of the 2015 presidential election.

[26] CFRN 1999 (as amended) Preamble

One can therefore, authoritatively assert, at least in principle that Nigeria is a 'democratic state.' In the words of Oputa JSC, 'all our Constitutions if not explicitly, then implicitly, created a democracy for the purpose of promoting the good government and welfare of all persons in our country on the principles of freedom, equality and justice.'[27]

It remains to see how this democracy has been facilitated by the arms and instruments of government especially the judiciary with a view to heralding positive social changes.

2.5 Separation of Powers

Government relates to the politics of a sovereign nation or state. As an institution of state, it is about a body of persons and institutions that make, enforce and adjudicate on laws of a particular society. These government powers, constitutionally are divided into various branches. Separation of powers or classification of government powers is the division of government powers into the three branches of legislative, executive and judicial powers, each to be exercised by a separate and independent arm of government. This is done as a preventive measure against abuse of power, which will occur if the three powers are exercised by the same person or group of people. It could be said to be the constitutional doctrine of the division of the powers of government into the three branches of legislative, executive and judicial powers, each to be exercised by a different group of persons as a means of check and balances in the government structure itself, to protect the people against tyranny.[28]

Under this constitutional doctrine, one branch of government should not encroach on the domain of another branch of government nor exercise the powers of another branch of government. The three traditional arms of government or types of government powers or division of government are the: legislature who represents the lawmaking arm of government, Executive who are implementers of the law and judiciary who are the interpreters and judges of the law. The roles of the three arms of government that is the legislative, the executive and the judiciary are distinct and their constitutional powers are separated by the constitution. The writer's main discuss is on the judiciary as an arm of government.

[27] C Oputa, "The Independence of the Judiciary: Myth or Reality" in (ed) E Amucheazi and O Olatowora, *The Judiciary and Democracy in Nigeria* (Lagos, National Orientation Agency, 1988) p. 169
[28] E Malemi, *op cit*, p. 82-83

2.5.1 The Legislature

This is the organ of government that has the supreme power to make and amend laws for the order and good governance of the State. Under the Constitution of the Federal Republic of Nigeria[29], *section 4 (1)* provides that the legislative powers of the Federal Republic of Nigeria shall be vested in the National Assembly of the Federation which shall consist of the Senate and a House of Representative. On its own part, *Section 4 (2)*[30], states that the National Assembly shall have powers to make laws for the peace, order and good governance of the Federation or any part thereof with respect to any matter in the exclusive legislative list set out in part 1 of the second schedule to the Constitution.

2.5.2 The Executive

The executive arm of government implements, enforces or executes laws for a state or society. According to the provisions of the Constitution[31], the executive powers of the federation shall be vested in the President and may, subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice President and Ministers of the Government of the Federation or officers in the public service of the Federation, and shall extend to the execution and maintenance of the constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has for the time being, power to make law.[32]

2.5.3 The Judiciary

The judiciary arm of government consists of a system of courts organized in a hierarchical order. Its main functions to interpret and apply the law in order to resolve conflicts between individuals and groups inter se and between the government or its agencies and individuals or groups. In Nigeria, the constitution vests the judicial power of the Federation and the State in the courts established for the Federation and the State.[33] These courts include: the Supreme Court, the Court of Appeal, the Federal High Court, the High court of the Federal Capital Territory, Abuja, a High court of a State, the Sharia Court of Appeal of a State, the

[29] 1999 (as amended)
[30] CFRN 1999(as amended)
[31] *ibid*
[32] CFRN 1999 (as amended) s.5 (1) (a) (b)
[33] *ibid s.6 (1) (2)*

Customary Court of Appeal of a State, Customary and Sharia Courts of Appeal of the Federal Capital Territory.[34]

The judicial powers vested in the courts under the Constitution in Nigeria, shall accordingly; 'extend to all inherent powers and sanctions of a court, all matters between persons or between governments or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person'.[35] However, the Constitution precludes the court's jurisdiction from questions concerning compliance with ideals of government and from the legitimacy of any existing law made on or after 15th January, 1966.[36]

2.5.4 Evolution and Development of Separation of Powers

The origin of this doctrine started from the British philosopher John Locke who observed the conditions of 17th century England. Locke compared and contrasted the political conditions that prevailed on the continent of Europe during the 17th and 18th centuries with that of England in late 18th and 19th centuries. According to Locke, it was convenient to confer legislative and executive powers on different organs of government as the legislature can act quickly and at interval, while the executive must constantly be at work. Locke argued that it was foolhardy to give law makers the power of executing the law because in the process they might exempt themselves from obedience and suit the law (both in making and executing it) to their individual interest.[37]

Baron Montesquieu studied the work of Locke and fashioned out the principles of separation of powers as practiced today. Montesquieu related the studies of Locke in the light of his observation of the British constitution and concluded that whenever these three powers were vested in the same person, there would not be liberty and there would be end to everything. In the words of Montesquieu:

> When the legislative and executive powers are united in the same person or the same body of magistrates there can be no liberty because apprehension may arise lest the same monarch or senate should enact

[34] *ibid S.6 (1) (2) (5) (a-k)*
[35] CFRN 1999 (as amended) s. 6 (6) (a) (b)
[36] *ibid* s.6 (6) (c) and (d)
[37] (1632-1704) and B Iluyomade and B Eka, *Cases and Materials in Administrative law in Nigeria* (Ile-Ife: Obafemi Awolowo
Press Ltd, 2000) p.7

> tyrannical laws to execute them in a tyrannical manner. Again, there is no liberty if the judicial power be not separated from the legislative and executive. Where it joined with the legislative the life and liberty of the subjects would be exposed to arbitrary control: for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and apprehension. There would be no end to everything where the same man or the same body, whether of the nobles or of the people exercise those three power, that of enacting laws, that of executing public affairs and that of trying crimes or individual causes.[38]

Therefore, concentration of powers in the same person or body would no doubt lead to tyranny, because power corrupts and absolute power corrupts absolutely. Power if not limited by a boundary will become absolute. It must be noted that the three division of power which emerged through the concept of separation of powers is hardly exercised without interloping of exercise of power by each government. This of course is the essence of checks and balances system which helps the executive, legislative and judiciary to possess the ability to check one another in the performance of their respective functions. Indeed the interloping checks do not constitute derogation from separation of powers, but rather enhance and effectuate the instrumentality of constitutionalism. The check and balance doctrine is premised on the principles of recognition that particular function belongs essentially to a particular organ, while at the same time giving a limited power of interference to another organ for the purpose of ensuring that the exercise of the powers is not used in an arbitrary and despotic manner. A writer explained this in a perfect way by stating thus:

> Modern constitutional arrangements envisage sufficient interplay between each institution of the state. A complete separation of the three institutions could result in legal and constitutional deadlock. Rather than a pure separation of powers, the concept insists that the primary functions of the state should be allocated clearly and there should be checks to ensure that no institution encroaches significantly upon the function of the other.[39]

Explaining the doctrine of separation of powers as enshrined in the constitution and practiced in Nigeria, late Chief Obafemi Awolowo, SAN, GCFR said:

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[38] Baron de Montesquieu,*The Spirit of Laws,* (Espirit Des lois 1748) pp 3-6

[39] A Olong, *Administrative Law in Nigeria* (2nd edn,Enugu: Malthouse Press Ltd, 2009) p.28

> Under our Constitution, the three organs of government are separate and distinct both in respect of the function which they perform, and of the functionaries who are entrusted with the performance of those functions. In other words, under our constitution, no government functionary belongs to more than one organ and non performs the functions of more than one organ. This is one of the three well known forms of separation of powers and functionally the neatest of them all ……. our own form of separation of powers is fashioned after the American system. The ideal of this system is the provision of effective checks and balances in the government structure itself. By the adoption of this form, absolutism or oligarchy of any kind is outlawed, true democracy is entrenched and manifestly seen to be entrenched in the constitution. In otherwords, each of the three organs is obliged to keep within and guard its bounds of authority….. But does this all mean that each must operate in a watertight compartment regardless of consideration for each of the other two?..... Whilst the judiciary must be detached and independent from the other two organs and be manifestly seen to be so, the legislature and the executive must work in close and harmonious collaboration with each other, if the welfare of the people is to be truly and effectively served…… it is quite clear that the objective of the legislature and the executive are one and the same -to promote and serve the best interests of the people. If they work at cross purposes or refuse to co-operate and collaborate with each other, the interests of the people would be seriously endangered. This point is reinforced on the ground of plain common sense. When two persons or agencies are charged with joint responsibility to achieve a common objective, the two of them must constantly seek a consensus or, in the event of disagreement, one of the two must be allowed to have the last say. If each of the two, in the absence of consensus, claims the right of last say, then the common objective will either be unattainable or be very slow in attainment.[40]

Justice Jackson in *Youngstown Sheet and Tube Co v Sawyer*[41] said 'while the constitution diffuses power, in other to secure liberty, it also contemplates that practice will integrate the

[40] E Malami, *op cit,* p. 85
[41] (1952) 343 US 579, 635

dispersed powers into a workable government. It enjoins upon its branches separateness, but encourages interdependence'.

The explanations by Chief Obafemi Awolowo of the practice in Nigeria, and Justice Jackson of how the U.S Government works, put to rest the resumption of rigid separation of powers. In other words, there is no strict or water tight separation of powers. There is flexibility, the essential thing is to avoid tyranny by concentration of powers in one person or body. One branch should act as a check on the others within the permissible scope allowed by the constitution or the laws. For as James Madison, a Republican and 4th President of the United States of America said: 'In framing a government which is to be administered by men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself'.[42]

In *Kilburn v Thompson,*[43] the U.S Supreme Court held that for separation of power to work, those entrusted with power in one branch of government should not be allowed to encroach on the power of another branch. That each branch of government should be limited to the power given to it by the constitution. In this regard, the Court of Appeal held *inter alia,* in the case of *Commissioner of Local Government, Anambra State v Ezemokwe*[44] that under the 1979 constitution, a state executive has its constitutional duties just as the judiciary has its own duties. The judiciary ought not to interfere with the right of the executive to perform its duties. Therefore, the executive cannot be inhibited from performing its duties by the judiciary simply because the judiciary is also called upon to perform its own functions in similar circumstances. No arm of government is entitled to infringe on the functions of the other, except in recognized situations where one branch of government exceeds or abuses its constitutional powers. Therefore, a complete separation of powers is neither practicable nor desirable for effective governance. What the doctrine can be taken to mean is the prevention of tyranny by the conferment of too many powers on only one person or body and the check of one by another.[45]

[42] E Malami, *op cit,* p. 87
[43] (1981) 103 US 168 at 197 Abia State v A.G Federation [2002] 6 NWLR (pt 763) 264 SC
[44] (1991) 3 NWLR (pt 181) 615 CA
[45] E Malami, *op cit,* p.87

2.5.5 Why Should There Be Separation Of Powers?

Unlimited power in the hands of one person or group of people in most cases means that others are suppressed or their powers curtailed. The separation of powers in a democracy is to prevent abuse of power and to safeguard the rights of the citizens. The writer at this stage will consider two main/principal schools of thought on why there should be separation of powers. They are the school of division of labour in politics and the liberty school of thought.

2.5.5.1 The School of Division of Labour in Politics

This school argues that separation of powers in government springs from the eminent English economist, ADAM SMITH'S theory of division of labour, who described it as the separation of a work process into a number of tasks with each task performed by a separate person or group of persons. Smith further stated that the theory is most often applied to systems of mass production and is one of the basic organizing principles of the assembly line. That the act of breaking down work into simple repetitive tasks eliminates unnecessary motion and limits the handling of different tools and parts. The Scottish economist saw this splitting of tasks as a key to economic progress by providing a cheaper and more efficient means of producing goods. This school argues that same can apply in government, hence the need for separation of powers. To them, there should be division of power for: specialization or expertise and greater efficiency in government.[46]

2.5.5.2 The Liberty School of Thought

This school of thought maintains that liberty of the citizen is the primary and real reason for separation of powers in government. This school agrees with the views of Montesquieu. This is the most favoured view in most common law countries and in other countries of the world, as the greatest reason for the doctrine of separation of powers.[47]

In *USA V Brown,*[48] Warren CJ in the U.S Supreme Court supported this view by saying that the American constitution was not instituted with the idea to promote government efficiency. In his words: 'The separation of powers under the American constitution was obviously not

[46] *ibid p. 88*
[47] *ibid*
[48] (1965) 381 US 437, 443

instituted with the idea that it would promote government efficiency. It was on the contrary, looked at as a bulwark against tyranny.'

The theory of separation of powers was formulated as a check against tyranny. The organs of government are to be co-equal. No arm of government is to be allowed to be so powerful as to subjugate the other arms of government and the people.

Explaining that the doctrine of separation of powers was included in the United State Constitution to guard against tyranny and dictatorship, Justice Louis Dembitz Brandeis of the U.S Supreme Court in *Myers v USA*[49] said:

> The doctrine of separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary powers. The purpose was not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Implementation of separation of powers, is a general safeguard against tyranny, dictatorship, oppression and other social and political evils, such as legislative exercise of judicial functions or more simply, legislative judgments. A distinction between judicial and legislative powers has been concisely put by the United States Supreme Court in *Prentis v Atlantic Coast Line Co.* thus:

> A judicial inquiry investigates, declares and enforces liabilities as they stand in present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter.[50]

The concept of separation of powers is not a question of mere convenience nor is it an accident of political history, but a deliberate regulatory step to prevent tyranny, by separating the powers of government, conferring them on different persons and making each arm of government to act as a check and balance on the other, whilst the press plays the role of a watchman to keep the people well informed and to hold the government responsible and accountable to the people.

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[49] *(1962)272 US 52*
[50] *(1908) 211 US 210 at 228*

It has long been recognized, for instance, that vesting judicial powers in an independent judiciary is essential to justice and liberty, which are the ideas of society and the foundation of a nation. Without an independent judiciary, charged with the exercise of judicial power, there will be an easy betrayal of justice and liberty and the concept of the rule of law will become empty. The position was explained by Deane J in the High Court of Australia in *Polyuchowich v The Commonwealth*[51] thus:

> The main objective of the sometime inconvenient separation of judicial from executive and legislative powers had long been recognized at the time of the federation. It is to ensure that the life, liberty, and property of the subject is not in the hands of arbitrary judges, whose decisions are then regulated only by their own opinions and not by any fundamental principles of laws…… Parliament cannot usurp the judicial powers of the common wealth by itself purporting to exercise judicial powers in the form of legislation.[52]

The importance of separation of power was recognized in the case of *Liyanage v The Queen*[53]where the Judicial Committee of the Privy Council (JCPC) pointed out, upon the facts of the case, that there existed under the Ceylonese constitution a tripartite division of powers-legislative, executive and judicial and that it would be unconstitutional for judicial functions to be allowed to be interfered with by the legislature through an Act of parliament.[54] The following are the importance of separation of powers:

a. Decentralization of Power

One great importance of separation of power is the decentralization of organs of government. There are a lot of benefits of decentralization of government control. These include: effective monitoring of the system by each of the divisive organs of government; it avoids misuse of powers by one person or organ. Oputa JSC[55] remarked while writing on separation of power:

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[51] (1991) 172 CLR 501 at 606
[52] *ibid* 607
[53] (1967) AC 259
[54] M Okanny, *Nigerian Administrative law* (Enugu:African First Publishers, 2007) pp 16-17
[55] C Oputa, *Independence of Judiciary in a Democratic Society*, unpublished paper quoted by I Sagay, *The judiciary in Modern Democracy in Nigeria Issues in 1999 Constitution* (NIALS Publication 2000) p-81

> The concept arose from the need to ensure the restraint of governmental powers by dividing that power without carrying that division to an extreme……..it is in fact the checks and balances that explain the overlapping among organs of government in actual practice.

b. Prevention of Arbitrary Use of Powers

The concept of separation of powers, prevents arbitrary use of powers. Where absolute power is conferred on one body it is bound to be misused. Chief Justice Taft said:

> It is a breach of the national fundamental law if congress gives up its legislative power and transfers it to the president or to the judicial branches or if by law attempts to invest itself or the members with either executive power or judicial power.[56]

c. Creating Harmonious Working Relationship

When each unit and subunit of all organs of government are aware of their role and duties, there is bound to be respect for each unit's duties and roles, and this will create a good working condition among workers, administration, civil servant etc. With regard to this, Late Chief Gani Fawehinmi, a legal luminary said:

> Those who invented the rule believed that the national polity could only attain order and peace through furtherance of the ideals of social justice, an integrated part of which is the non-interference in the structure for the resolution of disputes otherwise the alternative is the pressure-coker friction, deep disrupts, constant instability with periodic chaos and violence. To obviate divisive tendencies, they advised in their wisdom that those who make laws for societies must be distinct from those laws and each of the two (makers and executors of law) must be different from those who interpret the laws or adjudicate on them. Hence in the modern constitutional parlance every civilized society must be governed by law makers who are styled legislators to make laws, the executors to carry out those laws and the judiciary to adjudicate on some of the imperfections, the rule of law is the only part yet designed by man for political sanity in

[56] *Hampton & Co v United States* (1928) US 394 at 406-407

> any nation. Nigeria cannot afford to be different if it is to survive as a nation.[57]

d. Protection of the Judicial Independence

One great advantages of separation of powers is not only dividing the powers amongst the organs but it is also protecting and preserving the judiciary by making sure that neither the legislature nor executive takes away the powers, and the exercise of legislatives powers in particular is subject to control by the judiciary. Section 4 (8) of the 1999 Constitution [58] restates this protection by providing thus:

> Save as otherwise provided by this constitution the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law, and of judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.

The foregoing provision indicates that the courts of law are independent, protected and preserved under the separation of powers.

e. Protection of Liberty

The only mechanism that can protect people's liberty and rights, more especially the minority in the society is when powers to govern are not concentrated in the hands of one person, otherwise the powers will be corrupted and power corrupts and absolute power corrupts absolutely. The idea of separation of power to different organs solves this problem and protects the liberty of citizens. Montesquieu said this with regard to this importance:

> ……the secret of civil liberty lay in the separation of these powers in the reserving of each type of power to different persons or body of persons. The result of linking them will destroy liberty. Man will always push what powers they have to the limits and if those who make the laws

[57] K Danladi, *Outline of Administrative Law and Practice in Nigeria* (Kaduna:Ahmadu Bello University Press Ltd, 2012) p.64
[58] (a*s amended)*

> also enforce them, they can tyrannize their fellow men. The result will be the same where either the executive and the judicial or the legislative and judicial powers are joined in the hands of the same person.[59]

f. Enhancement of Effective Governance

The overall result of application of separation of powers in Nigeria is that it will enhance and create viable and effective governance by administrators. In the case of *Governor of Kaduna State and 2 others v Lawal Kagoma,*[60] the plaintiff, who was a supervisory councilor challenged the power of the Governor of Kaduna State to appoint a commission of inquiry into the affairs of Kaduna Local Government Council. He argued that the inquiry could only be set up by the state Executive council, and not by the Governor. The action was dismissed by the High Court. The plaintiff, appealed to the Court of Appeal which reversed the judgment of the High court. Being dissatisfied, the Defendant/Respondent further appealed to the Supreme Court and the Supreme Court set aside the judgment of the Court of Appeal and confirmed the judgment of the High Court. The court held that Governors and their deputies are members of the Executive Council of the State and that Commissioners and Special Advisers are mere advisers who assist the Governor. Justice Nnamani JSC (as he then was) stated as follows:

> I am in no doubt that the provision relating to the position of Governor at the State level and President at the Federal level was designed to vest executive responsibility for the purposes of effective government. The checks and balances which abound in the constitution with respect to the powers so granted are designed not to cut down the extent of those powers but to ensure that they were exercised with due regard to the fundamental objectives of state policy.

2.5.6 Application of Separation of Powers in Nigeria

Under the 1963 Republican Constitution where by Nigeria practiced the British parliamentary system of government, the judiciary was clearly separated as a branch of government. The

[59] *ibid p. 65*
[60] *(1982) 3 NCLR 1032 at 1051*

separation between the legislature and the Executive was not quite clear. The legislature and the executive were blended to some extent. The doctrine of separation of powers was blurred because top members of the executive arm of government such as the prime minister and all his cabinet or ministers were all members of parliament. Thus, there was a fusion of the legislature and the executive to some extent. The same thing applied in the four regions, Northern Region, Western Region, Mid West Region and Eastern Region, where the premier of each region and the entire cabinet or ministers were members of the respective Regional House of Parliament. However, where an officer acting in his capacity in one branch of government went beyond his duties in that capacity, the courts readily held such action void for being *ultra vires* his powers in that capacity at the suit of an aggrieved party.

2.5.6.1 Military Rule and Separation of Powers

With the advent of military rule in Nigeria, beginning from January 15, 1966, the military suspended and modified the 1963 Constitution by virtue of the Constitution (Suspension and Modification) Decree No. 1 of 1966. By virtue of this decree, it dissolved the Parliament and fused legislative and executive powers in the Supreme Military Council (SMC) which was the Ruling Military Council.[61] The fusion of both legislative and executive functions or powers is repeated in every military regime. The Ruling Military Council has also been known as Armed Forces Ruling Council (AFRC) and Provisional Ruling Council (PRC), and so forth in various regimes.

The military also passed the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1970, by virtue of which Decrees became the supreme laws of the land and the validity of any decree or edict cannot be inquired into by any court of law.[62] But whenever an Edict was inconsistent with a Decree it became null and void to the extent of such inconsistency.[63] In instances where it is alleged that an Edict is clashing with a Decree, a court has jurisdiction to entertain the matter. An Edict is usually declared null and void to the extent of its inconsistency with the relevant Decree. The doctrine of the Federal Military Government's Decree 'covering the field' may also be applicable in appropriate instances. Though the judiciary is never abolished nor its power taken away completely, however, its judicial power was ousted in various matters by ouster clauses contained in the relevant

[61] The Constitution (Suspension and Modification) Decree No. 1, 1984 Cap 64, 1990 and the Federal Military Government (Enforcement of Powers) Decree 13 cap. 137, 1990
[62] Lakanmi &Anor V.A.G .Western State (1971) 1 U.I.R 201
[63] The Council of the University of Ibadan v Adamolekun (1967) All NLR 225 SC.

Decrees or Edicts which stripped the courts of power or jurisdiction to look into such specified matters. The case of *Lakanmi v A.G Western State*[64] is an example of such legislative judgment or bill of attainder. In that case the SMC by the aforesaid Federal Military Government (Supremacy & Enforcement of Powers) Decree[65] set aside the judgment of the Supreme Court which was in favour of the plaintiff and also stripped the courts of power to inquire into the validity of any decree or edict, except where there was a clash between a decree and an edict. However in other cases of breach of fundamental rights, the court, especially, by way of the writ of habeas corpus were able to secure the liberty of detained persons in several instances.[66]

However, with the advent of the military in 1984, the military subsequently made its powers wider and sweeping. With the promulgation of the State Security (Detention of Persons) Decree No. 2, 1984 as was amended, the military could by virtue of this Decree commit any person to detention at its pleasure and release the person whenever it deemed fit. However, earlier cases like *Tai Solarin & Ors v IGP* [67] were more fortunate as the court set the applicants free because their detention order were not made under the hand of the then Chief of Staff Supreme Military Headquarters as required by the Statute. In this instance, we see the Federal Military government or Provisional Ruling Council (PRC) exercising all the three powers of the government that is to say: legislative power to make laws, executive power to implement laws and carry out government business, and Judicial power to determine that a person is innocent or guilty and confirm sentence as the appellate body of last resort in any matter. It has by statute appointed itself an appellate body or to commit any person to prison indefinitely at its pleasure. For instance under the State Security (Detention of Persons) Decree.[68]

During the military rule, the judiciary is only independent to the extent that it does not interfere with the rights of the military to rule. Whenever the courts try to curtail the powers of the military, a Decree is usually passed to strip the court of the relevant jurisdiction.[69]

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[64] *ibid*
[65] Decree No. 28, 1970
[66] Agbaje v COP (1969)1 NMLR 137 HC, (1969) 1NMLR 176 CA, Re Mohammed Olayori (1969) All NLR 733
[67] Unreported suit No. M/55/84 Lagos High Court.
[68] *No. 2, 1984 (as amended) Wariebi kojo Agamene v Abacha Unreported FHC/L/CS/84/94*
[69] E *Malami op cit, p. 93*

2.5.6.2 Civilian Rule and Separation of Powers

Nigerian Constitutions since 1979 have provided for a presidential system of government. Each constitution also provided for a clear division of the three powers or branches of government as follows: Section 4, the legislature with legislative power, section 5, the executive with executive power; and section 6, the judiciary with judicial powers. During a civil rule, the constitution is the supreme law of the land and rule of law is the basis of government action. Any law or action that contravenes the provisions of the constitution is void to the extent of such inconsistency.[70] Any branch or officer of government that goes beyond its or his powers will usually have such action set aside by court at the suit of a proper party who is aggrieved. In *Ekpenkhio v Egbadon*,[71]Ogundare JCA *as he then was, said:*

> A cardinal principle of our federal constitution 1960, 1963 and 1979 is the separation of powers of the executive, the legislative and the judiciary, but the judiciary has the added responsibility as a guardian and protector of the constitution. Therefore whenever the executive or legislative arms of government exceed their constitutional powers, the judiciary on a proper application to it, will curb the exercise of such excessive power and declare it a nullity.[72]

In *Orhiomnom Local Government Council v Ogieva* [73] the Court of Appeal said that the principles of checks and balances in the local government system is meant to enhance the smooth administration of the local government councils and not to cripple it for that reasons, one organ of the council cannot properly use a method not permitted by law to monitor another organ of the council. This principle of proper checks and balances applies in every tier of government.

Today, the real safeguard against tyranny does not rest in a precise nor indeed a rigid separation of powers, per se, but in a representative constitutional democracy with democratic institutions and control put in place, to act as checks and balances on the exercise of governmental powers. Examining the role of the courts in the observance of the doctrine of separation of powers, the Court of Appeal in the case of *Tende &Ors v A.G Federation*

[70] *A.G Bendel State V.A.G Federation & 22 Ors (1982) 3 NCLR 1 SC.*
[71] [*1993] 7NWLR(pt 308) 717*
[72] *ibid* p. 744 CA
[73] [1993] 4 NWLR (pt 288) 468 CA

[74]cited with approval the dictum of Bello CJN *in Engineering Enterprises of Nigeria Construction Co v A.G Kaduna State* where his Lordship said:

> In exercise of its judicial powers a court of law should adhere to constitutionality. It should not condone the commission by a state of a constitutional wrong nor should it be an accessory after the fact to the commission of unconstitutionality.[75]

The Court of Appeal then went on to hold that under the 1979 constitution, government is divided into three separate and independent branches, the executive, legislature and the judiciary. Each branch of government must not encroach into the sphere of the other. It is the duty of the court to maintain that. The courts do not possess a veto power over the other two arms of government. Its power properly construed are supervisory. The superior courts are empowered to declare null and void any infraction of the provisions of the constitution. That is the second duty entrusted to the courts and it is to apply with full force and vigour such powers within the confines of the law.

2.5.6.3 Application of Separation of Powers under the 1999 Constitution (as amended).

Having laid down the foundation of what led to separation of powers and what it is, it will not be difficult to appreciate the fact that if its application under the 1999 Constitution[76] is viewed, the following questions will come up: what provisions of 1999 Constitution vest the federal and states, executive, legislative and judicial power? Secondly, by what method or techniques does the constitution maintain the principles of checks and balances to sustain independence and avoid arbitrary use of these powers. These and more will form the discuss now.

a. Legislative Power Under the 1999 Constitution[77]

i. Federal Legislative Powers

The legislative power at the federal level is vested in the National Assembly.[78]The National Assembly has power to make laws for peace, order and good government of the Federation or

[74] [1988] 1 NWLR (pt 71) 506 CA
[75] [1987] 2 NWLR(pt 57) 381 at 391 SC
[76] FRN (as amended)
[77] *ibid*
[78] CFRN 1999(as amended) s. 4 (1)

any part thereof with respect to any matter included in the executive legislative list set out in Part 1 of the Second Schedule of the Constitution.[79] The National Assembly is a bicameral body, having two distinct branches namely: the Senate and the House of Representatives. The underlying basis for this is the idea that a two chamber legislature is best so that representation in one might be based on population, while in the other the states would be represented on equal basis particularly in the light of Nigeria's federal structure. Additionally, two chamber legislatures ensure that the two chambers can serve as a check on each other thereby preventing the haphazard passage of Bills.[80]

ii. State Legislative Power

The legislative powers of the States is provided under *section 4 (6)*[81] to this effect:

> The legislative powers of a State of the Federation shall be vested in the House of Assembly of the State. The House of Assembly of a State shall have the power to make laws for the peace, order and good government of the state or any part thereof with respect to the following matters, that is to say, any matter not included in the Exclusive Legislative list set out in Part 1 of the Second Schedule to this Constitution.[82]

The State House of Assembly is a unicameral legislative body, having only one chamber. Members of the State House of Assembly are elected by the people for a fixed period of time and they are not answerable to State Executive Governors. The House also performs some quasi-judicial function like impeaching the Governors as a result of serious gross misconduct. It can also invite any person to question him on any matter relating to which it can make laws.

iii. Local Government Legislative Powers

The Local Government does not in strict sense make law, being deliberative bodies. They are not in strict sense legislative bodies and only exercise subordinate law- making powers through bye-laws. Bye laws are ordinary laws affecting particular portion of the area, made or

[79] *ibid* s.4 (2)
[80] M Gidodo & Shik Yil, *The Province of Legal Method* (Jos: Mono Expression Ltd, 2003) p.64
[81] CFRN 1999(as amended)
[82] *ibid* s.4 (7) (a)

applied by some authority clothed with statutory powers ordering something to be done or not to be done and accompanied by some sanctions/penalty for its non-observance.[83]

Therefore, bye laws stand to be laws in this case operating from the local government for the purpose of separation of powers. The legislative power of the local government is vested in the local government council which is exercised by the leader of the council, deputy leader and other councilors of the council. The legislative power of the Local Government is vested in the Local Government which is comprised of a leader, deputy leader and councillors.

b. Federal Executive Powers

Section 5(1)(a)[84] provides that subject to the provisions of the Constitution and any law made by the National Assembly, the executive powers of the Federation shall be vested in the President and may be exercised by him either directly or through the Vice President and Ministers of the government of the Federation or officers in public service of the Federation. Furthermore, the exercise of these functions by the President, Vice President, ministers or other officers in the public service of the Federation shall extend to the execution and maintenance of the Constitution, all laws made by the National Assembly and all matters with respect to which the National Assembly has, for the time being power to make laws.[85]

Suffice it to say that from the wordings of the above provision, the general function of the executive is nothing more than implementing any law made by the law makers, and this is achieved through the President, Vice- President, minister and all other administrative officers working under the offices of the above mentioned officers. The 1999 constitution is distinctively clear as to the process of coming to seat of President and Vice President. They are elected by the citizens of Nigeria for a fixed period of time.[86] Under this system, members of the executive cannot be members of the legislature and members of the legislature cannot be members of the executive. The President and his cabinet are not answerable to the legislature except in case of impeachment of the President.[87] The executive does not in any way control the functions of the legislature and the President can only summon the legislature for the first session after general election. The President and his cabinet do not sit for any

[83] A Guru, ' Process of Making Bye-law in Local Government', A Paper Presented at Local Government Department Ahmadu Bello University, Zaria on 12th December, 2006, p. 5
[84] 1999 CFRN (as amended)
[85] *ibid* s.5 (2)
[86] CFRN 1999 (as amended) s. 133-135. The period is four years subject to re-election for another four years
[87] *ibid* s.143 (i)- (ii) Regulates the impeachment proceedings of the President and vice president by the National Assembly.

deliberation with the legislature. However the President can send bill to the legislature for approval before it can become a law.

The President has power to conclude and enter into treaty with any country on behalf of the Federation of Nigeria subject of course to such treaty being enacted into law by the National Assembly.[88]

The 1999 Constitution maintains a system of checks and balances by making some exercise of power by the executive subject to some limited interference by the legislature. For example, the function of appointing members of his cabinet, judges of the federal superior courts, Ambassadors/High Commissioners, Chairmen and members of some commissions of federal government establishment, must be confirmed by the legislature before such appointments can be effective.[89]

i. Executive Powers at State Level

The executive power of a State is exercised by the State Governor [90] and may be exercised by him either directly or through his deputy or other Commissioners. The State Governors are directly elected for a fixed period of time by the citizens of Nigeria. Members of State Executive Council cannot be members of State House of Assembly and neither can the state executive dissolve the legislature. However, the House of Assembly can remove the Governor through an impeachment process.[91] The Governor of a State can initiate a Bill and send it to the State House of Assembly but such Bill must be voted by two-third majority of the members of House. If not, the Bill stands to be rejected.

ii. Executive Powers At Local Government Level

Local government is government at local level and this enables local people to govern themselves in certain specific areas. It is a unit of government established by an act of law to administer the functions of government and oversee the welfare of the local dwellers.[92] Under the 1999 constitution, local government is not a third arm of government because the combined effect of *sections 7 and 8(3)-(4)*[93] could give the impression that it is a creation of State House of Assembly. This is so because the power creating them is conferred on the

[88] *ibid* s.12 (i)
[89] K Danladi, *op cit,* p. 57
[90] CFRN 1999 (as amended) s. 5 (2)
[91] *ibid* s. 188 (i) (ii)
[92] M Okoh, *Local Government Administrative* (Ibadan: West Book Publishers, 2003) p. 58
[93] CFRN 1999 (as amended)

State House of Assembly subject to the power of the National Assembly to make consequential provisions with respect to the names and headquarters of the newly created local government in line with the constitution.[94]

Be that as it may, there appears to be some level of separation of powers at the local government level. To this extent, the executive powers of the local government is exercised by the Chairman of the local government council and his deputy who are elected/appointed by the people of the local government area for a fixed period of time depending on the state local government law. Other members of the executive of local government include supervisors and secretary of the council. [95]

c. Judicial Powers

The judicial powers at the federal and state levels under the 1999 constitution are not separated unlike the case of executive and legislature. The judicial powers are inter woven in terms of exercise of their powers. Both federal and state judicial powers operate on the same hierarchical structures to the extent that a case that was handled by state courts can reach federal court on appeal. There is an inter-relation between the state and federal judicial powers.

i. Federal Judicial Powers

Judicial powers can be defined as the powers allocated to the judicial organ of the government by the constitution, to interpret any provision of law enacted in Nigeria. This may include power to judicially review any action of either the executive or the legislature that is not done in accordance with the law.[96] Judicial power is also defined[97] as the power of judiciary, first, as the power given to the judiciary to determine disputes between the component parts of the federation, to determine disputes between the state *inter se* or among citizens themselves. Secondly, it refers to the totality of powers which a court exercises when it assumes jurisdiction to hear, determine and enforce its decision in a dispute submitted to it by the parties there to.

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[94] *ibid* s.8 (5)
[95] K Danladi, *op cit*, p. 58
[96] K Danladi, *op cit*, p. 59
[97] N Agu (ed), *Judicial Power, Nigeria Essay in Jurisprudence(Lagos: M.I.M.S Publishers, 1993) p. 24*

In the case of *Senator Abraham Adesanya v President of Nigeria & Ovie Whiskey*,[98] the Supreme Court per Idigbe JSC (as he then was) described judicial power as this:

> Judicial power, as is well known is a very wide express, far apart from its meaning as the power which every sovereign must of necessary posses to enable it settle and decide controversies between its subjects and between its subject and itself…….

The judicial powers of the Federation are vested in courts established for the Federation. According to *s. 6 (i)*[99], 'the judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation.' These courts are:

a. The Supreme Court.

b. The Court of Appeal.

c. The Federal High Court.

d. National Industrial Court.

e. The High Court of the Federal Capital Territory, Abuja.

f. High Court of a State.

g. The Sharia Court of Appeal of the Federal Capital Territory, Abuja.

h. A Sharia Court of Appeal of a State.

i. The Customary Court of Appeal of Federal Capital Territory, Abuja.

j. The Customary Court of Appeal of a State.[100]

The judicial powers vested in the above courts shall extend, notwithstanding anything to the contrary in the constitution, to all inherent powers and sanctions of a court of law.[101] But the power shall not, except as otherwise provided by the constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any

[98] (1983) 1 SCNLR 296
[99] 1999 CFRN (as amended)
[100] *ibid* s. 6 (5) (a-i)
[101] *ibid* s. 6(6) (a)

law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of the Constitution.[102]

ii. State Judiciary Powers

The State Judicial Powers are vested in the courts established for the State. According to *section 6(2),*[103] the judicial powers of a state shall be vested in the court to which this section relates, being courts established; subjects, as provided by this constitution, for a state. To this extent, the court to which state judicial powers apply include state High Court, Sharia Court of Appeal, Customary Court of Appeal and such other courts established by the House of Assembly of any state.[104] Other courts established by state include Magistrate Court, Area Court, Customary Court and Sharia Court.

The difference between the judicial powers of the Federation and those of a state is that, the judicial powers of the Federation are exercised over federal legislative matters in the Exclusive and concurrent lists, while judicial powers of the State apply to matters within the legislative competence of the states. In other words, federal courts adjudicate over federal matters while state courts adjudicate over state matters.[105]

Cases handled by state courts may if appealed to higher court reach the federal courts for determination for example, a matter or case commenced in the Magistrate Court of a State may be appealed by the dissatisfied litigant to a State High Court and if not satisfied with the decision of the State High Court may still appeal to Court of Appeal and probably Supreme Court. Therefore, the courts in Nigeria whether state or federal operate under the same hierarchical system.

iii. Judicial Power at Local Government

The judicial power at local level or government is exercised by state courts. The local government is not by law allowed to establish any court within the council area for the purpose of deciding dispute or trying suspects or accused persons.

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[102] *ibid* s. 6(6) (c)
[103] 1999 CFRN (as amended)
[104] *ibid* s. 6(4) & 6 (5) (e) (g) (i) (j) (k)
[105] B Akubue,*Public Law and Justice Delivery in Nigeria and English World* (Enugu: Bismark Publication, 2009) p. 62

iv. The Effect of Section 6 (6) (d) of the 1999 Constitution

A dissection of *section 6 (6) (d) of the Constitution,* 1999 shows that the sub- section applies under three situations:

- **i.** where there is an action on an existing law;
- **ii.** the existing law must be one made on or after the 15th of January 1966; and
- **iii.** the action on the existing law must be for the determination of any issue or question as to the competence of any authority or person to make such law.

As far as matters which come within the purview of the provision are concerned, the judicial powers of the court cease to operate over them and this qualifies the extension of judicial powers in section *6 (6) (b) of that Constitution* to all matters between persons or between government or authority and to any person in Nigeria, as well as all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person. Whilst reflecting on the same provision in the 1979 Constitution in *Joseph Mangtup Din v A.G of the Federation,*[106] Idigbe, JSC opined that the provision does not permit the court to inquire into proceedings which seek to determine issues or questions as to the competence of any authority or person (that is legal capacity, power, legal qualification or jurisdiction of any authority or person) to make any existing law, promulgated between 15th January 1966 to the time the Constitution came into force. The import of this provision is that where, for instance, a State House of Assembly made a Law on a matter within the Exclusive List prior to May 1999 when the 1999 Constitution came into operation, a person whose civil rights and obligations have been affected, cannot challenge the legislative competence of the State House of Assembly to make such law affecting him even if the issue would otherwise have been justiciable and is not statute-barred. It is difficult to fathom any justifiable basis or wisdom behind *section 6 (6) (d) of the Constitution*.

In *Prince Mustapha v Governor of Lagos State and Ors.*[107]Oputa JSC, echoed the view of Irikefe JSC (as he then was) in *Uwaifo v A.G of Bendel State*[108] in his search for the wisdom behind *section 6 (6) (d) of the 1979 Constitution* which is repeated as such in *section 6(6) (d) of the 1999 Constitution.* In the views of their Lordship, the wisdom behind the said section is that the military regimes at the end of their rule sought to hand down a Constitution in which

[106] [1988] 4NWLR (pt 87)171
[107] [1987] 2 NWLR (pt58) 584
[108] (1982) 7 SC 124 at 145

they made certain that future administrations would not be given a free hand to dig up skeletons of any legislation with which they were involved, for scrutiny.

It is worrisome, to say the least, that judicial powers, which, by tradition, vest in the judicature can be displaced by such selfish proclivity of a military regime which took over the affairs of governance, in the first place, on the pretext of saving the ship of state from disintegration and malady, only to unceremoniously inject an ouster provision in the Constitution on judicial powers, in order to stall any investigation on its stewardship and exercise of legislative powers. Even at that, the said section is unnecessary for the achievement of the aforesaid purpose.

It is our law that in determining the merits of a case, the court is to apply the substantive law in force at the time the cause of action accrued.[109] Consequently, a person whose civil rights and obligations are affected by any law, which is made between the 15th of January 1966 and May 1999, will have the merits of the substantive law in force during the period. Surely, under our law, accrued rights and obligations are not affected by a change in the law unless the change is made retrospective.[110]In that event, the 1999 Constitution cannot alter an obligation, which had accrued under a law, which had come into operation before the Constitution came into force. By this simple reasoning, It is clear that there was no need to have labored to include *section 6 (6) (d) in the 1999 Constitution* and tamper with the judicial powers of the court. There is, therefore, no justification for the aberration that *section 6 (6) (d) of the Constitution* holds out. It is most appropriate to allow the courts to enjoy the powers to interpret and pronounce on the validity of laws.

Beside, the Nigerian Constitution is founded on the principles of separation of power.[111] It is a settled principle of separation of powers that none of the three arms of government under the constitution should encroach onto the powers of the other. Each arm is a separate, equal and co-ordinate department and none can constitutionally encroach upon or erode the function vested in the other.[112] The provision of *section 6 (6) (d)* negates this principle by exempting the legislative powers of the military from the searchlight and interpretative

[109] Adigun v Ayinde (1993) 11 SCNJ I: Alao v Akano (1988)2 SCNJ 300
[110] Victor Rossek v A.C.B. Ltd (1993) 10 SCNJ 20
[111] s. 4, 5 and 6 which vested legislative, executive and judicial powers in the legislature, executive and judiciary respectively.
[112] A.G. (Abia State) & Ors v A.G (Federation) (2002) 6 NWLR (pt 763) 264.

function of the judicial arm of government in a constitutional democracy. This is inappropriate. As Locke[113] reminds us:

> It may be too great a temptation to human frailty, apt to grasp at power, for the same person who have the power of making laws to have also in their hands that power to exempt themselves from obedience to the law they make and suit the law both in its making and execution to their own private advantage.

[113] Scared Treaties on Government (New York: Cambridge University Press, 1690) p. 120. and C Obiozor, 'The Constitutional Vesting of Judicial Powers on the Judicature in Nigeria: The Problem of Section 6(6)(D) of the Constitution of 1999' (2011) NIALS, 218.

CHAPTER THREE

THE STRUCTURE OF THE COURT SYSTEM IN NIGERIA

3.1 The Structure of the Nigerian Judiciary under the 1999 Constitution (as amended).

Judicial powers of the Federation and the States are vested on the superior courts of record established by the Constitution and other courts established by Acts of the National Assembly and laws of state legislature. Courts established by the Constitution are:

a. The Supreme Court.

b. The Court of Appeal.

c. The Federal High Court.

d. National Industrial Court.

e. The High Court of the Federal Capital Territory, Abuja.

f. High Court of a State.

g The Sharia Court of Appeal of the Federal Capital Territory, Abuja.

h. A Sharia Court of Appeal of a State.

i. The Customary Court of Appeal of Federal Capital Territory, Abuja.

j. The Customary Court of Appeal of a State.[1]

k. The National Industrial Court

These are the superior courts of record in Nigeria. The Legislature may however establish such other courts as may be authorized by the law to exercise Jurisdiction on matters with respect to which the National Assembly may make laws,[2] and such other courts as may be authorized by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws.[3] The legislature may abolish any court which it has powers to establish.[4]

It is usual to refer to the Supreme Court and the Court of Appeal as Federal Courts.[5] Such nomenclature, while convenient labels might however obscure their real nature. They are not

[1] CFRN 1999 (as amended) s. 6 (5) (a) –(i)
[2] *ibid* s. 6 (5) (j)
[3] *ibid* s. *6 (5) (k)*
[4] *ibid* s. *6 (4) (b)*
[5] The heading to part 1 of chapter viii of the CFRN 1999

Federal Courts in the same sense as the Federal High Court or even courts established for the FCT. The Supreme Court and Court of Appeal are really more of (national) appellate courts than federal courts.

The State High Court which is the highest court of general jurisdiction in each State is by no means the final appellate court even on matters touching only on State legislation. Appeals lie generally from these State High Courts to the Court of Appeal.[6] Thus where the High Court of a State heard at first instance a matter under a State legislation, and delivers its final judgment, a dissatisfied party may appeal as of right to the Court of Appeal. The channel of appeal continues to the Supreme Court.

The Court of Appeal and the Supreme Court therefore are part of the hierarchy of each State's judiciary as there is no matter on which an appeal from decision of the State High Courts may not lie either as of right or with leave. It is more conceptual to view them as national courts rather than federal courts since they also exercise appellate jurisdiction, on matters from State High Courts.

Chapter vii of the Constitution makes provisions for the establishment, composition and jurisdiction of the superior courts of record for the State and the Federation and the election petition tribunals for the National Assembly and Governorship and State Legislative Assembly Elections. The Code of Conduct Tribunal is not included as part of the judicature in the Constitution. Its functions are judicial but its jurisdiction extends significantly to holders of political office.[7]

3.1.1 The Supreme Court

The Supreme Court is at the apex of Nigeria's judicial hierarchy.[8] It shall consist of a Chief Justice of Nigeria and such number of Justices of the Supreme Court not exceeding twenty one as may be prescribed by an Act of the National Assembly. The appointment of a person to the office of Chief Justice of Nigeria shall be made by the President on the recommendation of the National Judicial Council subject to confirmation of such

[6] CFRN 1999(as amended) s. 241 (1)
[7] O Amucheazi and C Onwuasoanya, *The Judiciary, Politics and Constitutional Democracy in Nigeria* (1999-2007)(Enugu: Snaap Press Nig. Ltd, 2008)p. *40*
[8] CFRN 1999 (as amended) s. 235

appointment by the senate.[9] Other Justice of the Supreme Court shall be appointed by the President on the recommendation of the National Judicial Council subject to confirmation of such appointment by the senate.[10] Its jurisdiction is largely appellate. Appeal lie to it from decision of the Court of Appeal. The Court has exclusive original jurisdiction to determine disputes between the Federation and a State or between States which involve any question on which the existence or extent of any legal right depends.[11] For the Supreme Court to exercise its original jurisdiction, the dispute must affect the State or the Federation in its corporate character.

The Constitution empowers the National Assembly by law to confer additional original jurisdiction on the Supreme Court[12] in pursuit of which the National Assembly passed the Supreme Court (Additional Original Jurisdiction Act) 2003.[13] This Act confers on the Supreme Court additional original jurisdiction to determine disputes between the National Assembly and the President as well as between the House of Assembly of a State and the National Assembly. It is doubtful whether the jurisdiction to determine disputes between State and Federal legislature conferred by Act adds anything new to the law. Already, the Constitution provides for disputes between the States and the Federation. This covers disputes between the political organs of state governments including their respective legislature.

For the purpose of exercising any jurisdiction conferred by the Constitution or any law, the Supreme Court is duly constituted by seven justices where it sits in its original jurisdiction or where an appeal raises a constitutional question[14]. In all other cases, the court is duly constituted by not less than five of its Justices. [15] The language of the relevant section suggests that in the later circumstance, five or more justices may sit while in the former, seven not more nor less shall sit. This would mean that theoretically, all the 22 justices may sit on a normal appeal not involving constitutional question.[16]

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[9] *ibid* s. 231 (1)
[10] CFRN 1999(as amended) *s.* 231 (2)
[11] *ibid* s. 230 (2)
[12] *ibid* s. 232 (2)
[13] LFN 2004 s.16

[14] *ibid* s. 233 (2) (b) or (c)
[15] *ibid* s. 234
[16] Amucheazi and Onwuasoanya, *op cit,p. 28*

3.1.2 The Court of Appeal

The Court of Appeal is the second highest ranking court in Nigeria's judicial hierarchy. It is composed of the President of the Court of Appeal and such other number of Justices not less than forty-nine for which not less than three shall be learned in Islamic personal law, and not less than three shall be learned in customary law, as may be prescribed by an Act of the National Assembly.[17] The President of the Court of Appeal is appointed by the President of Nigeria on the recommendation of the National Judicial Council (NJC) subject to confirmation by the Senate. The other Justices of the Court are appointed by the President on the recommendation of the NJC. There is no requirement of ratification by the Senate.[18] The Court of Appeal has original jurisdiction to hear and determine any question as to whether:

a. any person has been validly elected to the office of President or Vice President, Governor or Deputy Governor under the Constitution, or

b. the term of the President or Vice President has ceased, or

c. the office of the President or Vice President has become vacant.[19]

It should be noted that unlike the case with the Supreme Court, the National Assembly has no powers to add to the original jurisdiction of the Court of Appeal. The Court enjoys an extensive appellate jurisdiction covering appeals from decision of State and Federal high courts, State Customary and Sharia Courts of the FCT, Court Marshal, Code of Conduct Tribunal, National Assembly and State Governorship and legislative Assembly Election Tribunal. [20]

The decision of the Court of Appeal in appeals arising from election petitions shall be final.[21] The National Assembly may by statute confer additional appellate jurisdiction on the Court of Appeal. For the purpose of exercising any jurisdiction conferred by the Constitution or any other law, the Court of Appeal shall be constituted by at least three Justices of the Court of Appeal. [22]

[17] *ibid* s. 237 (1) (a) (b)
[18] CFRN 1999(as amended) s. 238 (1) and (2)
[19] *ibid* s. 239 (1)
[20] *ibid* s. 240 -246
[21] *ibid* s. 246 (3)
[22] *ibid* s.247

In case of appeals from a Sharia Court of Appeal, it shall consist of not less than three Justice of the Court of Appeal learned in Islamic personal law[23]and in appeal from a Customary Court of Appeal, it shall consist of not less than three Justice of the Court of Appeal learned in Customary law.[24]

3.1.3 The Federal High Court

The Federal High Court (FHC) shall consist of a Chief Judge and such number of judges of the FHC as may be prescribed by an Act of the National Assembly[25]. The Chief Judge of the FHC is appointed by the President on the recommendation of the NJC subject to confirmation by the Senate. All other judges of the FHC are appointed by the President on the recommendation of NJC without need for confirmation by the Senate.[26]

The Constitution confers exclusive jurisdiction on the Federal High Court in civil cases and matters touching on an extensive range of issues as follows: public revenue where the federal government or its organ is a party; taxation of companies, bodies corporate and persons subject to federal taxation, customs and excise; banks and banking (except ordinary banker customer relationship), companies and allied matters; intellectual property and standards; admiralty; diplomatic and consular relations; citizenship; immigration and emigration; bankruptcy and insolvency, aviation, ammunitions; drugs and poisons; mines and minerals; weights and measures.[27]

This section further states that:

a. relating to the administration or the management and control of the federal government or any of the agencies.

b. relating to the operation and interpretation of the 1999 constitution in so far as it affects the federal government or any of its agencies;

c. relating to any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the federal government or any of its agencies.

[23] *ibid S.247 (i) (a)*
[24] *ibid S. 247 (i) (b)*
[25] *ibid S. 249 (2)*
[26] CFRN 1999(as amended) *s. 250*
[27] *ibid* s. *251 (1) (p), (q) & (r).*

The Court shall also have and exercise criminal jurisdiction over subject matters covered in its civil jurisdiction. Its criminal jurisdiction further extends to treason, treasonable felony and allied offences. The court's criminal jurisdiction is, unlike the civil jurisdiction conferred on it by the Constitution not to the exclusion of any other court. The National Assembly is also empowered to confer further civil or criminal jurisdiction whether exclusive or not to the Court.[28] The Court shall for the purpose of exercising any jurisdiction conferred on it be duly constituted by one Judge.[29]

3.1.4 The High Court of the Federal Capital Territory Abuja

There shall be a High Court of the Federal Capital Territory, Abuja which shall consist of a Chief Judge and such number of Judges of the high court as may be prescribed by an Act of the National Assembly.[30] The Chief Judge of the High Court of the Federal Capital Territory, Abuja, is appointed by the President on the recommendation of the National Judicial Council, subject to confirmation by the Senate. All other Judges of the High Court of the Federal Capital Territory are appointed by the President on the recommendation of the National Judicial Council.[31]

The Constitution confers exclusive jurisdiction on the High Court of the Federal Capital Territory, Abuja to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceeding involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person, which originate and are brought before the High Court of the Federal Capital Territory, Abuja.[32] The High Court of the Federal Capital Territory, Abuja shall be duly constituted if it consists of at least one judge of that court.[33]

[28] *ibid s. 251 (1) (s).*
[29] *ibid s. 253*
[30] CFRN 1999 (as amended) s. 255
[31] *ibid* s. 256 (i) (2)
[32] *ibid* s. 257 (I) (2)
[33] *ibid s.* 258

3.1.5 The Sharia Court of Appeal of the Federal Capital Territory, Abuja

There shall be a Sharia Court of Appeal of the Federal Capital Territory, Abuja which shall consist of a Grand Kadi of the Sharia Court of Appeal and such number of Kadis of the Sharia Court of Appeal as may be prescribed by an Act of the National Assembly.[34] The appointment of a person to the office of the Grad Kadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja shall be made by the President on the recommendation of the National Judicial Council, subject to confirmation of such an appointment by the Senate.[35] The appointment of a person to the office of a Kadi of the Sharia Court of Appeal shall be made by the President on the recommendation of the National Judicial Council.[36]

The Sharia Court of Appeal shall, in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, exercise such appellate and supervisory jurisdiction in civil proceedings involving question of Islamic personal law.[37] The Sharia Court of Appeal shall be duly constituted if it consists of at least three Kadis of that court.[38]

3.1.6 The Customary Court of Appeal of the Federal Capital Territory, Abuja

There shall be a Customary Court of Appeal of the Federal Capital Territory, Abuja which shall consist of President and such number of Judges of the Customary Court of Appeal as may be prescribed by an Act of the National Assembly.[39] The appointment of a person to the office of the President of the Customary Court of Appeal of the Federal Capital Territory, Abuja shall be made by the President on the recommendation of the National Judicial Council.[40]

The Customary Court of Appeal of the Federal Capital Territory, Abuja shall in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of customary law.[41] For the purpose of exercising any jurisdiction conferred upon it by the

[34] *ibid s.* 260
[35] *ibid s.* 261 (1)
[36] *ibid s.* 261 (2)
[37] CFRN 1999(as amended) *s.*262(1)
[38] *ibid* s. 263
[39] *ibid* s. 265
[40] *ibid s.* 266 (2)
[41] *ibid s*. 267

consititution[42]or any Act of the National Assembly, the Customary Court of Appeal shall be duly constituted if it consists of at least three judges of that court.[43]

3.1.7 The High Court of a State

The State High Court used to be courts of unlimited original jurisdiction. This has changed with the 1999 Constitution. The general jurisdiction of the High Court of a State is now impaired by the exclusive jurisdiction of the Federal High over certain matters. The High Court is composed of the Chief Judge of the State and such number of other Judges of the High Court as may be prescribed by a law of the House of Assembly of a State.[44]

The Chief Judge is appointed by the Governor of the State on the recommendation of the National Judicial Council subject to confirmation of the appointment by the House of Assembly of the State. For other judges, there is no requirement of confirmation by the legislature but the Governor makes the appointment of a person to the office of a Judge of a High Court of a State on the recommendation of the National Judicial Council.[45]

The Court shall have and exercise original jurisdiction to hear and determine any civil proceeding in which the exercise or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceeding involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.[46] This jurisdiction is subject to the exclusive jurisdiction of the Federal High Court and any other provision of the Constitution.[47]

The High Court of a State is duly constituted by one judge.[48] The provisions relating to the High Court of a State apply *mutatis mutandis* to the High Court of the Federal Capital Territory, Abuja.[49]

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[42] *ibid*
[43] *ibid* s. 268
[44] *ibid s.* 270 (2) (a) & (b)
[45] *CFRN 1999(as amended) s.* 271 (1) & (2)
[46] *ibid s.* 270
[47] Example of such other limiting provisions in the Constitution are *S.6(6) (c) & (d),S. 308 (1)* which oust the court's jurisdiction in respect of enforcement of the provision of chapter II of the Constitution determining the competence or authority of past military administrations to make existing laws, and entertaining any civil or criminal proceedings against an incumbent President, Vice President, Governor or Deputy Governor
[48] *ibid s.* 273
[49] *ibid* s. 301 (b); s. 255-258

3.1.8 Sharia Court of Appeal of a State

There shall be for any state that requires it a Sharia Court of Appeal for that state which shall consist of a Grand Kadi and such number of Kadis of the State Court of Appeal as may be prescribed by the House of Assembly.[50] The appointment of a person to the office of the Grad Kadi of a Sharia Court of Appeal of a State shall be made by the Governor of the State on the recommendation of the National Judicial Council, subject to confirmation of such appointment by the House of Assembly of the State.[51] The appointment of a person to the office of a Kadi of the Sharia Court of Appeal of a State shall be made by the Governor of the State on the recommendation of the National Judicial Council.[52]

The Sharia Court of Appeal of a State shall, in addition to such other jurisdiction as may be conferred upon it by the law of the state, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the court is competent to decide.[53] The Shaira Court of Appeal of a State shall be duly constituted if it consists of at least three Kadis of that Court.[54]

3.1.9 Customary Court of Appeal of a State

There shall be for any State that requires it a customary court of Appeal for that State which shall consist of a President and such number of Judges of the Customary Court of Appeal as may be prescribed by the House of Assembly of the State.[55] The appointment of a person to the office of President of a Customary Court of Appeal shall be made by the Governor of the State on the recommendation of the National Judicial Council, subject to confirmation of such appointment by the House of Assembly.[56] The appointment of a person to the office of a Judge of a Customary Court of Appeal shall be made by the Governor of the State on the recommendation of the National Judicial Council.[57]

A Customary Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law and decide on such questions as

[50] *ibid s.* 275
[51] *ibid s.* 276 (1)
[52] *ibid s.* 276 (2)
[53] *ibid s.* 277 (1) (2)
[54] *ibid s.* 278
[55] CFRN 1999(as amended) *s. 280*
[56] *ibid s. 281 (1)*
[57] *ibid s. 281 (2)*

may be prescribed by the House of Assembly of the State for which it is established.[58] It shall be duly constituted if it consists of at least three judges of the court.[59]

3.1.10 The Election Tribunals

There shall be established for each State of the Federation and the Federal Capital Territory, one or more election tribunals to be known as the National and State Houses of Assembly Election Tribunals which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether any person has been validly elected as a member of the National Assembly and whether any persons has been validly elected as member of the House of Assembly of a State.[60]

There shall also be established in each State of the Federation an election tribunal to be known as the Governorship Election Tribunal which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor of a State.[61]

The National and State Houses of Assembly Election Tribunal and the Governorship Election Tribunal shall consist of a chairman and two other members. The Chairman shall be a judge of a High Court and the two other members shall be appointed from among judges of a High Court, Kadis of a Sharia Court of Appeal, Judges of a Customary Court of Appeal or other members of the judiciary not below the rank of a Chief Magistrate. They shall be appointed by the President of the Court of Appeal in consultation with the Chief Judge of the State, the Grand Kadi of the Shaira Court of Appeal of the State or the President of the Customary Court of Appeal of the State as the case may be.[62]

The quorum of an election tribunal shall be the chairman and one other member.[63] An election petition shall be filed within 21 days after the date of the declaration of result of the election.[64] An election tribunal shall deliver its judgment in writing within 180days from the date of the filing of the petition.[65] An appeal from a decision of an election tribunal or Court

[58] *ibid s. 282*
[59] *ibid s. 283*
[60] *ibid s. 285 (i) (a) (b)*
[61] *ibid* s. *285 (2)*
[62] CFRN 1999(as amended) 6th Schedule Item A paragraph 1(3)
[63] *ibid s.* 285 (4)
[64] *Ibid s.* 285 (5)
[65] *ibid s.* 285 (6)

of Appeal in an election matter shall be heard and disposed of within 60days from the date of the delivery of judgment of the tribunal or Court of Appeal.[66]

3.1.11 The National Industrial Court

There shall be a National Industrial Court of Nigeria which shall consist of a President and such number of Judges of the National Industrial Court as may be prescribed by an Act of National Assembly.[67] The President of the National Industrial Court is appointed by the President on the recommendation of the National Judicial Council, subject to confirmation of such appointment by the Senate. All other judges of the National Industrial Court are appointed by the President on the recommendation of the National Judicial Council.[68]

Notwithstanding the provisions of *sections 251, 257 and 272 of the Constitution* and anything contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters relating to labour, employment, trade Unions, industrial relations and matters arising from workplace, relating to Factories Act, Trade Dispute Act, Trade Union Act, Labour Act, Employee's compensation Act or any other Act or law relating to labour, employment etc, relating to grant of any order restraining any person or body from taking part in any dispute over the interpretation and application of the provisions of chapter iv of this Constitution as it relates to any employment, labour, industrial relations.[69]

For the purpose of exercising any jurisdiction conferred upon it by the constitution or as may be conferred by an Act of the National Assembly, the National Industrial Court shall have all the powers of a High Court.[70]

The National Industrial Court shall be duly constituted if it consists of a single judge or not more than three judges as the President of the National Industrial Court may direct.[71]

[66] *ibid* s. 285 (7)
[67] (CFRN 1999 (as amended S. 254A)
[68] Ibid S. 254B (1) (2)
[69] Ibid S. 254 C (1-6)
[70] S. 254 D (1)
[71] S. 254 E (1)

3.1.12 Code of Conduct Tribunal

The Code of Conduct Tribunal is not included in the Constitution as part of the judicature. It is rather an administrative tribunal exercising judicial functions and composed of a Chairman and two other persons appointed by the President on the recommendation of the National Judicial Council. The Chairman shall be a person who has held or is qualified to hold office as a Judge of a superior court of record in Nigeria.[72]

The tribunal has the jurisdiction to try and punish a public officer for breach of the code of conduct set out in Part 1 Fifth Schedule of the Constitution.[73]Appeals from its decision lie as of right to the Court of Appeal. Proceedings before the tribunal are without prejudice to the power of a court of law to try and punish a public officer if the act for which he is tried and punished by the tribunal is also a crime.[74]

The doctrine of double jeopardy therefore would be thought not to avail such a public officer in a subsequent trial. This suggests that the code of conduct tribunal is not a regular court. This view was rejected by the Court of Appeal in *AGF v Abubakar* [75] where the court unanimously held that the tribunal is a court and that proceedings before it are criminal proceeding.[76]

3.2 Control of The Judiciary

3.2.1 Checks and Balances

The guarantor of constitutionalism is the judiciary. It is the arm charged with keeping the executive and the legislature within the boundaries of their constitutional powers. Every exercise of powers by either or both of these two arms could be challenged before the courts. This power of courts to declare any act of the legislature or the executive lawful or unlawful is the definitive feature of constitutionalism. This power is immense. It means that the judiciary potentially has the last say in contentious issues of political purport. Does this then amount to judicial hegemony?[77] The researcher answers in the negative.

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[72] *ibid* 5th Schedule pt 1 paragraph 15(1)
[73] *ibid*
[74] *ibid* paragraph 18 (6)
[75] [2007]8 NWLR (pt 1035) 117
[76] Amucheazi & Onwuasoanya, *op cit,p*. 27-39
[77] Significant limitation to judicial exercise of power in the political process is that unlike the other arms, the judiciary will not usually act on its own initiative. Where there is a dispute, the judicial ball can only be set rolling if a party to the dispute

An intricate mechanism of checks and balances is built into the Constitution. The executive and the legislature enjoy their respective provinces of control over the judiciary. First, in the appointment process of the Justices of the Supreme Court and the heads of all the other superior courts, the executive appoints and the legislature confirms. This permits both arms to have a say on who becomes a Judge, or who does not become one. Both arms also participate in the process of removing the heads of superior courts.

The Code of Conduct Bureau and the related Tribunals are also designed as internal cleansing agents within government and Judicial officers fall within the bracket of persons under their surveillance. The safeguards provided by traditional checks and balances may however prove insufficient in addressing the issue of proper control of the judiciary. There is the ever-present danger that where a single clique controls the executive and legislative arms of government, they may cooperate to render the judiciary a mere puppet under their direction.[78] In such a situation, appointment to the judiciary will be less a matter of learning and character than of political sympathies and patronage. That will be harmful to constitutionalism. The 1999 Constitution sought to address this insufficiency by the introduction of the National Judicial Council.

3.2.2 The National Judicial Council

The origin of the National Judicial Council has been traced to the report of the Eso Panel on Judicial Reform/Reorganization 1993.[79] The panel which was set up, *inter alia*, to make recommendations for the improvement of judicial integrity recommended the creation of two bodies. One to manage the affairs of the judiciary nationally while the other would be responsible for appointment of all judges. Both functions were created under the 1999 Constitution. The National Judicial Council is a product of the search for independence, impartiality and integrity of the judiciary. Under the Independence Constitution of 1960, the appointment and removal of judges was at the direction of the Premier and Prime Minister on the advice of the Judicial Service Commission of the Regions and the Federation

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approaches the court. It is noteworthy that many political disputes are resolved outside the precincts of the courts through negotiations, arm twisting or other methods in use by politicians.

[78] Consider that the People Democratic Party had been in control of the Nigeria federal executive and has enjoy an overwhelming majority in the federal legislature since 1999. Traditional checks and balance safeguards would leave the judiciary at the mercy of one political party or political set. We do however acknowledge that in the Nigeria context, this problem would be more imagined than real since even within the party, there has always remained a wide spectrum of divergence and considerable internal conflicts.

[79] A Nwankwo 'The role of National Judicial Council in the Sustenance of the Judiciary Under Nigeria's Democracy' In A Oyeyipo et al (ed), *Judicial Integrity, Independence and Reforms (Essays in Honour of Hon. Justice M.I Uwais)* (Enugu: Snapp Press, 2006) p.11.

respectively. The 1963 Republican Constitution did not provide for Judicial Service Commissions and the appointments of judicial officers were left fully in the control of the Premier or the Prime Minister as the case may be. Under the military, there emerged at various times the Judicial Advisory Committees with some loose powers to make recommendations for appointments to judicial offices. The situation created under the Republican Constitution easily generated suspicion and unease in the political opposition and fair-minded observers.

Events surrounding the electoral dispute of 1979 provide an illustration of public sceptism with a judiciary, the appointment of which is not clearly insulated from the influence of politicians. For instance, a day after one of the candidates in the Presidential elections of 1979, Chief Obafemi Awolowo, filed his appeal to the Supreme Court on August 20 1979, Justice Fatai-Wlliams was sworn in as the new Chief Justice of Nigeria (that is on August 21, 1979). As a High Court Judge of the Western Region in 1964, it was Fatai-Williams who had dismissed eleven petitions filed by loyalists of Obafemi Awolowo against the election of the Nigeria National Democratic Party led by Awolowo's political foe, Ladoke Akintola. This has led to the interpretation that: …. Fatai-Williams was one of Chief Awolowo's opponents hiding under the sober gown of a judge.[80] This perception was not helped by the fact that Justice B.O Kazeem JCA, who presided over the election tribunal that heard the petition at first instance, was in 1962 the lead prosecution counsel during Awolowo's trial for treasonable felony.

The 1979 Constitution re-introduced the Judicial Service Commission for the states[81] and the Federation.[82] Appointment to the office of the Head of Supreme Court or the State High Courts were now to be made by the President and Governor respectively on the advice of the Judicial Service Commission, subject to approval by the Senate in the case of the Federation or the State Legislature in the case of States.[83] This was also the procedure in respect of appointment of other Justices of the Supreme Court and the President of Court of Appeal.[84] For other federal judges, either of the Court of Appeal or the Federal High Court, there was no requirement for ratification by the Senate. For judges of the State High Courts or of the State Customary or Sharia Courts of appeal, other than the heads of these courts, appointment

[80] D Babarinsa, *House of War(* Ibadan: Spectrum, 2003) p.53.
[81] CFRN 1979 s.170
[82] *ibid* s.140
[83] *ibid* s.211(2)
[84] *ibid* s.217(1)

was by the Governor on the recommendation of the State Judicial Service Commission without the participation of the legislature.

The 1999 Constitution adopting the Eso Committee Report in part, introduced far-reaching changes with regard to appointments, removal, discipline and funding of the Judiciary. This was done by the creation of and vesting of sensitive powers on the National Judicial Council. The body is established by *section 153 (1)(i) of the 1999 Constitution*. It comprises 23 members as follows:

(a) The Chief Justice of Nigeria (CJN) who shall be its chairman;
(b) The next most senior Justice of the Supreme Court who shall be the deputy chairman;
(c) The President of the Court of Appeal;
(d) Five retired justices selected from the Supreme Court or the Court of Appeal by the CJN;
(e) The Chief Judge of the Federal High Court;
(f) President of the National Industrial Court;
(g) Five Chief Judges of States/FCT to be appointed by the CJN to serve in rotation for two years;
(h) One Grand Khadi to be appointed by the CJN from the Sharia Courts of Appeal;
(i) One President of the Customary Court of Appeal to be appointed by CJN from the Customary Courts of Appeal;
(j) Five members of Nigerian Bar Association at least one of whom must be a Senior Advocate of Nigeria to be appointed by the CJN on the recommendation of the Nigerian Bar Association Executive;
(k) Two members not being legal practitioners who in the opinion of the CJN are of unquestionable integrity.[85]

The functions of the National Judicial Council are:

(a) To recommend to the President persons to be appointed as judicial officers for all federal superior courts and the courts of the FCT;
(b) To recommend to the President the removal from office of judicial officers for all federal superior courts and the superior courts of the FCT;

[85] CFRN 1999(as amended) Third Schedule part 1 Item I paragraph 20, s.153 (2).

(c) To recommend to the Governors persons to be appointed as judges of the superior courts of the States;

(d) To recommend to the Governors the removal of judicial officers of the superior courts of states as well as exercise disciplinary control over them;

(e) To control its finances of the judiciary;

(f) To advice the President and the Governors on matters pertaining to the judiciary as may be referred to it;

(g) To appoint, dismiss and exercise disciplinary control over its own members and staff;

(h) To deal with matters related to broad issues of policy and administration.[86]

Of the 23 members of NJC, five are appointed strictly by virtue of the offices they hold: once they have been appointed to hold the designated offices, they become members of the NJC authomatically.[87]Seven are appointed by the CJN from among heads of courts. The discretion of the CJN in making these seven appointments is conditioned by the stipulation that they are to serve in rotation for two years in the Council. Five retired Justices of the Supreme Court and or Court of Appeal are also appointed by the CJN but again from within a closed group. Five members of the Nigeria Bar Association (and these five only participate in considering nominations to the superior courts). Only two of the members of the council are appointed on the absolute discretion of the CJN. This analysis is offered because a lot of criticism is directed at the perceived pervading presence and influence of the CJN in the council.[88]The reality is that the CJN's absolute influence would be restricted to only the two non-lawyers whom he alone appoints. The composition of the council ensures that the CJN does not put the Council under his arm. Further the professional members of the Council are persons who have attained considerable distinction in the legal profession and could be trusted to uphold their personal integrity in deliberations.

A survey of the composition and powers of the National Judicial Council reveals the concern which led to its establishment. That concern is essentially: how to insulate the judiciary from the currents of partisan politics. This concern was addressed in four ways:

[86] *op cit* paragraph 21
[87] *op cit* s.155(1)(a)
[88] A typical example of this brand of criticism is found in a Communiqué issued by the Citizen's forum for Constitutional Reform (CFCR) at the end of their Colloquium on Access to Justice and Legal Reform held in Lagos between the 2nd and 5th of November 2000 where they among other things condemned the composition and powers of the NJC as being unfair and undemocratic citing as one of their reasons that 17 of the members of the Council were appointees of the CJN. http://www.edd.org.uk/cfcr/index/html. accessed on 07/02/15.

i. Merit and Professionalism in Appointments to the Superior Bench:

The composition of the Council is designed to ensure that persons recommended to the appointing authority are persons of integrity and proper qualification. The recommendation by the Constitutional Drafting Committee in 1978 of a 20-man Judicial Service Commission headed by a layman, with the Chief Justice of Nigeria playing a second fiddle and dominated by non-lawyers (12 out of the 20 were to be non-lawyers) had attracted the justifiable ire of learned critics.[89] Aguda had written:

> …so staggering to any lawyer and indeed any discerning person is the composition of the Commission, that it can safely be said that by it, the Judiciary of the future has not only been politicized, but also the road to the appointment of mediocrity to the Nigerian Bench firmly paved.[90]

Before a person is appointed to the superior bench of either a State or the Federation, he is made to pass through a filtering process starting with the Judicial Service Commission through the appointing authority and afterwards ratified in some cases by the legislature. After such a filtering process, surely chaff should be separated from the grain.

ii. Financial Control of the Judiciary

The Constitution confers the Council with the power to control the finances of the judiciary of the States and the Federation. Any funds standing to the credit of the Judiciary from the Federation Account shall be paid to the Council for disbursement to the heads of courts of the States and the Federation.[91] Thus, by this mechanism, the financial control of the judiciary is sought to be preserved. In fulfilling this role, the Council has acted with the degree of probity expected of it.

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[89] D Ewelukwa, 'Judicial Machinery' in *The Great Debate, Daily Times of Nigeria*, November 11 1977, p.382 The author had in addition argued that the Commission should not have had the Chief Justice of Nigeria and the President of the Court of Appeal in its membership since it deliberated on matters which could affect these officers' personal interests. While that point is valid, we however note that the membership of these officers is counterbalanced by the fact that they are in a minority. Indeed a regulatory body of the bench need have the heads of the superior courts in its membership especially as the Chief Justice is also the political head of the Judiciary, the third arm of government; it is only seemly that he has a participation in the highest controlling body of that arm.

[90] A Aguda, The Judiciary Under the Draft Constitution' in *The Great Debate, Daily Times of Nigeria*, November 11 1977, p.358

[91] CFRN 1999(as amended)s.162(9)

iii. Discipline in the Superior Bench

Once appointed, a judicial officer is not entitled to behave as he pleases. The Council's functions extended to the exercise of disciplinary measures against erring judicial officers. This is indispensable to the maintenance of a viable bench. *Paragraph 21(b) & (d) of Item 1 of the Third Schedule* provide for disciplinary measures being taken against erring judicial officers. Such measures may extend to the suspension or removal of the judge. The exercise of disciplinary powers is an effective means of control that the Council has over judicial officers, the Council is not subject to the control or direction of any other person or authority.[92] It has plenary powers to bring judges within the frontiers of judicial integrity by dangling this sobering prospect of punishment.[93] The power to remove a judge however cannot be exercised by the NJC alone. It can only recommend removal to the President in the case of federal judges and to the Governor in respect of State judicial officers.[94]

iv. Insulating Judges from Political Control

A judge enjoys security of tenure until he attains the age of retirement and may only be removed from office if:

a) being a head of any of the federal courts, he is removed by the President acting on an address supported by two-thirds majority of the Senate praying that he be so removed; or
b) being a head of any of the state courts, by the governor acting on an address supported by two-thirds of the state legislature: or
c) in any other case by the governor or the President as the case may be, acting on the recommendation of the National Judicial Council.

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[92] CFRN 1999(as amended) s.158 (1)

[93] This power was exercised on several occasion by the Council in suspending Justices Wilson Egbo Egbo of the FHC and Stanley Nnaji of the Enugu State High Court in 2004 for abuse of discretion; Justice C.N Okoli (chief Judge of Anambra State), Justice Kayode Bamisile (Chief Judge of Ekiti State), and Justice Jide Aladejana (also of Ekiti State) for their unsavoury roles in the impeachment episodes in these States in 2006.

[94] Note that S.292 (1)(a) CFRN 1999 when read together with Item 21 (b) and (d) Part 1, Third Schedule to the Constitution will suggest that the NJC has a role in the removal of all judges of superior courts in Nigeria. There is merit though in the view that in respect of heads of superior courts, the executive and legislature may proceed without the recommendation of the council. See S. 292 (1) (1) CFRN 1999. In such cases, the recommendation council while useful on moral grounds., will not be a precondition to the exercise by the legislature and executive of powers to remove the head of superior court. A contrary position is suggested in the Court of Appeal's decision in *Ebonyi State v Isuama [2004] 6 NWLR (pt 870) 511* where the court proceeded from the basis that a Chief Judge is entitled to have the allegations against him brought before the NJC before he could be validly removed.

In all these situations, grounds for removal must be one or more of the following:

a) inability to discharge the functions of his office arising from infirmity of mind or body; or
b) misconduct; or
c) contravention of the Code of Conduct.[95]

The participation of the Council in the process of disciplining or removing judicial officers affords protection to judges against victimization from aggrieved politicians. The Constitutional Drafting Committee of 1978 had not extended the functions of the Judicial Service Commission to participation in the process of removing judges prompting Abiola Ojo to comment that:

> …one would have thought that greater security against frivolous removals is needed if a judge is to perform his functions without fear or favour… there is need to bring in the Judicial Service Commission in the process of removing judicial officers.[96]

Good counsel did finally prevail and the Judicial Service Commission created under the 1979 Constitution for the States and the Federation were given roles to play in the removal process of judicial officers.[97]This role was extended also to the NJC in the 1999 Constitution.

It has been observed earlier that before the 1999 Constitution, the watchdog function over the judiciary was carried out more or less by the Judicial Service Commission at both the Federal and State levels. The 1999 Constitution preserved the existence and composition of the Judicial Service Commissions[98]but their functions changed. Disciplinary control over all judicial officers of all superior courts (whether state or federal) is now transferred to the newly created council. The Judicial Service Commissions also ceased to have powers to recommend the appointment and removal of judicial personnel directly to the Chief Executive. Rather, they became the lower rung in a two-tier channel of recommendation. The State and Federal commissions recommend to the National Judicial Council, persons for appointment to or removal from state and federal superior courts respectively, prior to the

[95] *ibid* s.292(1)
[96] O Abiola,' An X-ray of the judicial System' in *The Great Debate, Daily Times of Nigeria*, November 11 1977,p.380,381
[97] CFRN 1979 Third Schedule, pt 1, item D, paragraph 8(c)
[98] CFRN 1999(as amended) Third Schedule, pt I, Item E, paragraph 12, for the Federal body; Third Schedule, pt II, item C paragraph 5.

council's recommendation to the respective Chief Executive. The trend is in the direction of centralized control of the judiciary. This development presents a conceptual problem for federalism prompting a learned author to observe that it

> … is in violation of the principles of true federalism. Proponents of the provision have justified it on the basis that it would leave little room for the interference by state governors in the affairs of the judiciary … the method of appointment of the judicial officers is definitely relevant to the sustenance of the Independence of the Judiciary, but not at the expense of violating [sic] a cardinal principle of the basis of the organizational structure of the nation… it would be inconceivable for the President of the United States of America to appoint the judges of the state of New York through the instrumentality of a federal executive body or agency.[99]

It is correct that the participation of the council in the appointment and removal of state judges will check a situation where Governors may be tempted to toy with the independence of the state judiciary. The State Judicial Service Commission is composed of seven or eight members, five of whom are appointed at the absolute discretion of the State Governor while the other two (or for a state which has both the Sharia and Customary Court of Appeal, the other three) are still appointed by the Governor, but conditional upon other recommendations. It is evident therefore that if the appointment and removal of judges were still left for the Judicial Service Commission of the states alone to recommend (as was the case under the 1979 Constitution), it will be leaving the matter in the unhindered control of the state Governor. The intervention of the Council which is placed beyond the ordinary control of a Governor thus addresses this mischief. The same reasoning is also applicable to the case of the President, the Federal Judicial Service Commission and the appointment of federal Judges.

The argument that the tendency towards a unified control of the judiciary caused by the establishment of the Council is in violation of federal principles should be treated warily. First, the present constitutional scheme does not throw federal principles entirely to the winds. There are separate judicial service commissions for each state and the centre. It must be remembered that recommendations originate from these commissions. To that extent, there is recognition of federal principles. Again, there is considerable substance in the view

[99] J Akande, *Introduction to the Constitution of the Federal Republic of Nigeria 1999* (Lagos: MIJ, 2000) p.384

that classical federalism is hardly found in practice anywhere. Each Country adapts to a model of federalism that responds to its needs and circumstances. Thus in the search for judicial integrity or other legitimate concerns, Nigeria is free to and has departed from classical models of federalism. Again, greater unitary practices are evident not just in the organization of the judicature but in many other facets of Nigeria's constitutional life perhaps as a logical consequence of administration. After a history of military administration spanning more than a half of its post-independence history, there are inevitable imprints of the centripetal tendency of military style of governance and where these imprints are of practical value to legal and political developments, they should not be sacrificed. The objectives which the NJC is designed to achieve, far outweighs any objection that may be raised on the basis of departure from federal theories.

Although the National Judicial Council is described by the heading of the segment of the Constitution under which it is established as well as the marginal note to the section that establishes it as 'federal executive body', this description can only be for linguistic convenience. It is trite that the marginal note will not be invoked to alter the clear meaning of words used in a statute. The Council is not an executive body in the sense that it belongs to the executive branch of government. Its description as executive is only an indication that it does not act in a judicial or legislative capacity. It is an executive instrument of the judicature. This need not be laboured as a glance in its composition reveals that it is dominated by judicial (and not executive) officials. Again, the true nature of the body is that it is *national* and not *federal* body. That is, it is not strictly an agent of the federal government. Rather, it is a common agency. In this connection, it has been observed that:

> When it [the NJC] exercises its duty in Paragraph 21(a) and (b) [of Part 1 of the third Schedule 1999 Constitution] it is an agent of the Federal Government. While if it discharges the obligations in Par 2 (c) and (d) above, it will metamorphose into an agent of State Government.[100]

3.3 Judiciary In Other Jurisdictions

At this stage, the researcher will briefly look at the judiciary in other jurisdictions in comparism with the system in Nigeria. These countries include:

[100] A Nwankwo, *op cit*, p.116

3.3.1 United States of America

The researcher will discuss the judiciary under the United States Constitution by looking at the explicit provisions which relate to judicial compensation (The Compensation Clause), tenure of judicial office (the Tenure Clause), and judicial selection (The Appointments Clause). The primary emphasis will be upon the applicable provisions of the United States Constitution because that Constitution provides a more effective basis for judicial independence than the State Constitutions within the United States (United States). The State Constitutions differ drastically in their provisions for the judicial branch of government, therefore, generalizations regarding the specific characteristics of state constitution concerning judicial independence are not possible. These basic characteristics of the American Constitution regarding judicial independence include:[101]

a. The Compensation Clause

The compensation clause provides that: The judges, both of the supreme and inferior courts……. shall, at stated times receive for their services, a compensation, which shall not be diminished during their continuance in office.[102]The purpose of this clause was to prevent the Congress from tampering with the judges' salaries as a means of diminishing the authority of the judicial branch of government as on balance, the power to diminish judicial salaries create the most danger to an independent judiciary.[103] The Framers' purpose in drafting the compensation clause was to preserve judicial independence. The issue of compensation does not apply in Nigeria.

b. The Tenure Clause and the Doctrine of Judicial Immunity

The Tenure clause of the US Constitution provides that the judges both of the supreme and inferior courts, shall hold their offices during good behavior…….[104]Much if not all, of the discussion concerning the compensation clause is applicable to the Tenure Clause. As pointed out by the Court of Claims in **Atkins v United States:**[105]

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[101] *CD Cole, "Judicial Independence in the United States Federal Courts, 2008 Journal of the Legal Profession <http.//vol.13art08.pdf.html accessed on 5 August 2015.*

[102] *United States Constitution 1787 art. III s. 1*

[103] *Ibid in 1776 the contineatial Congress had complained, in the Declaration of Independence, that George III had made colonial judges dependant upon him for both tenure and compensation as a means to extend his rule over the colonies.*

[104] *US Constitution art III s. 1*

[105] *Ibid p. 193*

> Long ago Justice Story noted the integral relationship of the Compensation clause and the Tenure clause, the latter securing to judges…. their continuance in office "during good behavior" Without the one provision, he said, guaranteeing an undiminished compensation, 'the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery……." The two clauses are inextricably tied to one another in pursuit of securing judicial independence and to allow the indirect diminution of judges' salaries to accomplish what the political branches are forbidden to do directly under the tenure clause would be to sanction a deplorable ruse at the expenses of constitutional principle.

The independence created by allowing judges to continue in office during good behavior has historically constituted virtual life- tenure. Virtual life-tenure in judicial office facilitates and assures independent judicial decisions. Coming to the aspect of judicial immunity, in the United States, the Supreme Court recognized the doctrine of judicial immunity in 1871, asserting that:

> It is a general principle of the highest importance to the proper administration of justice that a judicial officer in exercising that authority vested in him shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judges, would be inconsistent with the possession of this freedom and would destroy that independence without which no judiciary can be either respectable or useful.[106]

The only constitutional sanction applicable to federal judges in the United States is the impeachment process. The constitution provides that 'The House of Representatives….. shall have the sole power of impeachment.'[107]The senate shall have the sole power to try all impeachments.[108] The essence is to limit the means by which a judge may be removed from the bench thereby ensuring judicial independence. The Congress of the United States enacted *the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980* to create a

[106] *Bradley v Fisher, 80 Us (13 Wall) 333,347*
[107] *US Constitution art 1, s 2 clause 5*
[108] *US Constitution art 1, s.3 clause 6*

procedure within each circuit for investigation and action upon complaints by any person of judicial misconduct in the federal system.[109] This is not applicable in Nigeria.

c. The Appointments Clause

The Appointments clause in the US Constitution provides: 'The President shall nominate, and by and with the active participation and consent of the Senate, shall appoint…….. judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by law……[110] The selection of all federal justices of article III courts is controlled by the Appointments clause. This mode of appointment is similar with that of Nigeria in appointment of certain justices.

3.3.2 South Africa

In the past twelve years, great transformation was achieved in the South Africa Judiciary: race and gender diversity have improved, judges for the most part have proven themselves dedicated to promoting constitutional valves, and various courts have made decisions reflecting the independence of the courts within the system of separation of powers.

In 1997 after the Constitution court had declared the death penalty unconstitutional and in response to rising levels of violent crime, demands by the public for more rigorous anti-crime programmes and more severe sentences for convicted criminals increased. Consequently, the legislature passed the Criminal Law Amendment Act(CLAA)[111] which increased compulsory minimum sentences ranging from five years imprisonment to life imprisonment[112] for a variety of crimes such as murder, rape, robbery, drug trafficking, corruption, fraud and assault.[113]However, recognizing that sentencing is a judicial function and that sentencing officers must have some degree of independence in tailoring punishments to individual circumstance, the government included in the Act a provision that stated:

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[109] *Judicial Council Reform and Judicial Conduct and Disability Act 1980 (Codified as amended at 28 USC SS 331-373 (1982 &Supp.IV 1986)*

[110] *US Constitution art II s. 2 clause 2*

[111] *CLAA 105 of 1997*

[112] *ibid s. 51 (1) (2)*

[113] [108.] *ibid schedule III*

> If any court…. is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.[114]

While the legislature and executive have legitimate interests in protecting the people and in reducing crime, the government recognized, when drafting the CLAA, that any legislature aimed at achieving these goals could not infringe on judicial independence. The Act is an example of the government's successfully balancing the demands of the public and its legitimate role as protector of public safety against the requirements of judicial independence and of its sensitivity to the need for legislation to conform with the requirements of the Constitution.

The rape trial of Jacob Zuma, the former deputy President of the ANC served to demonstrate judicial independence and impartiality in South Africa. Accused by a 31 year old family friend of raping her at his home in Johannesburg in November, 2005, Zuma stood trial in the Johannesburg High Court and was acquitted on 8th May, 2006. A white man who was in some ways emblematic of the Old regime, Justice Van der Merwe, presided over the case against Zuma, a black man who was instrumental in the fight against apartheid and the ANC and was himself symbolic to many people of the new regime. Under pressure from Zuma's supporters, women's rights activists, political parties and a variety of other sources, the judge remained impartial and proved that he could apply the law without regard to race, political affiliation or background of the defendant.[115]

3.3.3 Malawi

Malawi is a small, densely populated, landlocked country of southern Africa. Over 80% of the population lives in rural areas and despite impressive macroeconomic growth over the last decade, rates of poverty remain stubbornly high. Malawian politics are dynamic and volatile. On one hand, the comparatively high level of competitiveness and presidential turnover are positive indicators of democratic progress in a region that continues to be characterized by hegemonic party systems. On the other hand, a personalistic style of politics and the

[114] *ibid s. (3) (a)*

[115] *A Gorden and D Poruce , Transformation and the independence of the Judiciary in South Africa <http.//vol.53art08.pdf.html accessed on 5 August, 2015.*

opportunistic cycling of politicians in and out of the political parties continue to hinder the formulation of effective development strategies in Malawi.

Over the last twenty years political conflicts, substantial and minor, have arrived at the doorstep of the Malawian judiciary. The Parliament has been dysfunctional and unstable. The Executive has pushed the democratic limits of their power, whereas in contrast, the judiciary has represented a core stabilizing institution for Malawi's fledgling democracy.

Across Southern Africa where there is a demise of the legislature, in both policy making and symbolic terms, the court becomes an even more important potential check on the power of the Executive and by so doing the court's independence and autonomy are carefully guarded and fostered.

The centrality of the judiciary in Malawi's politics was evident in the 2014 elections. In the wake of a highly flawed election all three political parties rushed to the courts seeking injunctions. The High Court overturned Joyce Banda's unconstitutional attempt to nullify the results and the Malawi Electoral Commission declared the results within the mandatory eight days. The judiciary was simultaneously lauded and chastised but in all, it appears to have emerged with its legitimacy intact. This is a reflection of the positive facets of judiciary independence in Malawi.[116]

3.3.4 India

The constitution makers of India had a ground vision of a free and just society based on the rule of law. In the realization of that vision they had assigned a prominent role to the judiciary which it held to perform independently and uninfluenced by the other two branches of the government, executive and legislature. Among all the troubles and tribulations India has faced since the commencement of the Constitution, the judiciary has performed its role fairly well. In its times of trouble with the executive, the judiciary has received the spontaneous and sustained support of a powerful legal community and of the people in general. Therefore the judiciary in India has its role along the expected lines. This has helped in sustenance and effective operation of a democratic constitution in India.[112]

[116] *R Ellet, 'Politics of Judicial Independence in Malawi'<http.//vol.43art08.pdf.html accessed on 5 August 2015.*
[112] *MP Singh, 'Securing the Independence of the Judiciary. The Indian Experience'<http.//vol.33art08.pdf.html accessed on 5 August, 2015.*

CHAPTER FOUR

THE COURTS AND POLITICAL GOVERNANCE IN NIGERIA

4.1. The Introduction of Political Party System in Nigeria

The colonialist in order to achieve their sole purpose of economic exploitation, founded the indirect rule or Native Administration System of ruling people through the native Chiefs (or the institution or authority which the people were willing to recognize and obey). It was an allegiance of people to a tribal head, freely given and without external cause. This was a concept older than Nigeria, having been applied by Lord Lugard while in East Africa.

The Indirect rule, with its disadvantages and problems, was regarded as not fit for independent government. With the movement of Nationalists in the West African Region, one thing they demanded under the nationalism quest was for constitutional reforms in all the British West African Colonies. These demands eventually led to the emergency of the Guggisbery Constitution of 1925 in Gold Coast and the 1922 Clifford Constitution in Nigeria, which introduced the elective principle, whereby four Nigerians were elected into the legislative council. This led to the foundation of the first Nigerian political party, the Nigerian National Democratic Party (NNDP) led by Herbert Macaulay.

The development of political parties helped a lot in arousing nationalist feelings and agitations in Nigeria. Some of these early political parties that came after the Nigerian National Democratic Party (NNDP) of 1923 were Nigerian Youth Movement (NYM) of 1936, West African Students Union (WASU) of 1925 and the National Congress of British West Africa, (NCBWA) of 1920. The parties articulated the people's interest and attacked colonial rule.

Later, the Macpherson Constitution of 1951 came up and three major political parties were formed to contest the election in the year for the attainment of self rule. They were the National Council of Nigeria and the Cameroon (NCNC) of 1944, the Action Group(AC) of 1951 and the Northern Peoples Congress (NPC) of 1951. The Action Group evolved from the Egbe Omo Oduduwa, a Yoruba Cultural Union. The NCNC had institutional membership who were mainly Igbo while the NPC had its origin in Jamiyyar Matah Arewa (JMT), a Hausa Cultural Organization.[1]

[1] N Izuako, 'Political Parties and Freedom of Association under the 1999 CFRN' (2001) 1,*UNIZIK L.J*,vol.6 p.2

The early political parties in Nigeria assisted or were instrumental in the country's success in the attainment of independence for Nigeria. They thereafter drifted in their desperate bid to clinch and control power at all cost whether at the centre or at the regional levels.

4.2. Political Parties Formed under the Various Republic in Nigeria

Since independence in October 1, 1960, many political parties have taken part in Nigerian politics. The political parties are listed according to the time or era in which they took part in Nigerian politics as follows:

4.2.1 1960 – 1966: The First Republic

National Council of Nigeria and the Camerouns	NCNC
Action Group	AG
Northern Peoples Congress	NPC
United National Independent Party	UNIP
Northern Elements Progressive Union	NEPU
United Middle Belt Congress	UMBC
Dynamic Party	DP
Niger Delta Congress	NDC
Lagos United Front	LUF
Nigerian National Alliance	NNA
United Progressive Grand Alliance	UPGA
Bornu Youth Movement	BYM

4.2.2 1979 – 1983: The Second Republic

National Party of Nigeria	NPN
Unity Party of Nigeria	UPN
Nigeria Peoples Party	NPP

Great Nigeria Peoples Party	GNPP
Peoples Redemption Party	PRP
Nigeria Advance Party	NAP

4.2.3 1992 – 1993: The Third Republic

Social Democratic Party	SDP
National Republican Convention	NRC

4.2.4 1996 – 1998: Abacha's Civil Rule Plan

Democratic Party of Nigeria	DPN
Congress for National Consensus	CNC
Grassroots Democratic Movement	GDM
National Centre Party of Nigeria	NCPN
United Nigeria Congress Party	UNCP

4.2.5 1998 till date: The Forth Republic

Peoples Democratic Party	PDP
All Nigeria People Party	ANPP
Alliance for Democracy	AD
And later the:	
Accord	A
Accord Alliance	AA
African Renaissance Party	ARP
All Progressive Grand Alliance	APGA
Advance Congress of Democracy	ACD
All Peoples Liberation Party	APLP

Allied Congress Party of Nigeria	ACPN
African Democratic Congress	ADC
Action Party of Nigeria	APN
African Political System	APS
African Renaissance Party	ARP
Better Nigeria Progressive Party	BNPP
Community Party of Nigeria	CPN
Congress for Democratic Change	CDC
Citizens Popular Party	CPP
Democratic Alterative	DA
Democratic Peoples Alliance	DPA
Democratic Peoples Party	DPP
Fresh Democratic Party	FDP
Hope Democratic Party	HDP
Green Party of Nigeria	GPN
Justice Party	JP
Liberal Democratic Party of Nigeria	LDPN
Labour Party	LP
Masses Movement of Nigeria	MMN
Movement for Democracy and Justice	MDJ
Movement for the Restoration and Defence of Democracy	MRDD
National Action Council	NAC
National Conscience Party	NCP
New Democrats	ND
National Democratic Party	NDP
National Majority Democratic Party	NMDP
National Reformation Party	NRP

National Solidarity Democratic Party	NSDP
National Mass Movement of Nigeria	NMMN
National Unity Party	NUP
New Nigeria Peoples Party	NNPP
Nigeria Advance Party	NAP
Nigeria Elements Progressive Party	NEPP
Nigeria People Congress	NPC
Party for Social Democracy	PSD
Peoples Mandate Party	PMP
Peoples Progressive Party	PPP
Peoples Redemption Party	PRP
Peoples Salvation Party	PSP
Progressive Action Congress	PAC
Progressive People Alliance	PPA
Republican Party of Nigeria	RPN
United Democratic Party	UDP
United Nigeria Peoples Party	UNPP[2]

Later on 6th February 2013, some political parties which include Action Congress of Nigeria (ACN), All Nigeria Peoples Party (ANPP), Congress for Progressive Change (CPC) and a faction of All Progressive Grand Alliance (APGA) in accordance with section 84(1) of the Electoral Act[3] merged and came up with a new name All Progressive Congress (APC) in anticipation of the 2015 election and won the 2015 Presidential election and other elective positions in several States.

[2] INEC: List of Registered Political Parties, November, 2006 p. 1-24
[3] Electoral Act, 2010 (as amended)

4.3. Nature of Political Party System

The political party is a connecting link between diverse groups in society and members of the electorate attempting to achieve organized political action. A political party is a body of persons recognized by the Constitution of Nigeria and like a trade union is distinct from the people which constitute it. A political party has its own rights and obligations as provided in the constitution and the Electoral Act.[4] It is clear by virtue of section 80[5] that political party registered under the Act shall be a body corporate with perpetual succession and a common seal and may sue or be sued in its corporate name.

In *Iyizoba v Olanipekun*,[6] it was held that the NPP being a registered party under the Electoral Act of 1977 was a person in law and was solely competent to sue or be sued. The recognized registered political parties are the only political associations that can canvas for votes and nominate people to contest elective offices.[7] A member of the Senate, or of the House of Representatives or of a House of Assembly shall vacate his seat in the House if being a person whose election to the Senate or of Hose of Representatives or of the House of Assembly was sponsored by a political party, he becomes a member of another political party before the expiration of the period of which that House was elected.[8]

The Electoral Act[9] confers political parties with rights and duties as to be treated as incorporated association within the class of trade union and similar organization. *In Rimi & Anor v Kano*[10], the court held that 'A political party being a creation of the constitution is a legal entity, and …. party constitution binds the party and its members as well.'[11]

4.4. Roles of Political Parties in a Democratic Process

Political parties play various roles in a democratic process. These roles include:

a. **Mobilization:** Electorates are mobilized by political parties to vote during elections. They are mobilized during elections especially during the campaigns. The parties

[4] Ovie Whiskey & Ors v Olawoyin & ors (1985) 6NCLR 156, Coker JCA (as he then was)
[5] Electoral Act, 2010 (as amended)
[6] (1981) 2 PLR 319
[7] CFRN 1999 (as amended) s.68 (1) (g) and s. 109 (1) (g)
[8] *Ibid*
[9] *op cit*
[10] (1982) 3 NCLRP 478
[11] Abubakar Rimi & Babarahe Musa v Peoples Redemption Party (1981) 2 NCLR p. 734

engage in political campaigns, appealing to electorates to go to the polling centres and vote for the candidates of their choice. In Nigeria, parties doll out a lot of monetary and other incentives like, the gift of bags of rice, motorcycles, machines, cars etc. Giving such gifts to the electorates/voters amount to buying their conscience. Electorates/voters have been observed to change their minds in favour of whosoever gives the highest amount of money or gift irrespective of the credibility or otherwise of the candidates.

b. **Socialization:** Political parties are vehicles that convert domestic aspirations into concrete objectives. Political parties educate and sensitize the populace and enlist candidates for elective offices after home grooming. They select campaign issues which make up the party's message towards captivating the electorate to their symbols during voting. In some cases, political parties act as a link between the government and public opinion.

c. **Organization of Government Policy:** In a parliamentary system of government, the party that wins the majority in the parliament forms the government while in the presidential system of government, the party that wins the presidency forms the government. Political parties provide a training ground for politicians. Where they are not successful, they remain in the opposition and act as watchdogs of the policies of the government in power constituting viable checks and balances in the system.

d. **Fence Mending:** In most cases, where the executive and the legislature disagree, the party (if the party is in power) intervenes to settle the problem.

e. **Disciplinary Measures:** Political parties discipline its members who infringe on the constitution of the party and other intra party feuds. Intra party face-offs occur almost on regular basis.

4.5 Electoral Reform Committee

Due to the various pitfalls or problems in our electoral system, the Federal Government in a bid to reform our electoral system, in 2008 set up an Electoral Reform Committee headed by Hon. Justice Mohammed Lawal Uwais (CJN as he then was). The Electoral Reform Committee sometime in 2009 submitted its report to the Federal Government. The Federal Executive Council (FEC), the highest decision –making organ of the government, had after three weeks of the deliberation on the report, accepted some of the recommendations and rejected quite a few. On Wednesday 11 March, 2009 the Federal Government released its white paper on electoral reforms proposed by the Justice Uwais led Committee to the Senate for confirmation. The recommendations made by the said committee, in order to effect the desired reform in our electoral system, some of which were accepted and others rejected by the Federal Government are as follows;

a. Recommendations accepted by the Federal Government

1. INEC Composition

They recommended establishment of a new, truly non-partisan, independent and impartial INEC composed of:

A. A chairman, deputy chairman and six persons of unquestionable integrity one of who must come from each of the six geo-political zones.

B. The inclusion of six other nominees comprising one nominee each from the following bodies:

i. Labour

ii. Nigerian Bar Association

iii. Media

iv. National Youth Council

v. Nigerian Civil Society and

vi. Women Organization

All the appointments will be subject to Senate confirmation.

2. Conduct of Elections

They recommended Open Secret Ballot System which allows

A. A voter to go into a polling booth to mark his ballot in secrecy and drop it in the box in the open.

B. Accreditation of registered voters prior to the commencement of voting for the purpose of tracking how many people cast their ballots in a polling station.

C. Display of voter's register prior to elections to enable registered voters, political parties and the electorate generally make claims and objections.

D. Election results will be announced at all polling centers by presiding officers duly signed and copies given to

   i. Accredited agents

   ii The Police and

   iii The SSS

E. State Independent Electoral Commission to be abolished so that INEC can conduct all elections in the country, including the local government polls.

F. Government accepts that politicians convicted of violence and thuggery during elections, in addition to any other punishment should be banned from holding public office for 10years

3. Funding of INEC

The funding of INEC is to be first-line charge on the consolidated Revenue Fund of the Federation so as to guarantee financial and administrative independence.

4. Independent Candidature

Government accepts the recommendation that independent candidates be allowed to contest all election.

5. Unbundling of INEC

Government accepts recommendation to create the following new bodies to handle some of the functions currently performed by INEC

A. Political Parties Registration and Regulatory Commission

Establishment of a Political Parties Regulatory Commission to among other things, register political parties, monitor their organization and operations and arrange for the annual auditing of accounts.

B. Electoral Offences Commission

Establishment of an Electoral Offences Commission to, among other things, deter the commission of electoral malpractices, investigate where they occur and prosecute alleged offenders.

C. Centre for democratic studies

Establishment of the centre for democratic studies to undertake broad civic and political education for legislators, political office holders, security agencies, political parties and the general public.

6. Tribunals

The number of judges that sit in Tribunal should be reduced from five to three so that more tribunals can be established per state.

7. Disqualification of Candidates

Disqualification of candidates fielded for any election should be done on the basis of the provision of the **1999 Constitution** and the **Electoral Act.**

8. Funding Political Parties

For the purpose of transparency and accountability, political parties must publicly disclose to INEC all sources of funding including donations. Only parties that score a minimum of 5 percent of votes cast will be eligible to receive grants from public funds.

b. Recommendations not accepted by the Federal Government.

However the Federal Executive Council did not accept the following recommendations:

1. That the National Judicial Council (NJC) should be responsible for the appointment of the board of INEC and those of the three proposed bodies to be established.

2. That election petition should be concluded within six months after the elections: four months at the Tribunal and two months at the appellate court.

   Council did not accept this recommendation because the current system in which judgments sometimes come after six months presents a better dispensation of justice to the aggrieved[12]

A lot of people condemned the decision of the Federal Government to retain powers to appoint members of the Independent National Electoral Commission (INEC). Almost all said that government's position indicated that it was not sincere with electoral reforms. But the ruling PDP disagrees saying Alhaji Musa Yar'adua has proved critics wrong while the recommendation will strengthen Nigeria[13].Vanguard Newspaper on Friday March 13, 2009 published interview conducted by its reporters with certain personalities in respect of the electoral reform committee recommendation and they have this to say:

1. Alhaji Bashir Tofa, former Presidential Candidate of the defunct National Republican Convention: Alhaji Bashir Tofa said the idea of the President insisting on retaining the power to appoint INEC chairman is not in the best interest of the Country. If he is sincere with the reform, he should either accept what the Justice Uwais committee has proposed which is tedious and he is giving the responsibility to those who should not have the responsibility too, which is a also a mistake too on the part of the committee**[14].**

   He blamed the Uwais committee for presenting a blank cheque for the President to manipulate, maintaining that it was a mistake that robbed Nigeria, chance of attaining electoral freedom.

2. Barrister Bamidele Aturu, a Lagos Lawyer, in a statement said very clearly; The Yar'Adua administration never really believed in any reform of the electoral process.

[12] Vanguard Newspaper Friday 13th March, 2009 pg15
[13] Vanguard Newspaper Friday 13th March, 2009 pg 1&5
[14] Vanguard (supra) pg 5

The decision of President to cling to the selection of members of the Commission indicates a resolve to continue to make the election management body an agent of the party in power.

What the government is saying loud and clear is that it is not interested in making INEC independent. It is difficult to see the sense in rejecting the recommendation that election petition cases be disposed of before swearing in and within six months of conclusion of the election. The government argues that lack late disposal of elections cases tends to justice denial. This is simply unbelievable. How can that be? The government simply is disconnected from the realities on the ground[15].

4.6 Admissibility Questions Regarding the PVC and the Card Reader

The introduction of the Personal Voter's Card (PVC) as well as the Card Reader is a novella concept in the electoral process and provokes new jurisprudence in the Nigeria Legal System and most especially as regards the credibility of elections in Nigeria. To have a better overview, it is imperative to initially regard Independent National Electoral Commission(INEC'S) description of the PVC and Card Reader before an attempt can be made to determine admissibility challenges and issues that may arise by counsel before the Tribunal. Anticipated challenges include admissibility of computer or electronically generated evidence as well as their necessary evidential foundation.

4.6.1 Independent National Electoral Commission (INEC) Smart Card Reader

The Independent National Electoral Commission's (INEC) Resident Electoral Commissioner in Lagos State, Mr. Akin Orebiyi in a televised interview with Channels Television sometime in March 2015, had this to say as regards the smart card reader:

"The Smart Card (PVC) has certain features and benefits that will deter another person from using somebody else's card. When you insert your card, it will authenticate it to be sure it is an INEC's card and whether the owner of the card is the person bearing it. The individual will put his thumb on the smart card reader and it will bring the individual's features. The card reader is configured to be used in one particular polling unit. It cannot be used in two places."

[15] *Vanguard (supra) p.5*

From the aforesaid televised interview, certain questions are left unanswered, namely:

1. Does the Card Reader require a network to function properly?
2. Assuming it requires a network, what happens to polling Units that are in remote areas where there is no network?
3. How is the Card Reader configured?
4. What device or equipment is used to do the configuration;
5. When configured, does the Card Reader have its independent storage device embedded in its build–up?

All these questions, bring to the fore, the all-importance question, which is, whether the INEC Card Reader qualifies as a Computer or an Electronic device?

The registration of a prospective voter begins when he (the would–be voter) approaches an INEC official at a public place designated by INEC as a Registration Point. The INEC official hands over to the prospective voter a form to fill-in his personal details such as his name, address and occupation amongst other. Upon completion of this Form, the official types in those personal details into a computer. This computer is connected to a biometric device and a camera for the purposes of capturing a prospective voter fingerprints and his picture respectively. Now, both the biometric device and camera qualify as electronic input device, as the main purpose is simply to input captured data, which is subsequently fed into the computer and stored.

The aforesaid registration process being a nationwide task performed by INEC all the INEC officials present their computers, which contain data of all prospective voters, and are then presumably, fed into the INEC Mainframe Computer.

The Mainframe Computer is a central computer that collates and stores all the data fed by each and every computer that were used at those Registration Points.

Thereafter, at a known date the INEC announces to the general public that the personal details were captured in a Card, called the Permanent Voters Card (PVC) and the Cards were ready for collection. The prospective voter goes to an INEC designated location and at that location he collects his PVC.

On the day of election at a polling point, he presents his PVC to an INEC official, who takes PVC and scans the PVC using an INEC Card Reader in order to validate or accredit the

prospective voter and confirms that the card really belongs to INEC. This is presumably to forestall forged cards or multiplicity of votes.

This PVC has a Barcode that enables the Card Reader read the PVC. Upon scanning the PVC when place directly underneath the scanner of the Card Reader, all the information on the PVC is prompted, that is, automatically displayed, on the display unit of the Card Reader. It is worthy of note that at this point the Card Reader qualifies as an Electronic Device as it simply reads the PVC.

Thereafter, the prospective voter is told to place any of his biometric finger on the fingerprint scanner, which also is a feature or part of the Card Reader. At this juncture, it is important to note that, assuming the Card Reader transmits that scanned finger through an Internet Service Provider (ISP) down to the mainframe (a computer) the Card Reader simple is an electronic device and the certificate of Authentication would have to emanate from the Mainframe as required by Section 84 of the Evidence Act, 2011 as amended. This is because the data emanating from the mainframe is computer generated. NOTE THE REFERENCE TO CERTIFICATION IS ONLY IN REGARD TO THE MAINFRAME AND NOT THE CARD READER.

However, where the Card Reader, which functions to read the PVC, goes further to have in its build-up, a storage device, thereby rendering the use of an ISP to validate a prospective voter, unnecessary, the card reader will qualify as a computer in its own kind

4.7 Internal Affairs of Political Parties and Judicial Review

One of the major problems faced by the judiciary is the legal way of deciding dispute from the actions of the political parties which in many occasions requires political processes. Thus due to tendency of political parties to use legal powers for political purpose, the courts are expected to play a role to review questions which appear to be political in nature but with legal elements. Judicial review in this context is a legal way in which the court controls or overturns the actions of the political parties or decide disputes arising from the exercise of powers and functions by the political parties.[16]

[16] T Allah, 'Deference, Defiance and the Doctrine of Defining the limits of Judicial Review; (2010) 60 *University of Toronto Law Journal* pp. 42 – 59.

The interference into legal aspects of the affairs of the political parties by the courts, promote party discipline, democratic principles and reduces injustice across party politics. The phrase 'internal affair of the political parties' refers to the affairs that involve the internal administration or matters of a particular political party. Even though the power of electing or choosing the leadership of the country with respect to some political offices is governed by the Constitution, the people are elected through registered political parties. However, the process of deciding whom to nominate and who to disqualify in a party therefore becomes the duty and responsibility of the various registered political parties. The researcher will at this point analyze the following issues: Do the courts have the power to review the internal affairs of a political party; What is the position of the Law in Nigeria with regards to the matters having to do with the internal affairs of the political parties; Is there any statutory provision in Nigeria regulating this important aspect of democracy that is the institution of political parties? What are the attitudes of the courts in Nigeria towards the internal affairs of the political parties? Is there any rational for judicial review of the internal affairs of political parties? Are the political parties bound by the provisions of their constitution?

The opportunity for the court to pronounce on the internal affairs of political parties in Nigeria came up in the case of *Onuoha v Okafor*.[17] The issue in this case has to do with whether the court has the power to review the decision of a political party dealing with nomination and sponsorship of candidate for election. The plaintiff together with other members of the party including the third defendant contested the primary election of the Owerri Senatorial District, Imo State under the Nigeria Peoples Party. The plaintiff was declared the winner having gotten the highest member of votes. The third defendant alleged irregularities in the election process. The party appointed a panel to investigate the allegation wherein the contestants were given opportunity to be heard. The party resolved the issue in favour of the third defendant and the plaintiff brought an action asking the court to nullify the panel's decision and declare his nomination valid and subsisting and sought for an injunction restraining the party from submitting the name of the third defendant or any other name to the Electoral body-FEDECO. The court granted the claim of the plaintiff.

The Court of Appeal set aside the decision of the High Court and dismissed the claims on all the grounds because in the court's opinion, the matter was not subject to judicial review, as selection of the candidate for sponsorship was the prerogative of the political parties and the decision of the party was binding on the members.

[17] (1983) 2SCNLR 244

The Supreme Court on appeal unanimously affirmed the decision of the Court of Appeal on the ground that the matter falls under the political questions not subject to judicial review. The Supreme Court stated that the only question for determination is whether the court had jurisdiction to entertain a dispute arising within a political party. Their Lordships answered the question in the negative. They considered *section 6(6)(b) of the 1979 constitution* and held that the right to sponsorship by a political party was not a legal right vested in the appellant, either under the Constitution or the Electoral Act or any other statute. Nor was it a right under the common law or customary law. Since no such right accrued to the appellant, he lacked *locus standi* and the court lacks jurisdiction. The court noted that even when a person is nominated through the primaries to bear the flag of a party such a nomination can be withdrawn by conduct if the leadership of the party denies the candidate its sponsorship, adding that implicit in the right of political party to canvass for votes for a candidate is the right to sponsor and the right to withhold sponsorship from a candidate.

Thus while the party's right to sponsor a candidate operated to oust the court's jurisdiction in matters of sponsorship of candidates for election, there was no adverse right against the party enjoyed by a candidate to compel his sponsorship even after nomination.

The underlying judicial attitude both at the Court of Appeal and the Supreme Court in this case was stated by Obaseki JSC as follows: -

> Can the court decide which of the two candidates can best represent the political interest of the NPP? In all honesty, I think the court will in doing so be deciding on a political question which it is ill-fitted to do …. the criteria to be used in determining the proper candidate to be selected are not available to courts to enable it adjudicate on the matter.[18]

The doctrine of majority rule in the running of association and companies as enunciated in the English case of *Foss v Harbottle*[19] was relied on by the courts in coming to their decision. Phil-Ebosie JCA (as he then was) had observed that in matters falling under the category of the instant case, the courts would only interfere if there was a breach of proprietary right or a breach of contract or where there was a statutory provision conferring jurisdiction on the court.

[18] *Ibid*
[19] (1843) 2 Hare 461

The decision in the above case offered an opportunity to the leadership and powerful cliques of political parties to act as they pleased, assured that the courts would not entertain any challenge to their actions. The decision was applied in a countless number of cases. Some of these cases will be mentioned in this work.

In *Jang v INEC*,[20] the appellant contended that he was the duly nominated candidate of ANPP in the 2003 elections to the Plateau State House of Assembly while INEC declared the 7th Respondent winner. The party denied that it sponsored the appellant. The Election Petition Tribunal declined jurisdiction stating that the question of which candidate a party sponsored was an internal affair of the party and the tribunal would not wade into it.

A similar situation arose in *Osakwe v INEC*.[21] On February 10, 2003, the People's Democratic Party (PDP) sent a list to INEC of candidates it intended to sponsor for Anambra State House of Assembly elections. By another letter dated March 6th, 2003, the party replaced the appellant name on its list with that of the 5th Respondent. Yet by a third letter dated that same day, the party restored the effect of its first letter dated February 10, 2003. Their prevarication caused uncertainty and confusion whereas the party obtained an order of the Federal High Court compelling it to use the original list. After the elections, appellant challenged the election of the 5th respondent before the election tribunal claiming that he, the appellant was entitled to the sponsorship of the party. His petition failed and his appeal was dismissed by the Court of Appeal on the ground of lack of jurisdiction of the courts to inquire into the domestic affairs of political parties.

In a similar case of *Okoli v* Mbadiwe,[22] the plaintiff having been nominated by the National Party of Nigeria was replaced by the name of the defendant as the candidate for election into the Akokwa/Arondizogu constituency. The plaintiff brought an action in respect of the substitution and the court held that it lacked the power of judicial review in this circumstance being a political question and that the court cannot inquire into the reasonableness or otherwise of a political party.

Also, in *Ogunsan v Oshunride*[23] having similar facts with the above case, the High Court relying on section 83 (2) of the Electoral Act[24] held that the court would not interfere with the matter because it concerns the internal affairs of the political party.

[20] [2004] 12 NWLR (pt 886) 46
[21] [2005] 13 NWLR (pt 1942) 442
[22] 1984 1NCLR 502
[23] (1986) 6 NCLR 611

In *Rimi and Musa v Peoples Redemption Party*[25], the party's chairman sought to convene party's convention, 18 days after the notice of the convention was given contrary to the provision of the party's constitution that party's convention must be held within 14 days from the date of notice of convention. The plaintiff sought an injunction against the party from holding the convention on a date fixed by the chairman. The court held that the matter was a non justiciable political question because the party's constitution makes the chairman's interpretation of the constitution final and binding.

Also in the case of *Balarabe Musa v Peoples Redemption Party*,[26] the party resolved that governors elected on the party's platform should not attend institutionalized meetings to which the governors of other political parties were invited. When the court was invited to quash the resolution, it refused on the ground that it was an internal affair of the party which the party has a supreme right over its affairs and the court cannot substitute its own will over that of the political party.

The court in *Obayemi v Awojolu*[27] also did not grant the injunction sought against National Party of Nigeria (NPN) from conducting its primary elections in Ondo State because the court felt that issue of conduct of party primary was an internal affair of a political party.

However, the court in *Rimi & Anor v Aminu Kano*,[28] interfered with the internal affairs of the People' Redemption Party by nullifying the expulsion of two members from the party. The expulsion was carried out by the chairman and secretary of the party who summoned the meeting of the National Directorate of the party and two members were expelled during the meeting for disobeying the party's instruction. This was contrary to the party's constitution which provides that expulsion could only be effected at the Annual Convention of the party.

In the case of *Dalhatu v Turaki*,[29] the All Nigeria Peoples' Party (ANPP) scheduled all its primary elections to hold on 3rd January, 2003. That of Jigawa State was to hold in Dutse in Jigawa State. A committee conducted the screening and primary election for Jigawa State in Kano in which the first defendant did not take part. The appellant who took part was declared the winner by the committee. Another primary was conducted in Dutse in which the 1st defendant participated and the appellant did not. The 1st defendant was also declared the

[24] (1982) 5 NCLR 840
[25] (1981) 2 NCLR 734
[26] (1984) 3 NCLR 104
[27] (1984) 5 NCLR 425
[28] (1981) 2 NCLR 734
[29] 1984 6 NCLR 840

winner. ANPP recognized the last primary election and the appellant brought an action challenging the recognition in court. The High Court after holding in favour of the plaintiff advised the Supreme Court to re-amend its position on the internal affairs of the political parties.

The Court of Appeal allowed the appeal against the judgment of the lower court. An appeal to the Supreme Court was dismissed. The court was of the view that a court of law has no jurisdiction to adjudicate on the issue of which candidate a political party should nominate or sponsor for election. That the exercise of this right is the domestic affair of the party guided by its Constitution. Since there are no criteria or yardstick to determine which candidate a political party ought to choose, the judiciary is therefore unable to exercise any judicial power in the matter. That it is a matter over which it had no jurisdiction. The question of a candidate, a political party will sponsor is more in nature of a political question which the courts are not qualified to deliberate upon and answer. If a court could do this, it would in effect be managing the political party for the members thereof. The court in trying to justify the rationale for that principle was of the firm view that since persons have freely given consent to be bound by the rules and regulations of the political party, they should be left alone to be governed by such rules and regulations. In other words, since persons have freely mortgaged their conscience to a situation, a court of law should not intervene.

It is humbly submitted that the rationale for this principle of the law is very difficult in the context of political parties in Nigeria. Although the decision of the court was based on the position of the law, at that point in time, the position was self inflicted by the judiciary as there was no law which precluded the court from entertaining such a matter having to do with the internal affairs of the political parties.

The year 2007 therefore marked the turning point of judicial approach to matters relating to the internal affairs of the political parties. In the case of *Ugwu & Anor v Ararume*[30] the undisputed result of the primary election conducted in Imo State on the 14th April, 2007 of the PDP showed that the 1st respondent scored the highest number of votes. The 1st appellant who also contested ranked 16 of 22 participants in the primary elections. The name of the 1st respondent was therefore forwarded to INEC as the winner of primary election. A month thereafter, the party forwarded the name of the 1st appellant to INEC as the party's candidate without stating the reason for its action. In reaction to this, the 1st respondent brought an action at the Federal High Court, Abuja against the party to review the action of the party

[30] [2007] 12NWLR (pt 1048) 36

because no cogent and verifiable reason was stated for his substitution. The court denied judicial review on the ground that it was within the power of the party to change the candidates it wants to sponsor for election as doing that for the party will be reviewing the internal affairs of the political party which the courts was not prepared to do.

The Court of Appeal set aside the decision of the trial court and allowed the appeal on the ground that trial court's ought to have looked into the matter to meet the justice of the case.

On further appeal to the Supreme Court, the court rejected the argument that the court cannot review the decision of political party changing its candidate since it amounts to internal affairs of the party and held that the argument no longer has any support whatsoever under any law in the country's present dispensation and the action is well justifiable. The court relied on *section 34(2) of the Electoral Act*[31] which provides that any party wishing to change the candidate must give cogent and verifiable reason for doing so, in reaching the conclusion that where a party fails to give any reason(s) which are cogent and verifiable, the aggrieved person has a legal right to seek redress in a competent court of law by virtue of *section 6 of the constitution.*[32]

In a similar case of *Rt. Hon. Rotimi Chibuike Amaechi v Independent National Electoral Commission,*[33] the appellant together with seven other members of the PDP were aspirants during primaries of the party for the Governorship seat of Rivers State. The appellant won the primary election by polling 6, 527 votes out of 6, 575 votes cast. His name was consequently submitted to INEC as the party's candidate for the election but was subsequently substituted with the name of the 2nd respondent who never contested the primary election. The party did not state any cogent and verifiable reason for so doing. The trial court reviewed the purported substitution on the ground that it could not hold because it was done during the pendency of the suit.

The Court of Appeal rejected this contention on the ground that it is within the power of the political parties to substitute its candidate and the substitution was in compliance with the law. The Court of Appeal appears to be swayed away by the Respondent's application urging the court to strike out the matter for lack of jurisdiction because on 10th April, 2007, the Appellant had been expelled from the party thereby rendering the appeal if eventually heard and in the event of the appeal succeeding, a mere academic exercise. The court was therefore

[31] 2006 now 2010 (as amended)
[32] 1999 (as amended)
[33] (2007) 9 NWLR (pt 104) 504

of the view per Omoleye JCA, that the expulsion of the appellant from the party has taken life out of the appeal and the court no longer had jurisdiction to entertain same.

On appeal to the Supreme Court, the court held the appellant to be the proper candidate of the PDP and ordered him to be sworn in notwithstanding the fact that Celestine Omehia was already serving as the Governor of the state because the party emerged as the winner of the governorship election in that state.

In line with the decision of the Supreme Court above, the Court of Appeal in the case of *Saidu v Abubakar*[34] was of the view that whether the appellant was validly nominated and sponsored by the 3rd respondent/appellant in the circumstances of this case is a very serious constitutional issue, actionable in connection with the election either at pre-election stage or after the election depending on when the constitutional disability came to the knowledge of the party seeking to challenge the qualification of the contestant relevant to the office of the declared winner. The court noted that this must be so because it is not unreal in this country for a person who seeks to challenge some decision of political parties to be expelled from the party.

Content analysis of the above cases would reveal that the judicial reactions or attitudes towards internal affairs of political parties in Nigeria was largely affected by the position of the law at the time those cases were presented before the court.

However, it is arguable that there has been no law which expressly barred the court from reviewing matters that bordered on internal affairs of political parties. This was a self restraint measure by the court because the courts were of the view that the matters were political in nature and therefore not fit for judicial intervention. It must also be said that almost all the decisions that were reached in this area by the courts before 2007 denied interference with the decisions of the political parties.

However, 2007 witnessed a change in the attitude of the courts to this issue of internal affairs of political parties. The reason for this change of attitude was firstly due to *section 34 (2) of the Electoral Act, 2006*[35] which requires all political parties seeking to change its candidates to provide 'cogent and verifiable reason' before such can be done effectively. The second reason was because of the attitude of political parties and its non compliance with internal

[34] (2008) 12 NWLR (pt 100) 60
[35] Now 2010 (as amended)

democracy. This made the court to wear its active posture by ensuring that political parties do not become lawless.

It is therefore submitted that the position of the law today is that the court has the power to review the internal affairs of the political parties. The court by so doing is not managing the affairs of the parties, rather, the court is enforcing the internal democracies and party discipline and the parties constitution which the parties have made for themselves and also ensuring due process and compliance to the rule of law.

4.8 The Current Position of the law on Internal Affairs of Political Parties and Judicial Review

4.8.1 The Right to Institute An Action Against Conduct Of A Primary Election

Section 87 (9)[36]provides:

> Notwithstanding the provision of the Act or rules of a political party, an aspirant who complains that any of the provisions of this Act and the guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court or High Court of a State or FCT for redress.

The meaning of this provision is that party members who participated as contestant in any primary election conducted by their parties now have a right to institute an action against the conduct of the said primary election where they are not satisfied with how it was conducted or the result arising therefrom. Unlike the situation in the past where the courts naturally would decline jurisdiction in such pre-election affairs. The courts are now cloaked with the requisite jurisdiction to hear such complaints. The Supreme Court in *PDP v Sylva*[37]per Rhodes- Vivour, JSC ……'*Section 87 (9) of the Electoral Act* confers jurisdiction on the courts to hear complaints from a candidate who participated at his party's primaries and complains about the conduct of the primaries.'

In *Lado v CPC* [38]per Onnoghen, JSC:

[36] Electoral Act, 2010 (as amended)
[37] [2012] ALL FWLR (pt 367) 606 at 634 paragraph H
[38] [2012] ALL FWLR (pt 607) 598 at 627 paragraph F

> As stated earlier in the judgment, section 87 of the Electoral Act, 2010, as amended, deals with the procedure needed for the nomination of a candidate by a political party for any election and specifically provided a remedy for an aggrieved aspirant who participated at the party primaries which produced *the winner by the highest number of votes.*

The first paragraph of this section is quite instructive as the Act is totally out to discourage political parties from trying to restrain their aggrieved members from seeking to ventilate their grievances in the court against their political parties or co-aspirants. This means that irrespective of whether there is an express provision in the Constitution of the political party prohibiting an action against the conduct of a primary election, an aspirant now has an uninhibited access to court to lay his complaints.

The next question is: Who are the aspirants? *section 87 (1)*[39]provides that a political party seeking to nominate candidates for election under the Electoral Act shall hold primaries for aspirants to all elective posts. The Supreme Court had the opportunity of interpreting 'aspirants' in *PDP v Sylva* [40] where the court stated….. 'from the above it is clear that an aspirant is a person who contested the primaries. An aspirant is thus a candidate in the primaries.' The Supreme Court has by the above definition, streamlined or limited the number of people who can have a right of action arising from a primary election. Even if one bought the forms, went for party screening exercise and was even cleared, if for any reason, whether by commission or omission, the person was prevented from actually contesting the primaries, the person is not an aspirant and the doors of the courts are closed against him/her. This means that such a person who did not actually participate as a contestant at the primaries lacks the *locus standi* to institute an action in the court to question the result or conduct of the primary. Furthermore, there are other factors which must enure in favour of an aspirant for him to have a right of access to court in primaries. These factors include:

[39] Electoral Act, 2010 (as amended)
[40] *supra p. 634 paragraph G per Rhodes- Vivour, JSC*

a. The Aspirant must have Participated in the Primaries As A Contestant

The particular contestant in the primaries must be the sole plaintiff in the suit. The Act does not permit the joining of party chieftains, supporters or voters in an action in respect of *section 87 (9)*. In *Senator Nkechi Nwaogu v Emeka Atuma*,[41] the Paramount Ruler and some chiefs of Ossisioma Ngwa Local Government Area of Abia State joined the suit to establish that they belonged to the particular Abia Central Senatorial District. In dealing with the issue of their joinder in the suit, the Supreme Court made the following pronouncements, per Mohammed JSC,[42]

> In other words, having regard to the nature of the case being strictly a pre-election dispute between two aspirants struggling to become candidates of their political party to contest the Senatorial Election of 9 April 2011 election, does the law prescribing the jurisdiction of courts in dealing with the matter permit the intervention or participation of persons who are to exercise their rights in voting for the successful candidates of the political parties in the subsequent general election?. The answer in my view is certainly in the negative. The only parties envisaged under the provisions of section 87 (1) and (9) of the Electoral Act, 2010 (as amended) earlier quoted in this judgment are the political parties who are enjoined to conduct or hold primaries for the aspirants, the aspirants/candidates themselves and the Independent National Electoral Commission to which the names of the successful candidates following the primaries conducted by the political parties are submitted. The law does not give any right to any electorate who is expected to exercise his right to vote at election to join any suit involving dispute between the aspirants arising from primaries conducted by political parties.

b. The Aspirant Must Have Emerged As Winner of the Primary

For such an aspirant to have access to complain before the court in a pre-election matter, he must be ready to proof before the court that he was actually the aspirant who won the nomination exercise of his party, but that for whatever reason, his party refused to forward

[41] [*2013] ALL FWLR (pt 669)1022*
[42] *p. 1038, paragraph B-E*

his name to INEC. According to the provisions of *section 87 (4) (b) (ii) of the Electoral Act,*[43] the aspirant with the highest number of votes at the end of voting shall be declared the winner of the primaries of the party and the aspirant's name shall be forwarded to the Independent National Electoral Commission as the candidate of the party for the particular state.

In *Lado v CPC,*[44]the Supreme Court per Onnoghen JSC, stated:

> The aggrieved aspirant who is not satisfied with the conduct of the primaries by his party to elect a candidate, must bring himself within the purview of section 87 (4) (b) (ii) (c) (ii) and (9) of the Electoral Act 2010 (as amended). it is only if he can come within the provisions of those subsections that his complaint can be justiciable as the courts cannot still decide as between two or more contending parties which of them is the nominated candidate of a political party, that power still resides in the political parties to exercise.

c. The Aspirant Must Institute His Action Promptly

For the said provision to avail the aspirant that actually won, he must take his complaint before the court timeously before the main elections into the office he is seeking actually holds. The provision will not avail an aspirant who sleeps on his right with the hope that when the wrongly substituted candidate wins the main election for his party, he can then awake to pursue his right with the hope of being declared winner without actually contesting the main election as was done in the Amaechi's case.[45]

In *Farouk Salim v Congress for Democratic Change,*[46] the appellant contested the primary election of his party, the CPC for the Tarauni Federal Constituency seat of Kano State for the April 2011 Elections. Owing to some problems that arose during the primaries, the winner was not immediately announced until some days later when the board of Trustees finally sat and approved the appellant as the winner of that nomination. However, the party failed subsequently to forward appellant's name to INEC. The name of the 3rd respondent Nasiru Babale Isa was rather forwarded. Appellant was aware of this change but failed to take any action in court to protect his candidature choosing to await the outcome of the general

[43] *2010 (as amended)*
[44] *supra at p. 623 paragraph G*
[45] *supra*
[46] [*2013] ALL FWLR (pt 677) 614*

election which the 3rd Respondent contested as the candidate of the party. At the end of the general election, the 3rd Respondent was declared winner. More than one month after the declaration of the winner of the election, Appellant filed a suit at the High Court of Kano State seeking a declaration that since he was the actual winner of the nomination exercise, he should be declared winner of the general election. The High court declined jurisdiction on grounds that it was a pre-election matter and ought to have been instituted before the actual elections. An appeal to the Court of Appeal met with a dismissal as the court was of the same opinion as the Tribunal. On further appeal, the Supreme Court affirmed both the holding and reasoning of the two lower courts, that being a pre-election matter, the rights have been spent after the holding of the general elections.

d. The Aspirant Must Join His Political Party and INEC In the Suit.

Since the Court now has the power to investigate who actually won a primary election in a dispute between two aspirants, the testimony and evidence of that political party over the conduct of the primary is very crucial and it must be joined as a party in the suit.[47] INEC must also be joined in such a suit. INEC becomes a necessary party so that it will be aware of the decision of the court and be bound by the decision since it is the body in-charge of preparation and custody of the list of candidates. Where an aspirant complies with the above factors he will have a right of access to court in respect of primaries conducted by his political party.

4.8.2 Power to Decide the Validly Nominated Candidate Where There are Two Conflicting Primaries.

The court has the power to decide the validly nominated candidate where there are two conflicting primaries. The Supreme Court has now made it quite clear that where there are two primaries conducted by the same political party, one by the state chapter or any faction of the party and another by the National Executive of the party, it is the one recognized or conducted by the National Executive of the party that produces the valid candidate of the party.

[47] *Emeka v Okadigbo [2012] ALL FWLR (pt 651) 1426*

In *Prince John Emeka v Lady Margery Okadigbo* [48] the fact or issue in contention was who among the following persons (a) Prince John Okechukwu Emeka (b) Lady Margery Okadigbo and (c) Senator Alphonsus Ubanese, emerged as the winner of PDP primaries conducted for the Senatorial Seat for Anambra North general election held in April 2011. The plaintiff claimed that he contested the primaries conducted by the People's Democratic Party (PDP) for the Senatorial Election for Anambra North in Anambra State. Aggrieved by the declaration of the 4th defendant as the winner of the primaries, he commenced an action in the Federal High Court, Abuja, vide originating summons, seeking determination of the following questions: whether on the proper interpretation of section 87 of the Electoral Act, 2010, the 2nd defendant has the right to remove the name of the person who won the indirect primaries for the nomination of a candidate for election into the Anambra North Senatorial District and present to the 1st defendant some other person as its candidate other than the winner of the said primaries; whether the 1st defendant can accept from a political party and recognize as the candidate of the party and place on the ballot paper, a person who did not emerge as the winner of the primaries conducted by the party and whether the 1st defendant can accept from a political party and place on the ballot as candidate for the election, a nominee of a political party who is not chosen in accordance with the provisions of section 87 of the Electoral Act. He sought declaratory and injunctive reliefs, inter alia, to the effect that; the plaintiff is the only valid and authentic candidate for the Senatorial district for Anambra North; order of injunction restraining the 1st defendant from dealing with any person except the plaintiff as 2nd defendant's candidate and 2nd defendant from holding out any other person as its candidate and mandatory injunction compelling the 1st defendant to recognise and publish plaintiff's names as the authentic candidate for the election.

The trial court granted plaintiff's claim. The defendants were aggrieved and filed three separate appeals to the Court of Appeal which was consolidated by order of court. The Court of Appeal allowed the appeal, declaring the 4th defendant as the authentic candidate. Also aggrieved, the 3rd defendant appealed to the Supreme Court. The appeal was dismissed on the ground that the appellant did not contest in the validly recognized primary of the party organized by the National Executive of the party.

The relevant electoral issues arising from the facts of this case are: whether the Court of Appeal and or the trial court had jurisdiction to determine who is the People's Democratic Party candidate for the Anambra North Senatorial District in the April 2011 general election

[48] (2012) ALL FWLR (Pt 651) 1426

from two parallel primary elections held on 8th January, 2011 and 10th January, 2011 respectively, having regards to the provision of the Electoral Act[49] and who among the following: Prince John Emeka, Lady Margery Okadigbo and Senator Alphonsus Ubanese, emerged as the winner of the PDP primaries conducted for the senatorial Seat for Anambra North in the general elections held in April, 2011.

In dismissing this appeal in favour of Lady Okadigbo who participated in the primary organized by the national executive as against Prince Emeka who participated in the primary organized by the state executive, the court made the following points : A primary election by National Executive of the party is the legally recognised primary, political parties must be joined to resolve disputes in court, and INEC is expected to play the role of an impartial arbiter. It should remain unbiased, not taking any side between two members of a political party struggling to emerge as a candidate of their parties.

The above case is a good authority to show that the issue of a primary or the nominated candidate of a party can now be properly instituted and considered by the court, contrary to the principles in Onuoha's case and the position under the 2006 Electoral Act. The court now has jurisdiction to investigate who indeed won a primary election whenever there is a dispute arising from a primary election, contrary to the situation in the past, before the 2010 Electoral Act (as amended).

Also the Supreme Court's decision in *Uzodinma v Izunaso,*[50] is worthy of note. The issue in this case was whether the appellant's nomination was in compliance with the party guidelines and constitution. The trial court assumed jurisdiction, thoroughly analysed the party guidelines and constitution, particularly the provisions on appeals to the National Working Committee from screening exercise. The Supreme Court approved of the assumption of jurisdiction in the matter and held per Rhodes- Vivour, JSC, thus;[51]

> The nomination of a candidate to contest an election is the sole responsibility of the political party concerned. The courts do not have jurisdiction to decide who should be sponsored by any political party as its candidate in an election. But where the political party nominates a candidate for an election contrary to its own constitution and guidelines, a dissatisfied candidate has every right to approach the court for redress. In

[49] *(2010) (as amended)*
[50] (2012) 2WRN 1
[51] *ibid p. 32-33, lines 45-50*

> such a situation, the courts have jurisdiction to examine and interpret relevant legislation to see if the political party complied fully with legislation on the issue of nomination. The courts will never allow a political party to act arbitrarily or as it likes. Political parties must obey their own constitution, and once this is done, there would be orderliness, and this would be good for politics and the country.

It is quite apparent that what is left now of the principles enunciated in *Onuoha v Okafor's* [52]case is very skeletal. With the express provision granted aggrieved parties and the court in section 89 (9)[53]to question all that transpired on the actual day of the primaries, the only issues left under the principles in Onuoha's case is what the Supreme Court termed as 'Pre-primary affairs of the party.'[54] By the said new term, the only area political parties can now exercise exclusive powers or jurisdiction without interference or questioning by the courts are on issue of sale of party nomination and expression of interest forms, amounts fixed for same, conditions set for screening, the actual screening exercise, disqualifying or banning of intending aspirants from partaking in the primaries, etc, these are the only areas confined to the domestic jurisdiction of political parties and continue to remain unjusticiable, at least for now.

4.8.3 Distinction Between Section 34 (2) Electoral Act, 2006 and Section 87 (9) Electoral Act 2010 (as amended)

According to the provisions of *section 34 (2),*[55] a political party cannot substitute the name of a person sent to INEC as a candidate in an election unless it gives a cogent and verifiable reason. This section was more concerned with stopping the abuse of wanton change of candidates by political parties. The section was never concerned with how a candidate got his name on INEC'S list of candidates. Once a candidate gets his name on INEC's list he automatically enjoyed statutory protection and it became quite difficult for his party to substitute him or give cogent and verifiable reasons as to why his name was substituted in the first place if he was not validly nominated.

[52] *supra*
[53] *Electoral Act 2010 (as amended)*
[54] *PDP v Sylva supra*
[55] Electoral Act, 2006

This position was made clear by the Supreme Court in *Senator Hosea Ehinlanwo v Chief Olusola Oke.* [56] The appellant Senator Ehinlanwo and the 1st Respondent Chief Oke, contested the primaries of the 2nd respondent party (PDP) for Senatorial seat in Ondo State. The 1st respondent, Chief Oke won overwhelmingly. Dissatisfied, the appellant appealed to the relevant committee of the party and still lost. Surprisingly, in the list of candidates sent by the party to INEC for screening, it was the name of the senator appellant that appeared as the candidate for the Senatorial seat. On discovery, the PDP wrote a letter of substitution of the candidate of the appellant to reflect the name of the 1st respondent. This was accepted by INEC and the name of the 1st respondent was reflected. Aggrieved, the appellant filed an action in the Federal High Court and prayed for a declaration that the party had no right to remove his name which had already been submitted to INEC and a further prayer that his name be restored back. The trial court granted his claims. On appeal, the Court of Appeal reversed the trial court's decision and set same aside. On a further appeal to the Supreme Court, the apex court was more concerned with the reason for the substitution of appellant's name pursuant to *section 34 (2) of Electoral Act, 2006* and held that, 'without enough information' given by the party, did not satisfy the requirement of cogent and verifiable reason required under *section 34 (2)* and accordingly restored back the name of the senator as the right candidate of the party. The court per Onnoghen, JSC[57]

> I have to emphasise the point that section 34 (2) seeks to protect the right of sponsorship of a candidate whose name had been submitted to the 3rd respondent by the 2nd respondent as its candidate for any election irrespective of how he emerged as the candidate…… it really does not matter how the name of the appellant got into the list of candidates. The fact remains that it is there and he was duly screened for the election before the application to substitute…. The name of the appellant might have gotten in the list by dubious means but that is not the issue before the court….. once the 2nd respondent submitted the name of the appellant that is the end of the matter as the court is without jurisdiction to inquire as to how the appellant made the list.

Furthermore, the 2006 Act did not require the political party to be joined as a necessary party in the suit before the Court could determine whether the reason given by a political party for

[56] [*2008] ALL FWLR (pt 442) 1007*
[57] *Ibid* at p. 1052-1053 paragraph D-A

substitution was 'cogent and verifiable'. This was succinctly stated by the Supreme Court in *Akpan v BOB* [58]per Muhammad JSC.;

> Whether PDP was a necessary party before the trial court. I think I need not to add anything on what the court below said on this question, that: That suit is primarily seeking for the determination of the question as to whether or not the 1st plaintiff has been properly substituted for the appellant as the candidate of the PDP for Akwa Ibom North East Senatorial District given the affidavit evidence of the parties before the lower court. There is nothing therein that could not be effectually and completely determined by the said court without the presence of PDP. In other words, the presence of the PDP as a party to come and canvass before the lower court who is its nominated and sponsored candidate for the election was, was not the question for determination in the suit but whether the candidate earlier nominated and sponsored by the PDP, had been properly substituted with the 1st plaintiff and the resolution of the question definitely cannot be based on what the PDP says, but on whether or not the provisions of the relevant law in that regard have been satisfied or complied with in the light of documentary evidence that must be placed before the court. The PDP, in the circumstances of this case, in my respectful view, does not necessarily have to be a party.

The position under the 2010 Act is radically different as the political party and INEC must be joined as parties. The Court will refuse to offer protection to any candidate whose name got into INEC'S list illegally without a clear emergence as winner of the primary. In a similar scenario as in *Ehinlanwo v Oke,* [59] considered under the 2010 Electoral Act, [60]the court assumed jurisdiction and decided the actual nominated candidate of the party and even though the wrong candidate had already gotten his name on INEC list, the Supreme Court ordered that same be substituted with the actual nominated candidate.

The case in point is *Nagogo v CPC.*[61] This was an appeal arising from the Nasarawa North Senatorial Election. The CPC instituted an action at the Federal High Court alleging that it conducted two primaries to elect its candidate. That the 1st primary was inconclusive hence it

[58] [2010] 17 NWLR (pt 1223) 421 at 503-504 paragraph E-B
[59] (2008) ALL FWLR (Pt 442) 1007
[60] (as amended)
[61] [2013] ALL FWLR (pt 685) 272

had to conduct another one. That upon the 2nd primary, Solomon Ewuga, the 2nd Plaintiff, won and that it promptly forwarded his name to INEC. But that surprisingly, INEC rejected the name of the 2nd plaintiff, preferring the name of Nagogo. The 2nd defendant Dr. Yusuf Nagogo denied the claims of his party, claiming that he won the 1st primary of the party and that there was no need for the 2nd primary and his name had already been submitted and reflected in INEC list of candidates.

At the trial, the Federal High Court held that INEC had no right to reject the name submitted to it by the party in preference of Nagogo and ordered a substitution of Dr Yusuf Nagogo with that of Solomon Ewuga, submitted by the party. Dr. Nagogo appealed the said decision to the Court of Appeal, claiming that the Federal High Court had no jurisdiction to entertain the subject matter since the contest was between two party members questioning the party on issue of nomination and sponsorship. The Court of Appeal dismissed the appeal and affirmed the decision of the Federal High Court, that INEC had no right to reject the name submitted by the party.

On further appeal to the Supreme Court, the apex court affirmed both the decisions of the High court and the Court of Appeal. The court distinguished this case from the *CPC v Lado* case[62], since in this case it was the National Executive of the party that approved of the 2nd primary and stood by the result of the 2nd primary with all relevant official documents to back the result whereas the appellant had no such official documents to prove his claim of winning the primary. However, since at the time the appeal was concluded at the Supreme Court, the general elections had been held and Nagogo won for CPC, the Supreme Court ordered that his name be substituted with Solomon Ewuga, and it was deemed that it was Solomon Ewuga who won the general elections instead of Dr. Nagogo, exactly as was the decision in Amaechi's case.

Nevertheless, this case showed a shift of position by the Supreme Court on issue of nomination and sponsorship, as the major claim of the plaintiffs were:

> (8) An order of this Honorable Court declaring that the sponsorship/nomination of the 2nd Plaintiff by the 1st Plaintiff having been in accordance with the law cannot be invalidated in Law.
>
> (9) An order of this Honourable court declaring the 2nd plaintiff as the sponsored candidate of the 1st plaintiff for Nasarawa North

[62] *supra*

> Senatorial District of Nasarawa State in the April 2011 general election.

Despite the fact that the name of the actual winner was not the initial name submitted to INEC, the Supreme Court ordered that the name of the winner of the primary election be substituted for the one that was not recognized by the party. This would not have been possible if it were under the 2006 Act as the party would have had a lot of difficulties proffering cogent and verifiable reasons for why his name was submitted to INEC in the first place, if he was not the duly nominated candidate of the party.[63]

4.8.4 Issue of Substitution of A Candidate Who Won the Primary Election and Whose Name Was Submitted to INEC by his Party.

Section 33 of the Electoral Act[64] provides that:

> a political party shall not be allowed to change or substitute its candidate whose name has been submitted pursuant to section 31 of the Act, except in the case of death or withdrawal by the candidate.

By the above provision, the powers of political parties to substitute the names of their candidate already submitted to INEC has been removed. The only circumstance when the party can substitute is if the candidate dies or personally wrote to his political party that he was withdrawing his candidature. This provision of the Act is to curb the scenario prevalent which gave rise to such decisions as in *Amaechi v INEC, Ugwu v Ararume, Ettim v Obat, Ehinlanwo v Oke.*[65]

4.8.5 Disqualification of Any Candidate by INEC

Prior to 2007 elections, INEC wielded vast powers to disqualify candidates at will, sometimes on the very eve of the elections, with the resultant consequence that candidates in

[63] U Udom,*Nigeria Electoral Laws: Issues and Matters Arising*(Lagos:Princeton & Associates Publising Co. Ltd,2014) p. 190-191
[64] *ibid*
[65] *supra*

an election lived in perpetual fear of the axe of INEC or electoral bodies in charge. This situation has now been effectively addressed by the new introduction in *section 31 (1) of the Electoral Act*, which hitherto was absent in previous legislations. *Section 31 (1)* provided that every political party shall not later than 60days before the date appointed for a general election under the provisions of the Act, submit to the commission in the prescribed forms, the list of the candidate the party proposes to sponsor at the elections, provided that commission shall not reject or disqualify candidates for any reason whatsoever.

By the above provision, no matter whatever defect INEC may discover a candidate to have, INEC has no power whatsoever to disqualify or reject such a candidate once his name had been submitted by his political party to INEC. This provision has been effectively considered and given judicial backing by the Supreme Court in *Dr. Yusuf Nagogo v Congress for Progressive Change.* [66]

4.8.6. Disqualification of a Defective Candidate

However, a defective candidate nominated by a political party can be disqualified and prevented from participating in the general election or prevented from assuming or continuing in the public office he contested for, if the elections to that office had already held and his party emerged as the winner.

The next question is: who can seek disqualification of such a candidate? To answer the above question, the relevant provisions are in *sections 31(4), 31(5) and 31 (6) of the Electoral Act*.[67] *Section 31 (4)* provides that a person may apply to the Commission for a copy of nomination form, affidavit and any other document submitted by a candidate at an election and the Commission shall upon payment of prescribed fee, issue the person with a certified copy of the documents within 14days.

From the provisions of *section 31 (5) of the said Electoral Act*, any person who has reasonable grounds to believe that any information given by a candidate in the affidavit or any document submitted by that candidate is false may file a suit at the Federal High Court, High Court of a State or FCT against such person seeking a declaration that the information contained in the Affidavit is false.

[66] *supra*
[67] 2010 (as amended)

Furthermore, from the provisions of *section 31 (6) of the Electoral Act*,[68] if the court determines that any of the information contained in the Affidavit or any document submitted by that candidate is false, the court shall issue an order disqualifying the candidate from contesting the election. This provision is not an entirely new provision as it had been there in the 2006 Electoral Act, Section 32. Unlike in the previous Act, INEC no longer has the right to share this power of disqualification with the High Court, as *section 31(1) of the 2010 Act* expressly provides that INEC shall not reject or disqualify candidates for any reason whatsoever. The power to disqualify is now exclusively that of the High Court whether Federal, State or Federal Capital Territory, Abuja. Even though INEC is a federal agency, the State High courts share jurisdiction with the Federal High Court in such cases of disqualification of a duly nominated candidate.

By the provisions of *section 154 (1)*[69] INEC is one of the federal executive bodies established for the Federation in accordance with our Constitution. By the provisions of *section 251 (1)*[70]*the Federal High Court* has exclusive jurisdiction to adjudicate on matters that affect the Federal Government or any of its agencies, which INEC is one of them. Furthermore, *section 31 (5) of the Electoral Act*[71] provides that the High Court of a State or FCT and Federal High Court have jurisdiction to adjudicate on issue of disqualification of a defective candidate between a candidate and INEC. It is submitted that this provision of the Act[72] is inconsistent the provision of *section 251 (1)(p-r) of our Constitution*. The law is that where any provisions of any law is inconsistent with the provisions of our Constitution, that law is null and void to extent of inconsistency.

4.8.7 Court cannot Grant An Injunction to Restrain A Political Party From Conducting A Primary Election or INEC from Conducting A General Election

By the provisions of *section 87 (10) of the Electoral Act*,[73] the Court cannot stop the holding of primaries or general election under the Act, pending the determination of a suit. This in other words means that even where a primary is inconclusive and the political party decides to cancel same and order fresh primaries, an aspirant who possibly could claim to have won in the alleged inconclusive primaries cannot invoke the powers of the court by ways of

[68] *Ibid*
[69] CFRN 1999 (as amended)
[70] Ibid
[71] Ibidi
[72] Electoral Act 2010, s. 31 (5)
[73] *ibid*

injunction to restrain or stop the holding of a new primary over the same position. No court has the power to order an injunction restraining or stopping the holding of a general election under any circumstances. This provision is to check the confusion that usually arises on the grant of such injunctions after the party and intending aspirants would have put everything on ground and prepared to participate or contest in the primaries, or in the case of INEC, after making adequate arrangements to conduct a general election.[74]

[74] U Udom *supra 201*

CHAPTER FIVE

ELECTORAL BODIES UNDER NIGERIAN LAW

Democracy cannot be discussed without the issue of election. The electoral process is vital to the sustenance of democracy. The concept of election denotes a process constituting accreditation, voting, collation, recording on all relevant INEC Forms and declaration of results. The collation of all results of the polling units making up the wards and the declaration of results are the constituent elements of an election as known to law. This can only be done under a democratic government, where the people are allowed to choose their leaders under our law. Where the provisions of these laws are not complied with, the courts are normally called in to adjudicate and interpret as the case may be.

5.1 The Law Governing Elections

The laws that govern elections in Nigeria are the Constitution[1] and the Electoral Act.[2] The Constitution is the supreme and most important law of the country. *Section 1 (3)* [3]makes it clear that if any other law is inconsistent with the provisions of the constitution that other law shall be void to the extent of the inconsistency. The courts have also upheld that section in countless decisions[4] for this reason alone any law dealing with elections that contradicts the provisions of the Constitution will be of no effect. The Constitution also provides clearly that the Government of Nigeria or any part thereof shall not be governed or controlled by any person or group of persons except in accordance with the provisions of the Constitution.[5] In other words, no one can occupy elective offices at the local, state or federal level unless he or she has been elected in accordance with the provisions of the Constitution or any law made in accordance with the Constitution. Apart from the laws on election, electoral bodies are equally established to help in conducting election in Nigeria.

5.2 Historical Development of Electoral Bodies in Nigeria

Nigeria has had various electoral bodies. They include:

[1] CFRN 1999 (as amended)
[2] 2010 (as amended)
[3] CFRN *ibid*
[4] NPA V Eyamba [2005] 12NWLR (pt 939) 409 and other decisions.
[5] CFRN *ibid*

5.2.1 Electoral Commission of Nigeria (ECN)/Federal Electoral Commission (FEC)

The Electoral Commission of Nigeria (ECN) was established to conduct the 1959 general election into local councils, regional and federal legislatures. The Commission was headed by a Chief Commissioner, Mr R.E. Wrath who was a senior lecturer in Public Administration at the University College Ibadan. Mr. J. J. Warren, a Briton, was appointed Executive Secretary of the Commission. Elections were held in 312 single member constituencies nationwide. Voting was by secret ballot and all registered adults in Nigeria were eligible to vote.

Subsequently, the Federal Electoral Commission (FEC) was established in 1960. The FEC conducted the post independence and regional election of 1964 and 1965 respectively. There was wide spread political violence particularly in the Western Region between the supporters of late Chief S.L. Akintola and late Chief Obafemi Awolowo. People were dissatisfied with the result announced by the Commission, which they felt tilted to the wishes of the NPC controlled federal government. All these led to violence, which engulfed the region and resulted in the demise of the first republic. When the military took over in 1966, FEC was dissolved.

5.2.2 Federal Electoral Commission of Nigeria (FEDECO)

The Federal Electoral Commission Decree[6] empowered FEDECO to organize and supervise all matters relating to elections to all elective offices as contained in *1979 Constitution of the Federal Republic of Nigeria.* The Commission was established under the regime of Chief Olusegun Obasonjo for the transition from military rule to civilian rule fixed for 1979. Chief Michael Ani was at the helm of the Commission and the elections conducted by the Commission were relatively free and fair and accepted by the different political parties. The only major disagreement was the issue of two third majority controversy[7] which proved a tough knot to crack.[8]

The 1979 elections represented a crucial part of the political programme of the Federal Military Government designed to transfer governance to elected representatives at the various tiers of government. The said election was considered a higher level of success than the

[6] No. 41 of 1977, s.3(1)(a) with amendments in 1978 and 1979
[7] Awolowo v Shagari(1979) 6-9 S.C p. 51

[8] S Ibe 'Electoral Commission in the past', *Daily Champion Newspaper*, April 12, 2004, p. 24

previous election. The presence of a military government which rounded up potential party thugs and effectively checked their activities created a peaceful atmosphere for the elections unlike what happened in 1983, where the elections conducted by FEDECO were alleged to have been rigged in favour of the ruling party- the National Party of Nigeria (NPN). The military administration of General Mohammed Buhari which seized power on December 31, 1983, dissolved FEDECO same year.

5.2.3 National Electoral Commission (NECO)

In 1987, after another military coup, the government of General Ibrahim Badamosi Babangida established the National Electoral Commission (NECO) to assist in the government's transition from military to civilian rule. The Commission was headed initially by Professor Eme Awa, a political scientist between 1987-1989. He was replaced by Professor Humphrey Nwosu who presided over the controversial June 12, 1993 presidential election which was annulled by the Badangida administration. Professor Okon Edet Uya replaced Professor Humphrey Nwosu as NECO chairman when the Interim National Government (ING) headed by Chief Ernest Shonekan was put in place. NECO was dissolved shortly afterwards by another military government under General Sani Abacha which came into power in November, 1993.

5.2.4 National Electoral Commission of Nigeria (NECON)

In December 1995, the military government headed by General Sani Abacha established the National Electoral Commission of Nigeria (NECON) with Chief S.K. Dagogo as the chairman. The Commission was poised from all indications to declare General Abacha, as the duly elected civilian president before the cold hands of death snatched him away on June 8, 1998. After the death of General Sani Abacha, the new administration of General Abdulsalami Abubakar dissolved NECON.

5.2.5 Independent National Electoral Commission (INEC)

The Independent National Electoral Commission was first established under *the Independent National Electoral Commission (Establishment, etc) Decree No. 17 of 1998*[9].The provisions of that decree as amended was subsequently incorporated into the 1999 Constitution.[10] The Commission is comprised of a chairman and twelve commissioners, two from each geo-political zone.[11] The members are appointed by the President in consultation with members of the council of state subject to ratification by the Senate.[12] A member can only be removed by the President acting on a petition supported by two-thirds majority of the Senate for inability to discharge the functions of his office or misconduct.[13]

The Commission has powers to appoint its own secretary and other staff[14]and may carry out its functions by itself or through agents such as the Resident Electoral Commission. In the exercise of its powers to make appointments or exercise disciplinary powers, the Commission is not subject to the direction or control of any authority or person. A reflection on the mode of appointment and removal of members of the Commission and the provision touching on its independence will reveal the concern that went into its establishment. The provisions of the Constitution are directed at securing the independence of the Commission.

Furthermore, the 2010 Electoral Act attempts to secure to the Commission, financial independence for its work.[15] This was achieved in 2014. What is the cause of this anxiety to make these elaborate provisions for INEC and the electoral process? The electoral process is vital to the sustenance of democracy. A scholar once observed: ….

> the unavoidable test for Nigerian's democracy will remain its ability to renew itself through a reasonably credible and stable process… The cost of electoral failure could involve not only the eruption of widespread violence and disorder or the imposition of potentially arbitrary emergence or military rule but also the escalation of current centrifugal challenges to the viability of the idea of a United Nigeria.[16]

[9] as amended by Decree No. 33 of 1998
[10] CFRN 1999 (as amended) s. 153 (1) (f)
[11] *ibid* Third Schedule Item F, paragraph 14 (1) (a) and (b)
[12] *ibid* s. 154 (3)
[13] *ibid* s. 154 (3)
[14] Electoral Act 2010 as amended s. 9 (1) and (3)
[15] *ibid* s. 3
[16] R Suberu: *Can Nigeria New Democracy survive in Current History*, May 2001 Internet Edition, p.

The electoral process and the principal institution regulating it therefore deserve a special attention and protection if these apocalyptic fears are to be avoided.[17]

In *Governor of Kwara State V Ojibara & Ors*[18], the Governor and House of Assembly of Kwara State dissolved the Kwara State Independent Electoral Commisssion[19] of which the respondents were members on the vague ground that the respondents/members of the Commission were guilty of inglorious acts. The respondents' challenge of the dissolution failed at the trial court. Their appeal succeeded. The Court of Appeal reversed the decision of the trial court and reinstated them to office. The appellants thereafter appealed to the Supreme Court which dismissed the appeal stating that the protection afforded the respondents by the Constitution cannot just be wished away by sheer whim and caprice of those in authority.[20] Holding that 'inglorious act' is not a valid ground for removing a member of the Commission, the court examined the constitutional protection of tenure afforded members of the electoral Commission.

The tenure of the Governor of a State under the 1999 constitution as well as that of the state legislature is four years. The Constitution however grants the members of a State Independent Electoral Commission a tenure of five years. It is pertinent to note that it was a deliberate purpose of the Constitution to create an Electoral Commission whose lifespan would exceed those of both the governor and the state legislature….. it is not the intendment of the Constitution that the membership of this Commission should change with the fortunes of the political parties of a State.

The Independent Electoral Commission (INEC) occupies a sensitive position in Nigeria's constitutional scheme and the duty before her is a grave and difficult one. INEC ought to be an impartial umpire between contending politicians, to bear insults and false insinuations against it by politicians with dignity; to resist the temptation of being drawn into the political battlefield as a warrior, a duty to observe the law and a duty to do justice. This responsibility assumes near-judicial proportions. This will explain why the procedure for the appointment

212. Available at http: //www. current history. com/org. pdf files /100/646/ 2007 pdf accessed on August 5, 2015.

[17] O Amucheazi & C Onwuasoanya, *op cit*, p.77-78

[18] (2007) I NJSC, 1

[19] CFRN 1999 (as amended) ss. 197-200 provides for the appointment, tenure and removal of members of the State Independent Electoral Commission similar to those concerning INEC

[20] o*p.cit,* p.10

and removal of members of the body resembles that of the appointment and removal of judicial officers.[21]

The Court of Appeal in *Haruna v Modibbo*[22] stated *inter alia* that it is in the interest of our electoral process that INEC and its officials should remain as neutral as possible in election cases as their primary responsibility is to conduct free and fair elections regardless of who wins.[23]

The Commission (INEC) is clothed with considerable powers and functions over the electoral process. These powers shall be examined under three convenient categories: the powers of INEC (a) before (b) at and (c) after the polls. These powers and functions are set out in the third schedule to the Constitution.

5.3 INEC's Power

a. INEC's Power before the Polls

i. Registration and Regulation of Political Parties[24] and ii. Functions in respect of Voter's Register[25]

The duties and powers of the Commission in respect of the voter's Register may be divided into (i) compilation/ updating of voters' register (ii) revision of voters register (iii) publication of voters' list. Every citizen of Nigeria who has attained the age of eighteen years and is ordinarily resident in, works in or is indigenous to a given local area or ward covered by a registration centre and who is not deprived of the capacity of voting under any statute or subsidiary law, is entitled to be registered as a voter on presentation of himself at the registration venue.[26]

Section 9(5) of the Electoral Act 2010[27] stipulates that registration of voters and the updating/ revision of voters register under this section shall stop not later than 60days before any

[21] Oguntade JSC in his lead judgment in *Ojibara* (Supra) notes this point in respect of state electoral commissions adding."…the result is that the members of the commission are expected to be independent and unbiased in their day to day judgment of affairs and events" pp 10-11
[22] (2004) 16 NWLR (pt 900) 487 CA
[23] *Ibid,* per Ogebe JCA concurring.
[24] CFRN 1999 (as amended) Third Schedule part 1 item 15(b) (c),(d) and (e)paragraph F
[25] *ibid* s. 78
[26] Electoral Act, 2010 (as amended) s. 12 (1)
[27] As amended

election in which such register is to be used. Although INEC is authorized to carry out continuous registration of voters under S.10 of the Act (this is what the Act refers to in subsequent sections as the supplementary voters' list), this is without prejudice to the provisions of *Section 9(5) of the Act as amended.* It seems that the correct and harmonious reading of both sections is that names registered under the continuous registration system beyond the stipulated statutory last date for registration or updating are not eligible to participate in already scheduled elections.

The Commission shall issue votes' cards to persons registered.[28]

After the compilation of the voters' register or supplementary voters' register, the Commission is required to display a copy of the register for each local council or ward for public scrutiny and for objections to be taken and claims made as to the inclusion or omission of names. This display must last for at least five days but must not exceed fourteen days.[29]

The Commission may then appoint revision officers to hear and determine claims and objections arising from the display. By the provisions of *Section 21(2) of the Electoral Act,* the determination of the Resident Electoral Commissioner on appeal from the decision of a Revision Officer is final. This is manifestly unconstitutional being in violation of the right to fair hearing under *Section 36(2) of the Constitution*. Thus an aggrieved person may still take the matter before the Federal High Court.

At the end of the hearings on claims and objections, the Commission shall then integrate the supplementary voters' register into the existing voters' register to produce the final voters' register. It must be stated that all these steps- voters' registration, update of voters' register, display of voters' register or supplementary register, and revision of register must be concluded within the 60days window period stipulated by *Section 9(5) of the Act.*[30] The final register must be published not later than 30days before a general election.[31] There is a further duty on the Commission to make available to every political party within 60days of the end of each year, the names and address of each person registered during that year.

[28] *ibid* s. 16(1)

[29] Electoral Act, 2010 (as amended) s. 19

[30] It was because INEC could not complete the process within the stipulated period that the Electoral Act was amended in 2007 to reduce the window period from 120 to 60days. *The Explanatory Memorandum to Act No. 53 of 2007.*

[31] *ibid* s. 20

iii. Receipt of Nominations from Parties.

The nomination of candidates to represent each political party in any election is primarily an internal matter for each party. The duty of INEC in this regard is ministerial to receive the nomination forms from the parties within the specified period (60days before the date of elections) accompanied by an affidavit deposed to by each nominated candidate stating that he has fulfilled the constitutional requirements for election into the particular office.[32] The Commission shall then publish such nomination within seven days of their receipt in the constituency where the candidate intends to contest.

A candidate may personally withdraw from the election not later than 45days to an election. A political party shall not be allowed to change or substitute its candidate whose name has been submitted pursuant to *section 31 of the Electoral Act*, except in the case of death or withdrawal by the candidate.[33]

A party may however make substitutions at any time before the election where its nominated candidate dies. The death of a candidate also imposes a duty on INEC to postpone the election in which he was to participate and the Commission shall appoint some other convenient date for the election within 14 days.[34] At the end of the nomination exercise and at least 30days before the election, the Commission shall publish a statement of the full names of all candidates nominated.

iv. Screening, Verification of Documents and Disqualification of Candidates.

The Commission (INEC) has powers to verify claims of candidates as contained in their affidavits submitted alongside the nomination instruments but does not have the powers to disqualify any candidate validly nominated by his party from contesting the election. The Act provides that after the submission of nomination by political parties, INEC shall display such nominations within 7days in the constituency concerned. Any person who believes that any information supplied in the candidate's affidavit is false may apply to the court to declare that the said information is false. If the court finds that the information is indeed false, it shall make an order disqualifying such a candidate from contesting the elections.[35]

[32] *ibid* s. 31(1) and (2)
[33] Electoral Act 2010 (as amended) s. 33
[34] *ibid* s. 36 (1)
[35] *ibid s*. 31(6)

The Commission (INEC) is defined to be a legal person with powers to sue and be sued.[36] It is thus a person who may apply for the declaration of falsehood of a candidate's affidavit and a consequent order of disqualification. Since the Electoral Act has made provisions for the procedure for the disqualification of a candidate for election, any procedure adopted outside these provisions will be outside the law and therefore unlawful. Only the courts have the power to disqualify any candidate for any election, the Commission has no powers to make such judicial pronouncement. The courts have in cases earlier cited established this.

The purpose of verification of documents by INEC will be to ascertain compliance with constitutional and statutory provisions. Where the Commission is not satisfied with the claims on the candidate's affidavit accompanying his nomination paper, it may then indirectly enforce the provisions on qualification/disqualification by applying to the court to disqualify the candidate.

Constitutional provisions on qualification are valid grounds on which an election tribunal may nullify a candidate's election to office. This is another method through which the disqualification provisions may be enforced and not through unilateral action by the INEC.[37] This issue came up for determination in *Action Congress v INEC*.[38] In that case, INEC's proposed screening, verification of documents and disqualification of the second appellant, a prominent opposition figure and presidential flag bearer of the first appellant in the 2007 presidential elections was challenged on the ground that INEC lacked the power to screen candidates, verify documents, or disqualify candidates for elections. The Federal High Court sitting in Abuja held that while the Commission had powers to screen and verify clams in the document submitted by the candidate, it lacked powers to disqualify any candidate.

The Court of Appeal however reversed in part the trial court's decision and held that INEC has powers to screen and disqualify a candidate for elections. The Court of Appeal considered that it would be a 'mere circus show' for the Commission to be expected to go to court first to seek a declaration before disqualifying a candidate when there was material before the Commission showing that the candidate ought to be disqualified.

On appeal to the Supreme Court, the apex court allowed the appeal authoritatively laying down the principle that under the Electoral Act and the Constitution, INEC lacked the power to disqualify any candidate. In reaching this decision, the court relied on legislative history

[36] *ibid*

[37] Amucheazi & Onwuasoanya, o*p cit,p.*85

[38] **(**2007) 12 NWLR (pt 1048) 222

and contrasted section 32(4)-(6) of Electoral Act 2006 from *section 21(8) and (9) of Electoral Act 2002*. The latter provided: the decision of the Commission as to the qualification or disqualification of a candidate for an election may be challenged by a candidate. Any legal action challenging the decision of the Commission shall commence within five working days and be disposed of not later than one week before the election.

Under the Electoral Act 2002, the court reasoned that INEC had powers to disqualify a candidate. A comparison of this with *section 32(4) (5) and (6) of the Electoral Act 2006* shows that the position has been altered by the legislature and that the powers of INEC to disqualify candidates has been taken away. Their lordships held that under 2006 Act, and now in *section 31(4)-(6) of 2010 Act as amended*, only the courts may disqualify a candidate upon the application of any interested person including INEC.

The court also considered *section 137 (1) (i) of the Constitution* which provides that: a person shall not be qualified for election to the office of the President if he has been indicted for embezzlement or fraud by a judicial commission of inquiry or a Tribunal set up under the Tribunals of inquiry Act, a Tribunal of inquiry law or any other law by the federal or state Government which indictment has been accepted by the federal or state government respectively.

It was part of the respondent's case that the second appellant had been indicted by an administrative panel of inquiry set up by the federal government for corruption related offences and that the report of the panel had been accepted by the federal government. Thus, the second appellant was disqualified by the application of *section 137(1) (i) of the constitution*. Their lordships in rejecting this contention, stated that *section 137(1) of the Constitution* is not self executing and must be read together with *section 137(1) and section 36(5) of the Constitution* which protect rights to fair hearing and presumption of innocence in criminal matters.

The Court stated that:

> clearly the imposition of the penalty of disqualification for embezzlement or fraud solely on the basis of an indictment for these offences by an administrative panel of inquiry implies a presumption of guilt, contrary to section 36 (5) of the Constitution--- I say again that convictions for

> offences and imposition of penalties and punishments are matters pertaining exclusively to judicial power.[39]

In stating this position, the Supreme Court saved the electoral process from the devious machinations of incumbents who set up so-called panels of inquiry to disqualify candidates of whom they do not approve. President Obasanjo had set up a panel which was perceived as a tool of vindictiveness established solely to indict and thereby lead to the disqualification of his political opponents, notably Atiku Abubakar, the second appellant in this case.

If the Supreme Court had not adopted this commendable stance, a free-for-all atmosphere of indictments and counter indictments may ensue with its potentials for unmanageable electoral chaos.

Indeed Chief Orji Uzor Kalu, former Governor of Abia State, one of President Obasanjo's most vociferous critics who had also been indicted by the federal government panel, set up a reprisal panel of inquiry in Abia State which indicted President Obasanjo and his perceived allies. The same fate has met the report of this Abia State panel in judicial lands.[40]

In *Buhari v INEC*[41] the petitioner and presidential candidate of the All Nigeria People's Party challenged the election of President Yar'adua of the Peoples Democratic Party on the ground that he was disqualified from contesting the 2007 presidential election; his indictment by the Abia State panel of inquiry having been accepted by the Orji Uzor Kalu government.

The Court of Appeal sitting as Presidential Election Tribunal in Abuja relied on *Action Congress v INEC***,** to reject this contention. The Court stated that:

> The indictment of embezzlement against a person to deprive him of the right……. to contest or vie for the post of the President of Nigeria is a very serious matter, and the issues can only be pronounced upon by the judicial branch. Such serious issues are riddled with complex questions of law and facts which are, by the provisions of the constitution in the exclusive preserve of the judiciary. No executive body should have the power or competence to unravel such serious and far-reaching complex issues without a proper recourse to the proper judicial process.[42]

[39] Action Congress v INEC o*p cit*,p. 222
[40] Action Group v INEC *op cit*,p. 223
[41] [2008] 4NWLR (pt 1078) 546
[42] *op cit,p. 614*

The lead judgment in the Supreme Court's decision in *Action Congress v INEC* did not consider the separate question whether INEC had powers to summon candidates for screening and verification of their documents, which was one of the issues presented to the trial court. The question was however addressed in the concurring opinions of Onnoghen and Muhammad JJSC who both held that INEC did not have any powers to screen candidates.

While Onnoghen JSC did not consider verification specifically, Muhammad JSC opined that it was for the political parties to screen[43] the candidates they intended to sponsor and that INEC had no power to verify the documents submitted by the candidates.

With due respect to his lordship, it will appear that the view of the trial court on INEC's power of verification is to be preferred to his dictum. The Constitution confers on INEC the responsibility to organize, undertake and supervise elections.[44] The Commission indeed has an interest in ensuring that constitutional stipulation as to qualifications for office are satisfied by candidates as part of its supervising functions. In order to enable it perform this function effectively, it should be able to verify claims by candidates.

Verification is defined as ----- 'to check or test the accuracy or exactness of, to confirm the authenticity of; to authenticate, to maintain, to affirm, to support.[45] It is submitted that INEC has the powers to check or test the accuracy, exactness or authenticity of a candidate's claim. This could require inviting candidates to submit further documents or attend interviews with the Commission. If in the course of verification, the Commission discovers that the candidate was unqualified or provided fake documents, it may then apply to the court to disqualify the candidate. It is respectfully urged that Muhammad JSC's dictum on INEC's powers to verify should not be followed in future.

The decision of the Supreme Court in *Action Congress v INEC* deserves applause even if on sociological grounds only. At a period when the impartiality of the electoral body was very much in doubt, unease would be excited in the average reasonable person if that body was left to decide who could and who could not contest elections. The judicial system provides a better impartial forum for the determination of such question. Although the Court of Appeal felt that it would be a circus show for INEC to first obtain an order of court before embarking

[43] His lordship adopted a restrictive definition of screening as to select by a process of elimination. In this sense, screening equates to disqualification. Adopting this definition might justify the decision that INEC lacks the power to screen.

[44] CFRN 1999 (as amended) Third schedule pt 1paragraph 15(a)

[45] B Garner, *Black's Law Dictionary*, (9th edn, St Paul: West Group, MINN 2009) p. 400

on disqualification, one may only add with respect, that even if it were so, it would be a worthwhile circus.

v. De-lineation of Constituencies

It is the duty of the Commission to delineate the country into senatorial districts and federal constituencies for elections into the National Assembly.[46] It is also the job of the Commission to delineate state constituencies for purpose of election into the state legislature.[47] The constitution has fixed the maximum number of senatorial districts per state at three(3) and the maximum number of federal constituencies for the whole country. The delineation of federal and state constituencies is on the basis of population. The Commission has powers to review the distribution of constituencies as warranted by changes in the structure or population of Nigeria.

2. INEC's Powers at the Polls

i. Briefing and Accreditation of Voters

The Commission (INEC) shall appoint a date for any election and publish this at least 150days ahead. On the date and time appointed by INEC for the elections, voters are to be briefed on the procedure for the conduct of the elections at every polling station. This is to acquaint the voters with their expected conduct and what they are to expect of the staff of the Commission. This provision is useful in view of high levels of illiteracy and civic ignorance in the society. This briefing is followed by accreditation of voters.

Accreditation is the process of identifying persons who have turned out as the actual registered voters. The voters' cards are marked and each accredited voters' name ticked against the voter's register to indicate the fact of accreditation. This procedure is very significant since the data it records could be used in election petition proceedings subsequently.

[46] CFRN 1999 (as amended) ss 71-75
[47] *ibid* ss. 112-115

ii. Issuing Ballot Papers/Actual Voting

After accreditation, ballot papers are then issued to voters. Each ballot paper must contain the symbols of all the parties contesting a particular election.[48] Each voter shall then proceed to cast his ballot. Before voting starts there is a duty on the Presiding Officer to show the voters that the ballot box is empty and he shall thereafter keep the ballot box in public view until the end of the poll.[49] Where a ballot paper is accidentally destroyed and cannot be used to cast a valid vote, the Presiding Officer has a duty to issue a new one to the voter.[50] Blind and incapacitated voters may be assisted by persons of their choice. The Presiding Officer, and in his absence, the polling clerk, is authorized to maintain order at each polling station and subject to the provisions of the Electoral Act may exclude an unruly person from the station. At the hour prescribed by INEC for the close of polls, a presiding Officer shall declare the polls closed and no new person shall be admitted into the polling station[51] while those already inside must be allowed to vote.

iii. Counting of the Votes /Announcement of Results

At the end of voting, counting shall be done at each polling station under the supervision of the presiding officer who shall thereafter enter the results of the election on the prescribed form and sign it. The form shall also be countersigned by the candidates or their polling agents. Copies shall be given to the polling agents and police officers where available. A candidate may personally or through his agent demand a recount of the votes and it is the duty of the presiding officer to ensure that this demand is met. However, only one re-count shall be allowed.[52]

The result of the election shall be announced at each polling station by the presiding officer. Subsequently, successive compilations at the wards, local government, state constituency, federal constituency, senatorial district and state collation centers shall be announced at their centers by the appropriate officers.[53] These results are also required by law to be posted on the commission's notice boards and website. The stipulations for immediate announcement of

[48] Electoral Act 2010(as amended) s. 82
[49] *ibid* s. 48
[50] *ibid* s. 55
[51] In practice, since elections are usually held in open spaces, this will be achieved by getting police men to stand behind the last voter on the queue and exclude any new entrants.

[52] Electoral Act, 2010 (as amended) s. 64
[53] *ibid s*. 27 (2)

results at each polling station and for extensive publications, is to secure transparency. When data is secreted, there are increased chances of its being finally doctored.

iv. Declaration of Winner/Issue of Certificate of Return.

After collation of the results for each contested office, the winner shall be declared by the appropriate returning officer. The Returning Officer for the Presidential Election is the Chairman of INEC while for the Governorship elections, the returning officers are the Resident Electoral Commissioners.

A Certificate of Return shall be issued to each winner by the Commission within seven days of the election.[54] Once the Returning Officer has declared the winner of an election, INEC cannot subsequently withdraw the declared results and announce a different winner.

In *Abana v Obi*,[55] the Returning Officer declared the First Respondent the winner of a seat in the National Assembly Elections in April 12, 2003. By a press release on April 18, 2003, the Anambra State Resident Electoral Commissioner cancelled the earlier announcement and declared the appellant winner of the election. First Respondent's petition at the Elections Tribunal succeeded whereas appellant appealed. In dismissing the appeal, the Court of Appeal sitting at Enugu held that INEC has no powers to cancel or withdraw declared results and all an aggrieved party could do (even if an error in the results declared was discovered afterwards) was to approach the Elections Tribunal for redress.

v. Postponement of Elections

The Commission's powers to conduct elections extends to the cancellation and postponement of a scheduled election on reasonable apprehension of violence or threat to peace or where there is a disaster or emergency under which the election cannot be held. Where an election in a particular area is postponed, there shall be no return for the constituency in question until the postponed polls are conducted. The Commission may, if satisfied that the result of the

[54] *ibid s.* 75 (1)
[55] (2004) 10 NWLR (pt 881) 319 CA

election will not be affected by voting in the area(s) in respect of which substituted dates have been appointed, direct that a return of the election be made.[56]

3. INEC's Power After the Polls

i. Election Petitions

At the announcement of results by INEC, election petitions will follow. INEC is usually made a respondent in these petitions brought before the election tribunals. The Commission may be represented in these proceedings by legal officers in its employ, the Attorney General of a state or federation or by a legal practitioner engaged by the Commission. The difficulty involved in permitting the Attorney General to represent the Commission is that he is usually an appointee of government and INEC might be perceived as being sympathetic to that government or its party.

The Commission will usually be required to make available to any of the parties to the petitions copies of electoral documents such as forms and ballot papers. These documents are required to be in the custody of the chairman of INEC.[57] It is the duty of INEC to make such certified true copies of these documents available to litigants or to the courts as the occasion demands. Where officers of the commission appear as witnesses before the tribunals, they are enjoined not to forget their oath to be neutral and fair to all the candidates.[58] They are to tell the truth as they know it and must not show favour to any of the candidates. Where INEC officials make mistakes at the polls, the commission must have the courage to admit this even if this would mean an overturning of their decision as to the winner of any particular poll.

ii. Conduct of Bye-Elections, Fresh Elections and Run Offs

An election tribunal may order the holding of fresh elections as an outcome of a petition. Also a vacancy may arise at any time as a result of death, resignation or recall in any of the legislative houses which could call for a bye-elections between candidates where there is a tie between them. On all these occasions INEC will be called upon to act.

[56] Electoral Act, 2010 (as amended) s. 26
[57] *ibid s.72*
[58] Electoral Act, 2010 (as amended) s. 28, Oguntade JSC's charge in Ojibara *supra* p. 17

iii. Prosecution of Electoral Offenders

Several offences are created in the Electoral Act relating to registration of voters, impersonation at the polls, corruption and fraud, violence and treating.[59] The commission is empowered to prosecute any person suspected of committing these offences.[60] This is a particularly delicate function as there are legitimate fears that a partial electoral body may use these prosecutorial powers to suppress the opposition.[61] Firmness and impartiality is called for in the discharge of this function. INEC must not hesitate however to invoke its powers in this direction to see every prosecution to its logical conclusion since a conviction may be of some detrimental value against offences in future elections. This extends to the prosecution of its own erring staff.

iv. Civil Education

The Electoral Act includes the conduct of civic education and promotion of sound democratic electoral processes among the functions of the Commission.[62] Under this power, the commission may either alone or in combination with other bodies (like the National Orientation Agency and Non Governmental Organizations) conduct voter education and mobilization on various themes such as electoral violence, ballot protection, recall procedure etc. The commission must refrain from giving the impression that it endorses any particular party during the conduct of these programmes.

v. Miscellaneous Functions

Where a referendum is required for the purpose of boundary adjustment, creation of new states, or local government; the power to conduct this is statutorily vested in the commission.[63] The monitoring of political parties is a continuing function. As parties recover from one election and begin to prepare for the next, the commission should continue its watchdog function over them without emasculating the freedom of association of members.[64]

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[59] *op cit* part vii

[60] *ibid* ss 117 - 132

[61] Suspicions trailed the prosecution of certain members of the Action Congress in the wake of the violence that followed the announcement of the 2007 gubernatorial elections result in Osun State as an emasculation of the opposition.

[62] Electoral Act, 2010 (as amended) s.2 (1) (a) and (b)

[63] *ibid* s.2 (1)(c)

[64] Amucheazi & Onwuasoanya, *op cit,p. 80 -96.*

5.4 Conduct of Elections in Nigeria.

The Constitution and Electoral Act provide for the conduct of elections in this country. The following steps are to be taken during the conduct of elections:

a. Registration of Political Parties

No association, other than a political party, shall canvas for votes for any candidate at any election or contribute to the funds of any political party or to the election expenses of any candidate at an election.[65] No association by whatever name called shall function as a political party, unless –

a. the names and addresses of its national officers are registered with the independent National Electoral Commission.

b. The membership of the association is open to every citizen of Nigeria irrespective of their place of origin, circumstance of birth, sex, religion or ethnic grouping.

c. a copy of its Constitution is registered in the principal office of the Independent National Electoral Commission in such form as may be prescribed by the Independent National Electoral Commission.

d. any alteration in its constitution is also registered in the principal office of the Independent National Electoral Commission within thirty days of the making of such alteration.

e. the name of the association, its symbol or logo does not contain any ethnic or religious connotation or give the appearance that the activities of the association are confined to a part only of the geographical area of Nigeria; and

h. the headquarters of the association is situated in the Federal Capital Territory, Abuja[66]

[65] CFRN 1999 (as amended) s.221
[66] *ibid* s.222

Any political association which complies with the provisions of the Constitution and this Act for the purposes of registration shall be registered as a political party provided however, that such application for registration as a political party shall be duly submitted to the Commission not later than 6 months before a general election.[67]

The Commission shall on receipt of the documents in fulfillment of the conditions stipulated by the Constitution immediately issue the applicant with a letter of acknowledgment stating that the necessary documents have been submitted to the Commission.[68]

Any political association that meets the conditions stipulated in the Constitution and this Act shall be registered by the Commission as a political party within 30days from the date of receipt of the application and if after the 30days the association is not registered by the commission it shall be deemed to be so registered.[69]

b. Procedure at Election

The Commission shall establish sufficient number of polling stations in each registration area and shall allot voters in such polling station.[70]The Commission shall provide suitable boxes for the conduct of elections. It is only the Commission that is entitled to provide suitable boxes for the conduct of the election.[71] The forms to be used for the conduct of elections to the offices mentioned in *Section 47 of this Act* and election petitions arising there from shall be determined by the commission.[72]

The polling Agents shall be present at the distribution of the election materials from the office to the polling booth. This is to ensure that an election is free and fair. As representatives of political parties the presence of the polling agents is expedient at the distribution of election materials to check incidences of fraud and forgery.[73]

The Commission shall prescribe the format of the ballot papers which shall include the symbol adopted by the political party of the candidate and such other information as it may

[67] Electoral Act 2010 (as amended) s. 78(1)
[68] *ibid* s. 78 (2)
[69] Electoral Act 2010(as amended) s. 78 (4)
[70] *ibid* s. 42
[71] *ibid* s.43(1)
[72] *ibid* s. 43(2)
[73] *ibid* s. 43(3)

require.[74] The ballot paper shall be bound in booklets and numbered serially with differentiating colours for each office being contested.[75]

Each political party may by notice in writing addressed to the Electoral Officer of the Local Government or Area council appoint a person (referred to as a polling agent) to attend at each polling unit in the local government or area council for which it has candidate and the notice shall set out the name and address of the polling agent and be given to the electoral officer at least 7 (seven) days before the date fixed for the election. Provided that no person presently serving as Chairman or member of a local government or Area council, Commissioner of a State, Deputy Governor, or Governor of a State, Minister or any other person holding political office under any tier of government and who has not resigned his appointment at least three (3) months before election shall serve as a polling agent of any political party, either at the polling station or at any center designated for collation of results of an election.[76]

Notwithstanding the requirement of subsection (2) of this section, a candidate shall not be precluded from doing any act or thing which he has appointed a polling agent to do on his behalf under this Act.[77]

Where in this Act, an act or thing is required or authorized to be done by or in the presence of a polling agent, the non-attendance of the polling agent at the time and place appointed for the act or thing or refusal by the polling agent to do the act or thing shall not, if the act or thing is otherwise done properly, invalidate the act or thing.[78]

The Commission shall, not later than 14days before the day of the election, cause to be published, in such manner as it may deem fit, a notice specifying the following matters:

a. the day and hours fixed for the poll;

b. by way of indication, the persons entitled to vote, and

c. the location of the polling stations.[79]

[74] Electoral Act 2010(as amended) s. 44 (1)
[75] *s*. 44 (2)
[76] s.45(1)
[77] s. 45 (2)
[78] s. 45 (3)
[79] s. 46

c. Voting in an Election

Voting in any particular election shall take place on the same day and time throughout the Federation.[80] At the hour fixed for opening of the poll, before the commencement of voting, the presiding officer shall open the empty ballot box and show same to such person as may lawfully be present at the polling station and shall then close and seal the box in such manner as to prevent its being opened by unauthorized person. The ballot box shall then be placed in full view of all present, and be so maintained until the close of poll.[81]

Every person intending to vote shall present himself to a presiding officer at the polling unit in the constituency in which his name is registered with his voter's card. The presiding officer shall, on being satisfied that the name of the person is on the register of voters, issue him a ballot paper and indicate on the register that the person has voted.[82] The president officer shall separate the queue between men and women if in that area of the country the culture is such that it does not permit the mingling of men and women in the same.

Voting at an election under the Electoral Act, 2010 as amended shall be by open secret ballot. The use of Electoral voting machine for the time being has been prohibited by the Act. A voter on receiving a ballot paper shall mark it in the manner prescribed by the commission. All ballots at an election under this Act at any polling station shall be deposited in the ballot box in open view of the public.[83]

No voter shall vote for more than one candidate or record more than one vote in favour of any candidate at anyone election.[84] Where the votes cast at an election in any constituency or polling station exceeds the number of registered voters in that constituency or polling station the election for that constituency or polling station shall be declared null and void by the commission and another election shall be conducted at a date to be fixed by the commission. After nullification, there shall be no return for the election until another poll has taken place in the affected area.

But where the Commission is satisfied that the result of the election will not substantially be affected by voting in the area where the election is cancelled, it may direct that a return of the election be made.[85] This is to prevent an election from being invalidated on mere failure to

[80] Electoral Act 2010(as amended) s. 47
[81] *ibid* s.48(1) (2)
[82] *ibid* s. 49 (1) (2)
[83] *ibid* s. 52 (1) (2) (3) & (4)
[84] *ibid* s. 53 (1)
[85] *ibid* s. 53 (2) (3) (4)

comply with minor provisions of the Act, which have no effect or do not substantially affect the outcome of the election.[86]

In an election petition where there is allegation of stuffing of ballot boxes, the ballot boxes in which the ballot papers were allegedly stuffed must be tendered before the tribunal and opened there. It is only when the ballot boxes are tendered before the tribunal and opened before it that such an allegation is sustainable.[87]

Where a voter makes any writing or mark on a ballot paper by which he may be identified, such ballot paper shall be rejected provided that any print resulting from the staining of the thumb of the voter in the voting compartment shall not be or be deemed to be a mark of identification under this section.[88]

A voter who is blind or is otherwise unable to distinguish symbols or who suffers any other physical disability may be accompanied into the polling station by a person chosen by him and the person shall, after informing the presiding officer of the disability, be permitted to accompany the voter into the voting compartment and assist the voter to make his mark in accordance with the procedure prescribed by the Commission.[89]

No voter shall record his vote otherwise than by personally attending at the polling station and recording his vote in the manner prescribed by the Commission. No person shall be permitted to vote at any polling station or unit other than the one to which he is allotted.[90]

The presiding officer shall regulate the admission of voters to the polling station and shall exclude all persons other than the candidates, polling agents, poll clerks and persons lawfully entitled to be admitted including accredited observers, and the presiding officer shall keep order and comply with the requirements of this Act[91] at the polling station.[92]

The presiding officer may order a person to be removed from a polling station or unit, who behaves in a disorderly manner or fails to obey a lawful order. Such person removed from a polling station or unit shall not, without the permission of the presiding officer, again enter the polling station or until during the day of the election, and if charged with the commission of an offence in that polling station or unit, the person shall be deemed to be a person taken

[86] Buhari v Obasanjo [2005] 15 NWLR (pt 941) 43-44
[87] Haruna V Modibbo [2004] 16 NWLR(pt 900) 530
[88] *Buhari v Obasanjo* [2005] 15 NWLR, (pt 941) 43-44
[89] Electoral Act 2010(as amended) s.56(1)
[90] *ibid* s. 57 & 58
[91] *ibid*
[92] *ibid* s .61 (1)

into custody by the police officer for an offence in respect of which he may be arrested without a warrant. The said power of the presiding officer shall not be enforced so as to prevent a voter who is otherwise entitled to vote at a polling station or unit from having an opportunity of so doing. In the absence of the presiding officer, the polling clerk shall enjoy and exercise all the powers of the presiding officer in respect of a polling station or unit.[93]

d. Personal Voter's Card (PVC) and The Card Reader (CR)

During the 2015 Presidential Election in Nigeria, Independent Electoral Commission (INEC) introduced the Personal Voter's Card (PVC) as well as the Card Reader (CR). The Smart Card has certain features and benefits that will deter another person from using somebody else's card. When one inserts his smart card, it will authenticate it to be sure it is an INEC's card and whether the owner of the card is the person bearing it. The individual will put his thumb on the smart card reader and it will bring out the individual features. The smart card is configured to be used in one particular polling unit. It cannot be used in two places.

The registration of a prospective voter begins when he approaches an INEC official at a public place designated by INEC as a Registration Point. The INEC official hands over to the prospective voter a Form to fill-in his personal details such as his name, address and occupation amongst others. Upon completion of this Form, the official types in those personal details into a computer. This computer is connected to a biometric device and a camera for the purposes of capturing a prospective voter's picture and the prospective voter's thumb prints. Both the biometric device and camera qualify as electronic input device, as the main purpose is simply to input captured data, which is subsequently fed into the computer and stored.

The aforesaid registration process being a nationwide task performed by INEC, all the INEC officials present their computers, which contain data of all prospective voters, and are then presumably fed into the INEC Mainframe Computer. The Mainframe Computer is a central computer that collates and stores all data fed by each and every computer that were used at those registration points.

Thereafter, at a known date the INEC announces to the general public that the personal details were captured in a Card, called the Permanent Voters Card (PVC) and the Cards were

[93] Electoral Act 2010(as amended) s.61(1)

ready for collection. The prospective voter goes to an INEC designated location and at that location he collects his PVC.

On the day of election at a polling point, he presents his PVC to an INEC official, who takes the PVC and scans it using an INEC Card Reader in order to validate or accredit the prospective voter and confirms that the card really belongs to INEC. This is presumably to forestall forged cards or multiplicity of votes. This PVC has a Barcode that enables the Card Reader read the PVC. Upon scanning the PVC when placed directly underneath the scanner of the Card Reader, all the information on the PVC is prompted, that is, automatically displayed, on the display unit of the Card Reader. It is worthy of note that at this point the Card Reader qualifies as an Electronic device as it simply reads the PVC.

Thereafter, the prospective voter is told to place any of his biometric fingers on the fingerprint scanner, which also is a feature or part of the Card Reader. At this juncture, it is important to note that, assuming the Card Reader transmits that scanned finger through an Internet Service Provider (ISP) down to the mainframe (a computer), the Card Reader simply is an electronic device and the Certificate of Authentication would have to emanate from the mainframe as required by Section 84 of Evidence Act, 2011 as amended. This is because the data emanating from the mainframe is the computer generated. The reference to certificate is only in regard to the mainframe and not the card reader.

However, where the Card Reader, which functions to read the PVC, goes further to have in its build-up, a storage device, thereby rendering the use of an Internet Service Provider (ISP) to validate a prospective voter, unnecessary, the card reader will qualify as a computer in its own kind.

e. Closing of Poll

At the prescribed hour, for the close of poll, the presiding officer shall declare the poll closed and no more person(s) shall be admitted into the polling station. Only those already inside the polling station shall be allowed to vote.[94] The presiding officer shall, after counting the votes at the polling station or unit, enter the votes scored by each candidate in a form to be prescribed by the Commission. The form shall be signed and stamped by the presiding officers and counter signed by the candidates or their polling agents where available at the

[94] Electoral Act 2010(as amended) s. 62(1)

polling station. The presiding officer shall give to the polling agents and the police officer where available a copy each of the completed form after it has been duly signed by the presiding officer and counter signed by the candidates or their polling agents.

f. Announcement of Result at the Polling Station

The presiding officer shall announce the result at the polling station.[95] A candidate for an election to the office of President shall be deemed to have been duly elected to such office where, being the only candidate nominated for election,

a. he has a majority of YES votes over No votes cast at the election; and

b. he has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the States in the Federation and the Federal Capital Territory, Abuja, but where the only candidate fails to be elected in accordance with this section, then there shall be fresh nominations.[96]

Where there are only two or more candidates for the election a candidate for an election to the office of President shall be deemed to have been duly elected, where:

a. he has the majority of votes cast at the election; and

b. he has not less than one-quarter of the votes cast at the election in each of at least two thirds of all the States in the Federation and the Federal Capital Territory, Abuja.[97]

In default of a candidate duly elected, the Independent National Electoral Commission shall within seven days of the result of the election held, arrange for an election between the two candidates and a candidate at such election shall be deemed to have been duly elected to the office of President if

a. he has a majority of votes cast at the election; and

[95] *ibid s.* 63 (1) (2) (3) (4)
[96] CFRN 1999(as amended) s.133
[97] *ibid s.* 134 (1)(2)

b. he has not less than one-quarter of the votes cast at the election in each of at least two thirds of all the States in the Federation and the Federal Capital Territory.[98]

A candidate for an election to the office of Governor of a State shall be deemed to have been duly elected to such office where, being the only candidate nominated for election;

a. he has a majority of YES vote over No votes cast at the election; and

b. he has not less than one-quarter of the votes cast at the election in each of at least two –thirds of all the local government areas in the State, but where the only candidate fails to be elected in accordance with this subsection, then there shall be fresh nomination.[99]

Where there are two or more candidates, a candidate for an election to the office of Governor of a State shall be deemed to have been duly elected where.

a. he has the highest number of votes cast at the election; and

b. he has not less than one quarter of all the votes cast in each of at least two thirds of all the local government areas in the state[100]

In default of a candidate duly elected, the Independent National Electoral Commission shall within seven days of the result of election held, arrange for an election between the two candidates and a candidate at such election shall be deemed to have been duly elected to the office of Governor of a State if;

a. he has a majority of votes cast at the election, and

b. he has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the local government areas in the State.[101]

[98] *ibid* s. 134
[99] *ibid s.* 179
[100] CFRN 1999(as amended) s.179(2)
[101] *op cit s*. 179 (4)

g. Posting of Results

The Commission shall cause to be posted on its notice board and website, a notice showing the candidates at the election and their scores, and the person declared as elected or returned at the election.[102]

h. Certificate of Return at Election

A sealed certificate of return at an election in a prescribed form shall be issued within 7 days to every candidate who has won an election under the Electoral Act, provided that where the Court of Appeal or the Supreme Court being the final appellate court in any election petition as the case may be nullifies the certificate of return of any candidate, the Commission shall within 48 hours after the receipt of the order of such court issue the successful candidates with a valid certificate of return. Where the commission refuses and, or neglects to issue a certificate of return, a certified true copy of the order of a Court of competent jurisdiction shall, *ipso facto,* be sufficient for the purpose of swearing in a candidate declared as the winner by that Court.[103] It means that the sealed certificate of return issued to a winner of an election is only provisional. Where the certificate of return is nullified by any of the appellate courts, it becomes void while still in the possession of the erstwhile winner of the election.

Where no fresh or bye election is ordered by the court, INEC is bound to issue the successful candidate (in court) a valid certificate of return which is superior and repealing to the sealed certificate of return.

5.5 Inconclusive and Supplementary Election

In Kogi State of Nigeria, in 2015, twenty two political parties and their respective governorship and deputy governorship candidates, including the incumbent governor, Idris Wada of the PDP and Abubakar Audu of the APC, contested in the Kogi State governorship election. In spite of the heavy deployment of security personnel and electoral resources, the election was characterized by irregularities and malpractices; card readers, delayed voters' accreditation and voting delays, pockets of violence preventing or disrupting voting, and snatching of ballot boxes- all leading, eventually to "inconclusiveness of the election" and

[102] Electoral Act 2010(as amended) s. 71
[103] *ibid* s. 75 (1) (2)

resulting in a yet to be announced date of a "supplementary election". At the conclusion of the election, in which only 511,648 out of 1,379,971 registered voters were accredited to vote, counting and collation of the final result took place. INEC, through the Returning Officer (RO) of the Kogi State governorship election, Prof. Emmanuel Kucha, instead of announcing a winner in the election, declared same inconclusive. In doing so, INEC stated that the APC candidate, Abubakar Audu, scored a total of 240,867 votes and won majority of votes in sixteen (16) Local Government Areas, while Capt. Idris Wada (Rtd), incumbent governor and PDP candidate, scored 199,514 votes and won a majority of votes in five Local Government Areas.

Prof. Kucha said that candidate Audu's votes being 240,867 and candidate Wada's votes being 199,514, the margin of candidate Audu's vote lead over candidate Wada was 41,353. He, however declared that since election could not hold or was cancelled in 91 polling units from 18 of the 21 Local Government Areas, leading to a total number of 49,953 voters who, either could not participate in the election or whose votes were cancelled, a figure that was higher than candidate Audu's vote lead of 41,353, no winner would be declared.

Prof. Kucha justified his action by relying on the 2015 INEC Election Guidelines. The INEC Approved Guidelines and Regulation for the conduct of the 2015 General Election, directs the Returning Officer as follows:

> Where the margin of win between the two leading candidates is not in excess of the total number of registered voters of the polling units where election were cancelled or not held, decline to make a return until another poll has taken place and the result incorporated into a new Form, Form EC8D and recorded into Form EC8D for the declaration and return[104].

After the declaration of the election as inclusive, the news of the death of Abubakar Audu, the APC's governorship candidate in the election was announced. Both the Constitution, and the Electoral Act, 2010 make provisions for situations in which a governor- elect dies after his election but before being sworn into office, and a (governorship) candidate in a scheduled and yet to be conducted election dies after nomination but before election. There is no provision that governs the peculiarity of the transitional situation in which a governorship candidates (or a deputy governorship candidate) of a party leading in an election and on the

[104] 2015 INEC Election Guidelines p.22, para 4, s.5

verge of winning the election, dies after the conclusion of the election but before the declaration of a winner.

Upon a careful consideration of the material facts of the Kogi election, the provision of Electoral Act, 2010 and the Constitution, and decisions of our courts, the researcher humbly states as follows: Firstly, INEC and its RO ought to have declared Candidate Audu of the APC as the winner of the election for having polled no less than one-quarter of all the votes in each of at least two-thirds of the Local Government Areas of Kogi State(16 out of 21 Local Government Areas) and scoring the highest number of votes.

In deciding who has been returned elected in a governorship election, INEC must take cognizance of the provisions of *sections, 69, and 70 of the Electoral Act* [105] and *section 179 (2) & (3) of the Constitution*. They provide thus: *section 69*- "in an election to the office of the… Governor,…, the result shall be ascertained by counting the votes cast for each candidate and subject to the provision… *Section 179 of the Constitution*, the candidate that receives the highest number of votes shall be declared elected by the appropriate returning officer" *Section 70*- "where two or more candidates poll equal number of votes being the highest in an election, the returning officer shall not return any of the candidates and a fresh election should be held for the candidates on a date to be appointed by the commissioner."

Section 179 (2) & (3) of the 1999 constitution provides that "(2) a candidate for an election to the office of the governor of a state shall be deemed to have been duly elected where, there being two or more candidates – (a) he has the highest number of votes cast at the election ; and (b) he has not less than one-quarter of all the votes cast in each of at least two-thirds of all the local government areas in the State"; and that "(3) in default of a candidate duly elected in accordance with subsection (2) of this section, there shall be a second election in accordance with subsection (4) of this at which the only candidate shall be – (a) the candidate who secured the highest number of local government areas in the State, so however that where there are more than one candidate with a majority of votes in the highest number of local government areas, the candidates with a majority vote in the highest number of local government areas, the candidate among them with the next highest total of votes cast at the election shall be the second candidate.

The researcher submits that supplementary election by INEC is illegal and unconstitutional. But this illegality becomes compounded when INEC decides to base its decision to hold a

[105] 2010 (as amended)

"supplementary election" on the ground that "the margin of win between two leading candidates in an election is not in excess of the total number of accredited voters who could not vote or total number of cancelled votes cast", since registered voters who voluntarily elected not to be accredited in order to vote cannot be compelled to do so.

Based on the foregoing facts, candidate Audu had fulfilled the requirement of the law and satisfied the provisions of the Electoral Act and the Constitution to warrant being returned elected before his demise. In declining to return candidate Audu as the winner of the election, the RO purportedly invoked INEC Approved Guidelines and Regulations for the Conduct of the 2015 General Elections, which directs, as stated above. The said Regulation, which INEC has the power to make under the *Section 73 and 153 of the Electoral Act*, but which is a subsidiary instrument, cannot override the clear provisions of *Sections 26, 47, 68, 69,and 70 of the Electoral Act, 2010* and *section 179 of the Constitution*. When voting takes place in an election, it does so on the basis of accredited potential voters, issued with their Permanent Voters Cards, some of whom may not return to vote even after accreditation. The will of the electorate in an election is, thus, that of accredited voters who ended up voting, and not that of a mass of registered voters who refused or neglected to vote; who were prevented from voting by the failure of INEC or the security agencies to discharge their duties; or whose cast votes were compromised, and therefore cancelled.

The researcher submits that supplementary election by INEC is illegal and unconstitutional. But this illegality becomes compounded when INEC decides to base its decision to hold a "supplementary election" on the ground that "the margin of win between two leading candidates in an election is not in excess of the total number of registered votes". The illegality of a decision to hold a supplementary election will, in our view be mitigated if it is based on the ground that "the margin of win between the two leading candidates is not in excess of the total number of accredited voters who could not vote or total number of cancelled votes cast" , since persons accredited in order to vote cannot be compelled to do so; and the case of registered voters who wished to vote but could not do so because they were accredited by INEC or because the security agents failed to secure them and guarantee their participation in the election, could not be used as an arbitrary justification for a supplementary election. It is instructive, in this regard, that although 49,953 registered voters is the numerical pretext for INEC and its RO to declare the Kogi Election inconclusive and to hold a supplementary election, only ***511,648*** out of ***1,379,971*** registered voters were actually accredited to vote in the election! If INEC had actually considered the margin of win between

the two leading candidates in relation to the number of accredited voters or the total number of cancelled votes (and not the number of registered voters) in the affected areas, it would have had no difficulty in declaring Candidate Audu and the APC as winner, thereby allowing the constitutionally prescribed course of events to be followed under Section 181 of the Constitution.

Secondly, by declining to announce a winner in the Kogi Governorship Election and deciding that a winner shall be announced after a supplementary election, INEC chose the path of illegality, as there is no room or provision in the Electoral Act or in the Constitution for a supplementary election, save as may be ordered by the court, following a partial nullification of an election result. Under the Constitution and the Electoral Act, there are four types of election: a general election, a bye election, a fresh election or rerun election, and a run-off (second ballot or third ballot) election, as the case may be. A General Election is the regular election that is conducted under the Electoral Act and the Constitution. It may be a Presidential, Governorship or a Legislative House (Senate, House of Representatives, or a State House of Assembly) election or election into a Local Government council or Area Council. A Bye Election is one conducted to fill a legislative seat, which became vacant by the death, resignation, incapacity or recall of an incumbent. A Rerun or a Fresh Election is one conducted, pursuant to an order of an Election Tribunal or Election Appeal Tribunal nullifying the result of a particular election, and directing that a fresh election be conducted in place of the nullified or voided election; a Run-off Election is one conducted between two leading candidates vying for a particular office, after the initial election amongst the many candidates contesting for that office has failed to produce a clear winner, who has won not only the majority of the votes cast in the election, but who also has fulfilled the requirements of the Electoral Act to be declared a winner and given a certificate of return.

It is to be noted that, as it was decided by the Court of Appeal, sitting as an election appeal tribunal, in the case of *Fayemi V. Oni*[106],

> a supplementary election is a complementary election ordered by the court upon the voiding of a portion or a part of the whole or total result of an election. In making the order, the portion of the overall election result that is not being contested, is saved and validated, while the part or portion that is successfully contested or challenged is voided and invalidated, and a new election ordered to be conducted in replacement of that voided part.

[106] [2009], 7NWLR, Pt. 1140, 223 at 2929-293, para. C-para. G

Essentially, a court-ordered supplementary election is, shorn of this now troubling nomenclature, a partial rerun or a partial fresh election. Unfortunately, that isolated and specific judicial pronouncement is now being used as a general franchise for unconscionable electoral illicitness.

Under *section 47 of the Electoral Act*,[107] "voting in any particular election under the Act shall take place on the date and time appointed by the Commission throughout the Federation". *Section 178(1) of the Constitution* provides thus: "(1) An election to the office of Governor of a State shall be held on a date to be appointed by INEC". *Section 46 (i) (a) of the Act* provides that "The Commission shall, not later than 14days before the day of election, caused to be published, in such manner as it may deem fit, a notice specifying the day and hour fixed for the poll". Thus, it is clear that a particular date and time, (not several dates and times, not Saturday and the Sunday that followed or any further date) were afore-fixed by INEC before the conduct of the supplementary election in Anambra State.

Section 26 (1) of the Election Act[108] provides that "where a date has been appointed for the holding of an election and there is reason to believe that a serious breach of the peace is likely to occur if the election is proceeded with on that date or it is impossible to conduct the elections as a result of natural disasters or other emergencies, the commission may postpone that election and shall in respect of the area or areas concerned appoint another date for the holding of the postponed election provided that such reason for the postponement is cogent and verifiable.

Section 26 (3) (4) &(5) of the said Act provides that "where the commission appoints a substituted date in accordance with the subsections (1) and (2) of this section, there shall be no return for the election until polling has taken place in the area(s) affected". (4) Notwithstanding the provision of subsection (3) of this section, the commission may, if satisfied that the result of the election will not be affected by voting in the area(s) in respect of which substituted dates have been appointed, direct that a return of election be made. The decision of the commission under subsection (4) may be challenged by any of the contestant at a court or tribunal of competent jurisdiction and on such challenge, the decision shall be suspended until the matter is determined.

[107] 2010, as amended 2010 (as amended)
[108] *ibid*

The provision of *section 26 of the Electoral Act*[109] only contemplates the "postponement of a scheduled election before the "arrival" of the date appointed for the conduct of the election on any of the three grounds (reasons) therein contained". The postponement must be before or ahead of the date earlier appointed, not during or after. Furthermore, the postponement of an election date and the appointment of new date for the postponed election must be done in *pari passu*. Under the said section an indefinite postponement is not envisaged or permissible.

The above section is, therefore, not a statutory authority for the family term in Nigera's electoral system called "Supplementary election". There is no legal backing in the Electoral Act or in the Constitution, for this electoral practice. INEC has the power to engage in a continuous registration of voters, prepare a supplementary voters list and include and integrate same in the voters register[110] But INEC lacks the power to hold a particular election on multiple dates except as allowed under *section 26 of the Electoral Act*. This was witnessed in the 2011 general election and in particular during the Imo State Governorship Election, Edo State Governorship election, the Ondo State Governorship Election and in Anambra State Governorship election.

Thirdly, in the event that INEC insists on conducting its supplementary election, it has to do so, based on the candidatures of the contestants in the November 2015 Election in Kogi State as if candidate Audu is not dead, since his party, the APC and the candidate for the Office of the Deputy Governor are still on the ballot. In the circumstances, cancellation of the election altogether and the conduct of a fresh election does not arise. Given the result of the "inconclusive election", candidate Audu, his running mate and their party, APC, already had emergent mandate and a legal entitlement to a certificate of return, even if it has not crystallized or is still *inchoate*. They have a legal right in the declared results, which cannot be erased by an administrative cancellation by INEC. In any case, the Electoral Act, 2010 does not support such a cancellation. *Section 68 of the Electoral Act, 2010* provides that "the decision of the RO on any question arising from or relating to- (a) unmarked ballot papers; (b) rejected ballot papers; and (c) declaration of scores of candidates and the return of a candidate, shall be made subject of review by the tribunal or court in an election petition proceedings under this Act". It is only the Kogi State Governorship Election Tribunal that can cancel the results so far declared. Not INEC, which has become "*functus offico",* as far as the declared results are concerned.

[109] 2010 as amended
[110] *Ibid* s. 10(1) (6) and 20

The researcher will also discuss the issue that before the supplementary election is held, there must be a substitution of candidate Audu, for reason of his death, by his party, the APC, based on the *doctrine of necessity*. Without any equivocation, as the law stands, such a substitution is not legally possible, for just as it is being argued that the law does not envisage that a candidate in an election may die between the conduct of an election and declaration of result, and as such the law does not make provision for such an occurrence, so also must it be conceded that the law does not anticipate the substitution being suggested.

While *section 33 of the Electoral Act*, allows a political party to change or substitute its candidate "in the case of death or withdrawal by the candidate", *section 36 (1) of the Electoral Act*, stipulates a timeline for doing so, by stating that "if after the time for the delivery of nomination paper and before the commencement of the poll, a nominated candidate dies, the Chief National Electoral Commissioner or the Resident Electoral Commissioner shall, being satisfied of the fact of the death, countermand the poll in which the deceased candidate was to participate and the Commission shall appoint some other convenient date for the election within 14 days".

Except the law specially provides for such a substitution, it would occasion more crisis of legality and legitimacy than it is intended to solve. How will the substitution be made, by what body and who shall be eligible to be the substitute? Is the substitution to be made by the APC's Central Working Committee, National Executive Council, State Executive Council, State Congress, through a fresh State's direct or indirect primaries, or by handpicking the aspirant who scored the second highest number of votes cast at the APC governorship election primaries preceding the Kogi election? Can the APC deputy governorship candidate automatically move up as the APC candidate to be substituted for candidate Audu, while another deputy governorship candidate is nominated or substituted? Again, how will the substitution be made, by what body and who shall be eligible to be the substitute? Can all these be legally done under such a nebulous *doctrine of necessity* or under a legal *dues ex machina?* Even if this hotchpotch arrangement were proposed by INEC and accepted by APC, what will be the legal effect of that in an election petition by any of the candidates of the other political parties, including the PDP? Will they forget the provisions of *section 141 of Electoral Act 2010*,which provides that "an election tribunal or court shall not under any

circumstance declare any person a winner at an election in which such a person has not fully participated in all the stages of the said election[111]".

The researcher submits that since the deputy governorship candidate and his party, APC are still on ballot, there is no need, and indeed, no law, for substitution, midstream. In spite of the legislative drain of the force of the Supreme Court's decision in Amaechi v INEC[102], the writer submits that Oguntade, J.S.C's decision therein on the pre-eminence of a political party in an election still remains good law. His lordship held that: "Now *section 221 of the 1999 Constitution* provides; "No association other than a political party shall canvass for votes for any candidate at any election or contribute to the funds of any party or to the election expenses of any party or to the election expenses of any candidate at an election"[113].

The above provision effectually removes the possibility of independent candidacy in our elections, and places emphasis and responsibilities in elections of political parties. Without a political party a candidate cannot contest. The primary method of contest for elective offices is therefore between parties. If, as provided in *Section 221* above, it is only a party that canvasses for votes, it follows that it is a party that wins an election. A good or bad candidate may enhance or diminish the prospect of his party in winning but at the end of the day, it is the party that wins or loses an election. Whereas candidates may change in an election but the parties do not. In mundane or colloquial terms, it is said that a candidate has won an election in a particular constituency but in reality and in consonance with *section 221 of the Constitution,* it is his party that has won the election.

Section 181 of the Constitution provides that:

> (1) if a person duly elected as Governor dies before taking or subscribing the Oath of Allegiance and oath of office, or is unable for any reason whatsoever to be sworn in, the person elected with him as Deputy governor shall be sworn in as Governor who shall be appointed by the Governor with the approval of a simple majority of the House of Assembly of the State; and

[111] A legislative intervention inserted by a PDP- led National Assembly to dilute the potency of the Supreme Court's unanimous decision in ***Amaechi v INEC,2008, 5 NWLR, (Pt. 1080), 227,*** *a pre-election matter* that lasted beyond the conduct of the election, wherein the SC decided that Amaechi must be deemed to have stood as the governorship candidate of the PDP in the Rivers State governorship election in 2007.
[102] *ibid*
[113] page 317, para F- page 318, para. B

> (2) Where the persons duly elected as Governor and Deputy Governor of a State die or are for any reason unable to assume office before the inauguration of the House of Assembly, the Independent National Electoral Commission shall immediately conduct an election for a Governor and Deputy Governor of the State.

The election in Kogi State can only be concluded by declaring a governorship candidate, a deputy governorship candidate and their party the winner or by declaring that there is a tie, thereby paving way for a fresh election under *Section 70 of the Electoral Act* and *Section 179 of the Constitution*. If candidate Audu, who, ought to have been declared a winner, is "post-humously" declared the winner, and given a certificate of return with his deputy governorship candidate and their party, any affected party or candidate who participated in the election can approach the Kogi State Governorship Election Tribunal under *Section 138 of the Electoral Act* to challenge the victory. This is the path of the rule of law.

5.6 Rationale for Election Petition

His Lordship Aniagolu, JSC in *Obih v Mbakwe,* [114] stated that the essence of democratic election is that they be free and fair and that in that atmosphere of freedom, fairness and impartiality, citizens will exercise their freedom of choice. Free and fair election cannot therefore tolerate thuggery or violence of any kind, corrupt practice, impersonation, threatening, undue influence, intimidation, disorderly conduct and any acts which may have the effect of impeding the free exercise by the voter of his franchise. Once an election is found substantially not to be free and fair and the electorate either by violence or intimidation have not been allowed freely to cast their votes, the election where such has occurred ought to, and must be nullified and a fresh one conducted. That is the essence of election petition.

[114] *(1984) 1 SCNLR 192 at 285-286*

CHAPTER SIX

THE COURTS AND ELECTORAL DISPUTES

There are various types of electoral disputes. They include

a. Intra party Dispute (Dispute that arises within a Political Party)
b. Election Petition (Petition or Objection against the outcome of an election)

Intra party dispute has been dealt with in chapter four of this work. In this chapter the researcher will look at election petition as a type of electoral dispute.

6.1 Election Petition

The Electoral Act,[1] in prescribing the manner of questioning an election states:

> No election and return of an election under this Act shall be questioned in any manner other than by a petition complaining of an undue election or an undue return (in this Act referred to as election petition) presented to the competent tribunal or court in accordance with the provisions of the Constitution or this Act and in which the person elected or returned is joined as a party.

What constitutes an election petition therefore is a complaint by a petitioner against an undue election or return of a candidate at the election. It is not a complaint against INEC, its officers and agents who conducted the election for failing to conduct the election as prescribed by law. The fact that the challenge of the election or return of a candidate at an election is the foundation of the cause of action in an election petition is also traceable to the provision of the Constitution prescribing the jurisdiction of election tribunals created under the Constitution.[2]

In *Ezeobi v Ezeka,* [3] it was held that an election petition is meant to question the election of a candidate returned as a winner. It must be shown that the purported election and return was void, one of which could be that the winner was not returned by a majority or lawful votes.[4]

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[1] 2010 (as amended) s.133(1)
[2] *All Nigeria Peoples Party v INEC & ORS[2004] 7NWLR (pt 871) 16 at 55 per Mohammed JCA (as he then was)*
[3] [1989] 1 NWLR (pt 98) 478
[4] *Goodwill E. Ezeoke v Godwin Dede & Ors* [1999] 5 NWLR (pt 601) 80 at 91-92 per Akaahs JCA

6.2 Nature of an Election Petition

The courts have repeatedly held that election petition is *sui generis* by which they mean that it is a special/peculiar proceeding for which provisions are made under the Constitution and the Electoral Act. It is such that in certain circumstances the slightest default in complying with the procedural step which otherwise could either be cured or waived in ordinary civil proceedings could result in fatal consequences.[5] This is as exemplified in the cases of *Benson v Allison*[6] and *Eminue v Nkereuwen*[7] which were decided on failure to give security before presenting a petition as required by the rules.

The procedure in election petition is distinct and completely divorced from the regular civil procedure.[8] The procedure in an election petition is special for which provisions are made under the Constitution. In our Constitution,[9] such provisions are made under *section 285 and the sixth schedule to the Constitution*. Election Petition is neither seen as a civil proceeding in the ordinary sense nor of course, a criminal proceeding. It can be regarded as earlier stated as a proceeding *sui generis*. In *Ige v Olunloyo*[10] Kalgo JSC said:

> ….there is no doubt at all that an election petition is a proceeding which is sui generis and is not to be treated as a normal civil proceeding. It is conducted under the peculiar provision of the relevant electoral law and it is not particularly related to the ordinary rights and obligations of the parties concerned…….

It is imperative that the procedure laid down in the Electoral Act and in the Guidelines for election officials be strictly complied with, except to the extent that it is waived by *Paragraph 49 (1) of the First Schedule to the Act*.[11] The rules of procedure for Election Petitions are contained in the First Schedule to the Act.

[5] *Ogu v Ekweremadu* [2006] 1NWLR (pt 961) 255 at 277
[6] (1955-56) WRNLR 58
[7] (1966) WRLR 63
[8] *Oyekan v Akinjide* [1999] 12 NWLR (pt 592) 523
[9] CFRN 1999 (as amended)
[10] (1984) 1 SCNLR 158
[11] *Okonkwo v Ngige [2006] 8 NWLR (pt 981) 119 at 130*

6.3 Courts That Have Jurisdiction to Entertain Election Petitions

According to the provisions of *Section 133 (1) of the Electoral Act*[12] no election and return at an election under this Act shall be questioned in any manner other than by an election petition presented to the competent tribunal or court. The section went further to explain what it meant by 'tribunal or court' in subsection 2 which states that tribunal or court means, in the case of presidential election, the Court of Appeal and in the case of any other election under this Act, the Election Tribunal established under the Constitution.

By the provision of *section 285 of the Constitution*,

1. There shall be established for each State of the Federation and the Federal Capital Territory, one or more Election Tribunals to be known as the National and State Houses of Assembly Election Tribunals which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether:
   a. any persons has been validly elected as a member of the National Assembly; or
   b. any person has been validly elected as a member of the House of Assembly of a State.
2. There shall be established in each State of the Federation an election tribunal to be known as the Governorship Election Tribunal which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor of a State.

A National and State Houses of Assembly Election Tribunal shall consist of a chairman and two other members.[13] The quorum shall be the chairman and one other member.[14] The Chairman shall be a judge of a High Court and the two other members shall be appointed from among Judges of a High Court, Kadis of a Sharia Court of Appeal, Judge of a Customary Court of Appeal or other members of the judiciary not below the rank of a Chief Magistrate.[15] The Chairman and other members shall be appointed by the President of the

[12] *2010(as amended)*
[13] *op cit* 6th schedule (1)
[14] *Ibid s*. 285 (4)
[15] *Ibid* 6th schedule paragraph 1 (2)

Court of Appeal in consultation with the Chief Judge of the State, the Grand Kadi of the Sharia Court of Appeal of the State or the President of the Customary Court of Appeal of the State, as the case may be.[16] Same applies to a Governorship Election Tribunal.[17]

The Court of Appeal is the final court in the appeals arising from the National and State Houses of Assembly Election Tribunal.[18] In respect of decision of the Court of Appeal on Gubernatorial Election from decisions of an Election Tribunal, before the recent 2011 amendment, by *section 246 (3)*,[19] it was not appealable to the Supreme Court. However, with the recent amendment, the Supreme Court has the jurisdiction to entertain such appeals from the Court of Appeal.[20]

6.4 Election Petition and Technicalities

Although the law requires strict compliance with procedure, it is not all non-compliance that is fatal. *Section 139 of the Act*[21] makes it clear that where an election was conducted substantially in accordance with the principles of the Act, it will not be invalidated for non compliance with the provisions of the Act if the non-compliance did not affect substantially the result of the election. In the same vein, *paragraph 53(1) of the First Schedule to the Act* allows defects in proceedings of non-compliance with the schedule or any rule of practice to be cured, although if the other party applies within a reasonable time an election petition may be set aside.

The Supreme Court considered the provisions of *section 135 of the Act of 2002* which is identically worded with *section 139 of the Act of 2010*[22] in *Buhari v Obasanjo*.[23]The court held that the petitioner must satisfy the court that the non-compliance affected the result to justify the nullification sought. The court further decided that failure of some electoral officers to affirm or take oath of allegiance did not in any way diminish the fact that the election was valid.

[16] *Ibid* 6th schedule paragraph 1 (3)
[17] *Ibid* 6th schedule paragraph 2
[18] Okadigbo v Emeka [2012] ALL FWLR (pt 623) 1869
[19] Former 1999 Constitution
[20] *Ibid* s. 233 (2) (e) (iv)
[21] Electoral Act 2010 (as amended)
[22] *as amended*
[23] [22] *[*2005] 13 NWLR (pt 941) 191

In *Ngige v Obi*[24] the court held, amongst other things that wrong naming of an Election Tribunal in the processes filed in an election petition could not be basis for striking out the petition. Equally, in *Abana v Obi*[25] *and Okonkwo v INEC*[26] it was held that substantial compliance does not mean absolute compliance. In the United States, a successful challenge must prove that irregularities changed the result of the election.[27]

Acts which may be regarded as sufficient to substantially affect the result of an election need not be widespread non-compliance. They may be acts which occur only in one or few places yet their effect are so significant to the overall result between or among the candidates. Thus while failure on the part of the electoral officer to open the poll if it leads to many people not voting and which affect the result of the election was considered substantial non-compliance, failure to give security for costs as required by the Act was regarded as a curable irregularity.[28]

There is no better way to sum up than to recall the clear warning issued by the Supreme Court per Achike, JSC in *Egolum v Obasanjo,*[29] that 'the heydays of technicalities are now over because the weight of judicial authorities has today shifted from undue reliance on technicalities to doing substantial justice even-handedly to the parties to the case.'

6.5 Grounds for Petition

By the provisions of the Electoral Act[30] which relates to proceedings to question an election, the petitioner must complain of:

a. an undue election, or

b. an undue return[31]

[24] (2007) 14 NWLR (pt 999) 1 at 229
[25] [2005] 6 NWLR (pt 920) 183
[26] [2004] 1 NWLR (pt 854) 242
[27] *B H Weinberg, The Resolution of Election Disputes (Washington D.C: IFES) p.17 and Andrews v Blackman 59 So. 769 (La 1912)*
[28] *Biyv v Ibrahum* [2006] 8 NWLR (pt 981) at 50
[29] [1999]7 NWLR (pt 611) 355 at 413
[30] *2010*(as amended) *s. 133*
[31] *ANPP v PDP*[2006] 17 NWLR (pt 1009) 467 at 486

The Electoral Act [32]went further to state that an election may be questioned on any of the following grounds:

a. That a person whose election is questioned was at the time of the election, not qualified to contest the election;

b. That the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act;

c. That the respondent was not duly elected by majority of lawful votes cast at the election; or

d. That the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.

The Court of Appeal in *Ayogu v Nnamani*[33] held that any ground which is outside these provided in the Act will be regarded as frivolous or baseless. In the instant case, the petitioner relied on pre-election violence as a ground for the petition. The court held that the said ground were irrelevant and struck them out.[34]

Subsection (2) of the said section[35]states as follows: 'An act or commission which may be contrary to an instruction or directive of the commission of an officer appointed for the purpose of the election but which is not contrary to the provisions of the Act shall not of itself be a ground for questioning the election.'

Section 239 (1) (a) of the Constitution[36] provides:

1. Subject to the provisions of this Constitution, the Court of Appeal shall to the exclusion of any other court of law in Nigeria have original jurisdiction to hear and determine any question as to whether:

    a. any person has been validly elected to the office of President or Vice President under this Constitution.

[32] *op cit* s. 138
[33] [2006] 8 NWLR (pt 981)160
[34] *Buhari v Obasanjo* (2005) 13 NWLR (pt 941) 282-283
[35] *Ibid*
[36] CFRN 1999 as amended

2. In the hearing and determination of an election petition under paragraph (a) of subsection (1) of this section, the Court of Appeal shall be duly constituted if it consists of at least three justices of the Court of Appeal

It appears clear that from the provisions of the Constitution and the Act set out above; a presidential election petition can be presented

a. based on the sole ground stated under *Section 239 (1) of the Constitution* and
b. on any of the four (4) grounds as prescribed under *section 138 (1) (a-b) of the Act*.

Section 133 (1) of the Act[37] makes it abundantly clear that an election petition may be brought or filed either in accordance with the provisions of the Constitution or the Act. It provided that the person presenting the petition shall complain of an undue election or undue return. The next question is 'When shall an election petition be said to be undue' or what shall constitute an 'undue' Election/Return.

Since the word 'or' is used disjunctively, it means that an undue election is different from an undue return. The Electoral Act did not define the word undue election. It rather defined the word election as any election held under this Act and includes a referendum.[38] Undue simply means 'improper'. Undue election therefore means an improper election. According to Black's Law Dictionary[39], 'return' in relation to an election means an official report of voting result. Undue return therefore means an improper report of voting result. From the above, a complaint about an undue election should be a complaint about the election process itself. While a complaint about an undue return should be a complaint about the result of election.[40]

6.6 Who May Present a Petition

A candidate in an election or political party that participated in the election may present an election petition. The presenter of the petition is the Petitioner.[41] The Act makes it compulsory that the person whose election is being challenged and any person who took part in the conduct of the election and whose conduct in that regard the petitioner has any

[37] *op cit*
[38] *op cit p. 156*
[39] BA Garner *art cit*
[40] PA Onamade*, Advocacy in Election Petition (Lagos: Philiade Co. Ltd, 2007) p. 378; PDP V INEC [2012] ALL FWLR(pt 639) 1053*
[41] Electoral Act 2010(as amended)s. 137 (1)

compliant about must be joined as Respondent. Generally, failure to join these persons is fatal and will lead to the petition being struck out. However, if an officer is shown to have acted as an agent of the commission and the petitioner complains of the conduct of such an officer, it shall not be necessary to join such officers or persons notwithstanding the nature of the complaint. The commission shall in this instance be made a respondent who shall be deemed to be defending the petition for itself and on behalf of its officers or such other persons.[42]

6.7 Time for Filing of Election Petition

Section 285 (5) of the Constitution[43] which is a new subsection that stipulate the time for filing an Election petition provides thus: 'An Election petition shall be filed within 21days after the date of declaration of result of the election. There is no provision for extension of the said days, so any aggrieved contestant in an Election must get his facts together and be prepared to file within the stipulated time. That is a very short time for preparation and filing of the petition especially in respect of Gubernatorial Election petition in view of the demands of paragraph 4 (particularly sub 5, 6, 7) of the 1st schedule to the Act[44]which demands that written statements on oath of all the witnesses and copies or list of every document to be relied on at the hearing of the petition be filed along with the petition, otherwise the petition shall be struck out.

The courts have interpreted these provisions strictly and in a situation where a petitioner filed his petition within time and even listed the documents to be relied on but failed to file every copy along with the petition, an application for leave to later exhibit the said copies were refused by the Tribunal. This was the scenario in *Action Congress Of Nigeria V Sule Lamido*[45] This involved an appeal from the Election Tribunal's dismissal of the election petition challenging the election of Sule Lamido as Governor of Jigawa State by the ACN that alleged presentation of forged certificate to INEC.

The petitioner's appeal to the Court of Appeal was also dismissed. On a further appeal to the Supreme Court, the issue was the failure to accompany the petition with all relevant documents. The Supreme Court affirmed the decision of the Tribunal and Court of Appeal

[42] *Ibid s*. 137 (3) (a) (b)
[43] *Ibid*
[44] Electoral Act, 2010 (as amended)
[45] [2012] ALL FWLR (pt 630) 1316

and held that all the relevant documents ought to have been filed along the petition pursuant to paragraphs 4 and 41 (8) of the 1st schedule.[46]

6.8 Accompaniments of A Petition

The Electoral Act[47] provides that the election petition shall be accompanied by:

a a list of witnesses that the petitioner intends to call in proof of the petition.

b. written statements on oath of the witnesses, and

c. copies of every document to be relied on at the hearing of the petition

By the above provisions, the names of all the relevant witnesses the petitioner intends to call, must be listed and filed along with the petition. This may not be much of a problem as it is easy to know most of the names of witnesses who took part in the election. The written statement on oath of all the witnesses listed must also be filed along the petition. This is where the greater problem may be encountered. A written deposition is supposed to contain the actual facts of which the particular witness personally experienced on the day of the election, so the story of what transpired in the different units must be told by witnesses who were actually present at such units or voting centers. By the provisions of section 126 of the Evidence Act[48], the testimony of a witness must be direct. If it relates to a thing that was seen or heard, it must be the testimony of the person who saw or heard it. Otherwise the witness deposition and evidence will be regarded as hearsay and not admissible or relevant in the election petition proceedings and will be rejected and struck out.[49]

6.9 Issue of Pre-Hearing Notice

By the provisions of paragraph 18 of the 1st schedule to the Electoral Act, the petitioner shall apply for the issuance of pre-hearing notice as in Form TF 007, within 7days after the filing and service of the petitioner's reply on the respondent or 7days after the filing and service of the Respondents reply as the case may be. Being an election petition, time is therefore of

[46] Electoral Act 2010 (as amended)
[47] *Ibid* para 4 (5) of the 1st Schedule
[48] 2011
[49] Evidence Act, 2011 s. 38, Dorna v INEC [2012] ALL FWLR (pt 815) at 829 para E-F per Fabiyi, JSC

essence. Once the 7days provided for such application expires, there can be no extension of time to make the application and the petition would automatically be deemed as abandoned, notwithstanding whatever further steps the petitioner may be taking in the matter.

6.10 Time for Delivery of Judgment by Election Tribunals

This is the most prominent and revolutionary provision that was introduced into the 1999 Constitution[50]even though the amendments took effect in January, 2011. *Section 285 (6)*[51]provides: "An election Tribunal shall deliver its judgment in writing within 180 days from the date of filing of the petition. The Supreme Court exhaustively considered the novelty of this provision and its implication in the locus classicus of *ANPP V Goni*[52] and from the pronouncements of the apex court the following very vital attributes are to be noted of the section.

In interpreting this new provision, the Supreme Court made it clear that the provision is of very strict application. That being a constitutional provision no court has the discretion to extend the time provided therein, when the Constitution itself had no provision for extension of time. Neither the Court of Appeal nor indeed the Supreme Court has the power to extend time once the 180days has caught up with a petition at the Election Tribunal before delivery of its judgment.

As earlier noted, the 180days is to be calculated from the date of filing of the petition. It is totally immaterial that the appellate court had ordered a retrial or that the trial was starting de novo. Once the 180 days is up, the petition must end automatically at whatever stage of the proceeding the Tribunal was engaged in.

The petition naturally lapses and the Tribunal is thereby robbed of the jurisdiction to continue to entertain the matter. There can be no extension even for one day.[53] In the words of Onnoghen, JSC, [54]

> The above being the law, it follows that an Election Tribunal in an Election petition matter must deliver its decision/judgment/ruling/order in writing within one hundred and eighty (180)days from the date the petition

[50] *Ibid*
[51] *Ibid*
[52] [2012] ALL FWLR (pt 625) 1821
[53] ANPP V Goni *supra*
[54] *Ibid* p. 1845, paragraphs A, H and E

> was filed. It means the judgment cannot be given a day or more or even an hour after the one hundred and eighty days from the date petition was filed…… it is my considered view that the provision of section 285 (6) is like a statute of limitation which takes away the right of action from a party leaving him with an unenforceable cause of action. The law may be harsh but it is the law and must be obeyed to the latter more so when it is a constitutional provision……. The time fixed by the Constitution is like the rock of Gibraltar or Mount Zion which cannot be moved, that the time cannot be extended or expanded or elongated or in any way enlarged; that if what is to be done is not done within the time so fixed, it elapses as the court is thereby robbed of the jurisdiction to continue to entertain the matter.

Other recent election petitions that have been victims of *section 285 (6) of the Constitution* include *Udoedeghe v Godswill Akpabio,*[55] *Udenwa v Uzodinma,*[56] *Shettima v Goni*[57] etc

From the above decision of the Supreme Court, it can be seen that not even a remittal from an appellate court nor an order for a trial *de novo* could be considered exceptional or compelling enough for a shifting of position in respect of the said *section 285(6).*

A petition filed pursuant to *section 285 (6)* is now more like a ship without an anchor or a malfunctioned Mac Truck on the highway, which once the key is put in the ignition, the gas pedal throttles itself at full speed with the driver having the only objective to reach the set destination, no matter the extenuating circumstances, nor accidents that may happen on the way. In such a situation, there is no doubt that there are bound to be casualties along the way.

Many limitation statutes make provision for extension of time in exceptional circumstances for example the limitation laws in respect of contract in the various States of the Federation make provision for extension of time under specified circumstance. Even the Constitution too has made provision for exercise of discretion and possibility of extension of time in *section 294 (1) of the Constitution* which is a limitation law in respect of the 90days stipulation for delivery of judgment by the superior courts of records.

[55] (2013) ALL FWLR (pt 673) 1
[56] [*2013]* ALL FWLR (pt 674) 1
[57] [*2012]* ALL FWLR (pt 606)1008

Section 294 (5) provides:

> The decision of a court shall not be set aside or treated as a nullity solely on the ground of non compliance with the provision of sub section (1) of the section unless the court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof.[58]

Such provision for extension of time give a human face to a legislation and allow for unforeseen circumstance that are never lacking in the conduct of human affairs. Of greater worry is the fact that the section did not contemplate the process of appeal and the possible outcome of a challenge of the decision of an Election Tribunal at the appellate court which could result in *de novo* trial.

The Question is: Is *section 285(6)*[59] not unconstitutional for rendering electoral appeals impossible or constituting an instrument for miscarriage of Justice? *Section 285(6)* is in conflict with relevant provisions of the Constitution, giving right of appeal in election petition cases. The section renders the right of appeal practically impossible to be exercised in many instances. To that extent it can be said that *section 285 (6)* though a constitutional provision, is itself unconstitutional.

The Blacks Law Dictionary[60] defines unconstitutional as 'contrary to or in conflict with a Constitution especially the US Constitution. The Law is unconstitutional because it violates the first amendment free speech guarantee.'

In otherwise, a law is unconstitutional when it violates any right guaranteed by the Constitution. *section 246(1)(b)&(c)*[61] gives a right of appeal to any party arising from the decision of an Election Tribunal to the Court of Appeal and where the appeal is in respect of a Governorship elections, the parties have a further right of appeal to the Supreme Court by virtue of *section 233 (1) (e) of the 1999 Constitution.*[62]

By virtue of *section 285 (7),*[63] a right of appeal is exercisable and extinguished immediately after 60days of the decision of an election tribunal. This right is not only in respect of a final

[58] *Constitution*
[59] *ibid*
[60] Garner *op cit p. 1527*
[61] *Ibid*
[62] as amended
[63] CFRN 1999(as amended)

decision of the Tribunal but includes all interlocutory appeals arising therefrom. Furthermore, the period of time stipulated in *section 285*[64] includes weekends, public holidays and vacation periods. In *PDP V CPC,* [65] both senior counsel in the matter had made strong suggestions urging that Sundays, public holidays and the period of court vacations ought to be exempted from the calculation of time in section 285 of the Constitution. The court however responded to the above suggestion as follows, per Onnoghen JSC:

> Would that not defeat the purpose of the provision which is clearly aimed at curtailing the inordinate delays arising from election matters where some learned counsel engaged in delay tactics resulting in long delays in the hearing and conclusion of election matters to the embarrassment, not only of the legal profession in particular, but the nation in general.

If the appeal is in respect of the National or State House of Assembly election, the right of appeal extinguishes at the Court of Appeal. However, if the appeal is in respect of a Governorship election, the parties still have another 60days from the date of delivery of judgment by the Court of Appeal to proceed to the Supreme Court and have the appeal heard and concluded within the said 60days. It is submitted that the said *section 285 (6),* in trying to arrest a mischief has created another mischief. Perhaps of greater impact than the one it was enacted to address. *Section 285 (6)* as adumbrated in many decisions of the Supreme Court was enacted to address the unending and embarrassing delays that had been the bane of election petition cases and the appeals arising therefrom.

Section 285 (6) by providing for a period of 180 days within which an Election Tribunal shall deliver judgment in any election petition without envisaging what possibly could happen on an appeal against such decision of the Tribunal has indirectly rendered an appeal on election petition impracticable or a mere academic exercise. It has equally constituted a vehicle or instrument for miscarriage of justice. This is so because when one calculates the different periods stipulated in *section 285 (6) and 285 (7),* it can be seen that the 180days stipulated for conclusion of an election petition is most unrealistic and practically impossible to attain, given the fact that the appellate court may reverse the decision of the election tribunal and order for a retrial. For example, in an election petition involving a Governorship election, the period of 180days stipulated in the Constitution is tantamount to a period of six months. The period of 60days for appeal to the Court of Appeal and thereafter another 60days to the

[64] *Ibid*
[65] [2011] ALL FWLR (pt 603) 1786-1799

Supreme Court is altogether a period of four months. Out of this six months allotted for the petition, issues of services (which sometimes may need application for substituted service), entry of appearance, filing of defence, pre-hearing session, etc are likely to consume not less than one month with utmost diligence from all concerned. The period of five (5) months is therefore left for the actual trial, addresses and oral summation of counsel, and finally the writing and delivery of the judgment.

With utmost diligence, the tribunal cannot conclude all the above and still leave a reasonable time for the process of appeal. Yet by *section 246 and 233*[66] the Court of Appeal and the Supreme Court have the authority to exercise all the judicial powers of the Federation as vested on them by *section 6 (1).*[67] Such powers include the powers to set aside the decisions of the lower courts or tribunal and the power to order retrial or *de novo* trials pursuant to *section 15*[68]or *section 22*[69] respectively.

The question now is: Of what benefit or effect is a retrial order or trial de novo to the successful appellant after an exhaustive appeal when the Constitution itself has rendered same unenforceable by limitation of time in *section 285 (6)* without a consideration or contemplation of the possibility of such a retrial being ordered by the appellate court?

A party who proceeds on appeal after judgment of an Election Tribunal under the present circumstance is already embarking on a doomed voyage. Even if the Tribunal should dismiss an election petition on technical ground as was the case concerning many governorship elections sequel to 2011 general elections, with a good number of months left for appeal, an aggrieved party instituting an appeal against such is still embarking on a perilous journey. For by the time he eventually gets the judgment of the Supreme Court in his favour (which most time will be just about the end of the four months for conclusion of the appeals) setting aside the decision of the trial tribunal, the 6months stipulated for consideration and delivery of judgment in the matter would have elapsed. The whole process of appeal is thus rendered academic and of no practical use.[70]

Section 285 (6) has left the Supreme Court with not much room in the consideration of appeals from Appeal courts arising from election tribunal, than affirming the decisions of election tribunals on grounds that with the effluxion of time it would serve no useful purpose

[66] *Ibid*
[67] *Ibid*
[68] *Court of Appeal Act, 2011*
[69] *Supreme Court Act,2012*
[70] CPC v INEC *supra* at p. 651, paragraph 11

setting aside the decisions of election tribunals as there would be no jurisdiction in such tribunals to consider a retrial *de novo* over such petition. In *ANPP v Goni***,**[71] the lead counsel to the appellant, Tayo Oyelibo SAN has argued strenuously that a refusal to order a *de novo* trial with a fresh 180days, tantamount to making an election tribunal the final court in respect of election petitions. The researcher is inclined to align with the submission of the learned SAN. There is no doubt that the implication of a decision given by a trial tribunal, especially in full trials, on the merits, is that such a decision will stand as final, notwithstanding whatever decision would be arrived at on appeal.

A few examples of where the appellate courts found themselves helpless will suffice. In the *ANPP V Goni*[72] case, the Court of Appeal had set aside the decision of the trial tribunal and remitted the matter for a *de novo trial* but this could not be realised because of the effluxion of the 180 days time limit in *section 285 (6).* The tribunal's decision became final.

In *Ikenga V PDP,*[73] the Court of Appeal also reversed the decision of the trial tribunal but due to effluxion of time the retrial order could not be carried out, in the circumstance the tribunal's decision remained as final.

The clear implication of *Section 285 (6)*[74] as it presently stands is that it has rendered many appeals on election petition matters impossible, impracticable and unrealizable even though the right of appeal in such matters are provided for in the Constitution. In other words the said provisions of *section 285(6)* are in conflict with the right of appeal in *sections 246 (1) (b) & (c)* and *233 (1) (e).*[75]

Where a provision of a statute renders activation of a constitutional provision impossible, such a provision is said to be unconstitutional. In the case of *Unogu v Aku & Ors,*[76] the Supreme Court held that the provision of 30days for conducting and completion of election cases provided under *sections 129 (3)* and *140 (2) of the then Electoral Act*[77]was unconstitutional and accordingly knocked same out of the provisions. The provision as it presently stands, no doubt being constitutional provision cannot be knocked out by the Supreme Court because of the supremacy of the Constitution. It can only be knocked out by an amendment of the Constitution by the National Assembly.

[71] *Supra*
[72] *Supra*
[73] Ikenga v PDP [2012] ALL FWLR (pt 628) 837
[74] CFRN 1999 (as amended)
[75] *Ibid*
[76] (1983) 14 NSCC 563
[77] 1983

Furthermore, given the experience encountered in respect of the provision, where appeals that were reversed and remitted could not be continued by the tribunal, it can be validly argued that *section 285 (6)*[78] has constituted a vehicle or an instrument for miscarriage of justice. In, *Akpan v BOB,*[79] the Supreme Court gave an instance of when a miscarriage of justice is said to occur per Muhammed, JSC:

> I think, a miscarriage of justice can only be said to present itself to a court of law when that court, after examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favourable to the appealing party would have been reached in the absence of the error complained of.

Applying the above meaning of miscarriage of justice as given by the apex court, it can then be agreed that a situation where an appellate Court, finds the decision of a trial tribunal erroneous and reverses same or sets same aside, with an order that a retrial be conducted, which retrial could not be carried out (and which possibly could have resulted in a different result from what it earlier was) definitely qualifies to be termed a miscarriage of justice.

However, unless the appellate court assumes the jurisdiction of the trial tribunal and embarks on a fresh evaluation of evidence on appeal, and declares its own independent findings and superimposes its own judgment on that of the Tribunal, the essence of appealing a tribunal's judgment is totally defeated once the appellate court decides to remit back a petition for a second trial either by the same panel of tribunal justices or a different panel given the time usually lost in reconstituting.

6.11 Time for Filing of an Appeal against Tribunal Decisions

This time provided for the filing of an appeal against the judgment of the Electoral Tribunal is 21days.[80] It will be a fatal mistake to think that since the provision is in a practice direction which is tantamount to rules of court that the provision can be extended on application. No doubt, once this period elapses, the appellate court will refuse any application for extension of time in view of the limitation of only 60days provided for conclusion of appeals.[81]

[78] *Ibid*
[79] [2010] 17 NWLR (pt 1223)421 at 479 paragraph D
[80] Electoral Tribunal and Court Practice Direction, 2011 para 6
[81] *Ibid* S. 285(6)

The Supreme Court made this position very clear in *CPC V INEC* [82]per Adekeye JSC:

> Section 1 of the Practice Direction are limitation laws. Where a Statute of Limitation prescribes a period within which an action should be brought, legal proceedings cannot be properly or validly instituted after the expiration of the prescribed period. Thus an action instituted after the expiration period is said to be statute barred.

6.12 Time for Delivery of Judgment By Appellate Court

Section 285 (7) and 285 (8)[83] are both new provisions. The misunderstanding in the interpretation and application of same by several decisions of the Court of Appeal had been the death knell of several election petitions arising from the 2011 general election. *Section 285 (7)* [84]provided as follows:

> An appeal from a decision of an Election Tribunal or Court of Appeal in an election matter shall be heard and disposed of within 60days from the date of the delivery of judgment of the Tribunal or Court of Appeal.

The section does not recognize diligence of counsel or petitioner of acting promptly in the filing of the appeal. Once the 60days expires, the appeal must die irrespective of the circumstance, whether compelling or exceptional.

In *PDP v CPC*[85], an appeal arose from the petition of the Congress for Progressive Change against the declaration of Dr. Goodluck Ebele Jonathan, the PDP candidate, as the winner of the presidential election. The appeal filed by the petitioner exceeded the 60days stipulated for appeals. Counsel argued that the delay was due to the court vacation and was not caused by the appellants who had acted timeously in getting their processes into court. In discountenancing the sympathetic position of the appellant in the case, Odili JSC [86]stated as follows:

> In keeping with the principles above stated it is not the function of a court to sympathize with a party in the interpretation of constitutional provision

[82] [2013] ALL FWLR (pt 685) at 628 para H
[83] *ibid*
[84] *Ibid*
[85] [2011]ALL FWLR (pt 603) 1786
[86] p. 1810 paragraph E-F

> merely because appellants acted timeously and due to no fault of theirs, there is an effluxion for the hearing and final determination of the appeal. Going along with what Chief Gadzama is asking of this Court, is to enter into and possibly take over the functions of the legislature and so the only avenue in dealing with the appeals before us, is to do what ought to be done within the context of this constitutional provision of section 285 and declare the appeals dead and they have been dead for more than 40 days and that is the reality on ground. Nothing can change that.

In the words of Onnoghen JSC[87]

> It is clear that by the use of the word "shall in section 285(7) of the 1999 constitution, the framers of the constitution meant to make the provision mandatory as it admits of no discretion whatever. It means that the 60days allotted in section 285(7) of the Constitution cannot be extended for one second as the decision of the appellate court must be rendered within 60days of the delivery of the judgment on appeal. It is my opinion that the 60days in section 285(7) of the Constitution includes Saturdays, Sundays and public holidays as well as court vacations because if it was the intention of the framers of the Constitution to exclude these days, they would have so stated in clear and unambiguous terms. The only exception may be where the last day of the 60days happen to be a Sunday or Public Holiday, then the action contemplated in section 285 (7) can be completed on the next working day as settled on a long line of authorities.

Furthermore, the section covers both interlocutory appeals and final appeals. It will therefore be foolhardy and imprudent to await final decisions before appealing on interlocutory matters, particularly such that could terminate the petition if successful. This was the situation in the Presidential election petition in *Congress for Progressive Change v Independent National Electoral Commission.* [88]

In the above case, CPC filed a petition at the Court of Appeal, Abuja challenging the electoral result that declared the PDP Presidential candidate, Dr Goodluck Jonathan and Architect Namadi Sambo, as the winners of the 2011 Presidential election. It prayed for declaratory and injunctive reliefs, to the effect that, the 3rd and 4th respondents election was voided by corrupt

[87] p. 1797-1798, paragraphs G-A
[88] [2012] ALL FWLR (pt 617) 605

practices and substantial non-compliance with the relevant provisions of the Electoral Act,[89]they did not fulfill the requirements of *section 134 (2) of the Constitution*[90] with regards to scoring the highest number of votes and mandatory one quarter of the votes cast at the election in each of at least two-thirds of all States in the Federation and F.C.T., the result declared was wrongful and invalid, the presidential election did not produce a winner and thereby sought an order directing the 1st and 2nd Respondents to conduct another election.

The Court of Appeal dismissed the petition. Yet aggrieved, the petitioner appealed to the Supreme Court. The respondents filed a preliminary objection challenging competence of some grounds of appeal and particularly that the interlocutory appeals in the matter were filed after the stipulated 60days provided by *section 285 (7)*. The Supreme Court upheld the objection and dismissed the interlocutory appeals.

It is however a great relief that decisions of the Court of Appeal on Governorship appeals are no longer final as with the many conflicting decisions of the Court of Appeal on the interpretation of *section 285 (7)& (8)*, it would have been very confusing and difficult to choose which were correct. But there has now been a convergence with the consistent decisions of the Supreme Court on the correct interpretation.

6.13 Issue of Delivery of Judgments and Reserving of Reasons Thereto

Section 285 (8) provided: 'The Court in all final appeals from election tribunal may adopt the practice of first giving its decision and reserving the reasons therefore to a latter date.' Due to an initial lack of appreciation of the import of these new provisions, several appeals from Election Petition Tribunals were lost at the Court of Appeal mainly on the grounds that by the time the judgments of the Court of Appeal were delivered, and the reasons given, the 60days stipulated for such delivery by the Constitution had already elapsed.

The novelty of *section 285 (8)* caused so much confusion at several divisions of the Court of Appeal, as most of the decisions were actually delivered within the 60 days time frame, but reserving the reasons for the decision to later dates which in most instances were given after

[89] 2010 (as amended)
[90] 1999 as amended

the 60 days stipulation. The Supreme Court itself appreciated the confusion caused by the novelty of this provision when it stated in *Abubakar v Nasamu*,[91] per Onnoghen JSC:

> It should be noted also that it is an already long time practice of the Supreme Court in the exercise of its jurisdiction, to adopt the practice of giving judgments to a later date. The practice is therefore not novel to the Supreme Court though the same cannot be said of the Court of Appeal. For the Court of Appeal, it is a novel practice hence, the apparent confusion.

However, in all such instance where the Court of Appeal delivered its judgment without the reasons in support thereof, the Supreme Court held such decision/judgments to be invalid, null and void. That both the decision/judgments together with the reasons for the said judgment must be delivered within the 60 days constitutional provisions, particularly in Gubernatorial Election appeals, since the Court of Appeal in such appeals was just an intermediate court whose decision was no longer final, but appealable.

In an appeal involving the Taraba State Gubernatorial Election in *Senator Joel Danlami Ikenga & Ors v People Democratic Party & 4Ors*,[92] the petitioner, who was the ACN candidate in the 2011 Gubernatorial Electoral in Taraba State, lost to his opponent Pharmacist Danbaba Danfulani Suntai of the PDP; filed an election petition challenging the return of the winners. The tribunal delivering its judgment, within 60days, dismissed the appeal but failed to give its reasons for the judgment the same day. In further appeal to the Supreme Court, the Petitioner/Appellant challenged the jurisdiction or power of the appeal Court to give its judgment and reserve the reasons for a later date when it was not the final court in respect of the Gubernatorial election petition, and not being the Supreme Court of Nigeria. The appellant further sought for an order for a rehearing of the appeal by a different panel of the Court of Appeal.

The Supreme Court allowed the appeal and declared the judgment of the Court of Appeal a nullity on the grounds that judgment delivered without the supporting reasons was no judgment. However the relief for rehearing of the Appeal by a different panel of the Court of Appeal was refused on the grounds that by *section 285 (7)*, the period for hearing of the appeal had already lapsed. In the circumstance, the judgment of the Trial Tribunal was

[91] [2012] ALL FWLR (pt 230) 1208 at 1234
[92] [2012] ALL FWLR (pt 628) 837

affirmed as if it had not been appealed against at all. Per Mohammed JSC who delivered the lead judgment:

> This action on the part of the Court of Appeal rendered its judgment a nullity in the absence of the reasons for the judgment resulting in leaving intact the judgment of the trial election petition tribunal delivered on 10th November, 2011 affirming the election and return of the 2nd and 3rd respondents as Governor and Deputy Governor respectively of Taraba State in the election to the office of Governor of Taraba State conducted by the 4th and 6th respondents on 26th April, 2011. In other words, the judgment of the Court of Appeal delivered on 6th January, 2012 without reasons for the judgment is indeed a nullity in the absence of the reasons for the judgment to provide the necessary materials from which the appellant may raise the grounds of appeal challenging the decision of that court in exercising their constitutional right of appeal. This is because the judgment of the court and reasons are inseparable partners in law as it is the judgment and the reasons therefore that constitute a valid judgment of the court. As for the relief of rehearing of the appeal by a different panel of the Court of Appeal sought by the appellants in this court, that relief cannot be granted because the 60days under subsection (7) of section 285 of the Constitution of the Federal Republic of Nigeria, 1999 within which the appellant's appeal must be heard and determined had already lapsed, as the judgment of the election petition tribunal giving rise to the appeal was delivered since 10th November, 2011. It will therefore be a futile exercise, in my view, granting that relief.

As earlier stated, many Gubernatorial election petition appeals and even presidential appeals failed at the Supreme Court on account of these novel provisions because of an initial lack of appreciation of the import and application, such other cases include:

Congress for Progressive Change v Yuguda.[93] This was an appeal by the candidate of the CPC resulting from its challenge of the return and declaration of Malam Ise Yuguda as winner of the governorship election.

Peoples Democratic Party v Congress for Progressive Change.[94] This was an appeal arising from the challenge by the CDC and its candidate against the return and declaration of Dr. Goodluck Ebele Jonathan as the President of the Federal Republic of Nigeria.

Chief Dr. Felix Amadi v Independent National Electoral Commission. [95]This was an appeal by the candidate of the African Political System (APS) arising from the Election Petition challenging the return of Chibuike Rotimi Amaechi as Governor of Rivers State in the 2011 April election.

Chief Great Ovedge Ogbaru &Anor v Dr. Emmanuel Uduagha. [96] This was an appeal by the candidate of Democratic People Party (DPP) against the declaration of the PDP candidate, Dr. Uduagha as the Governor Delta State.

PDP v Chief Anayo Rochas Okorocha.[97]This was an appeal by the PDP challenging the return and declaration of the All Progressive Grand Alliance candidate, Chief Okorocha as winner and Governor of Imo state.

CPC v INEC.[98]This was an appeal by Congress for Progressive Change against the declaration and return of Pharm. Danbaba Suntai of the PDP as the winner and Governor of Taraba State.

[93] [2012] ALL FWLR (pt 651) 1466
[94] [*2011] ALL FWLR (pt 603) 1786*
[95] [*2012] All FWLR (pt 621) 1415*
[96] [*2012] ALL FWLR (pt 637) 658*
[97] [*2012] ALL FWLR (pt 626) 449*
[98] (2013) ALL FWLR (PT 685) 605

6.14. Why The Court of Appeal is No Longer The Final Court in All Governorship Election Petition

Before the 2011 amendment of the Constitution, by *Section 246 (3)*,[99] decisions of the Court of Appeal on Gubernatorial Elections, from decisions of an Election Tribunal were final. It was not appealable to the Supreme Court. However, that section has been amended. And the provisions of *Section 233(1)(e)*[100] which hitherto did not include Governorship appeals to the Supreme Court has now reflected therein.

Section 233(1)[101]provides:

1. The Supreme Court shall have jurisdiction to the exclusion of any other court of law in Nigeria to hear and determine appeals from the Court of Appeal.

2. An appeal shall lie from decisions of the Court of Appeal to the Supreme court as of right in the following cases…..

   (a) decisions on any question…….

   i. Whether any person has been validly elected to the office of Governor or Deputy Governor in this Constitution.

   ii. Whether the term of office of a Governor or Deputy Governor has ceased.

   iii. Whether the office of Governor or Deputy Governor has become vacant.

This new provision is only in respect of Governorship appeals. It does not relate to the National Assembly and House of Assembly appeals. Decision of the Court of Appeal in such matters shall remain final and are not appealable to the Supreme Court. Some petitioners have made the mistake of construing the provision as granting a right of access to the Supreme Court in National Assembly petitions.

[99] *CFRN 1999 (as amended)*
[100] *Ibid*
[101] *ibid*

In *Okadigbo v Emeka,*[102] an election petition appeal involving the Anambra North Senatorial Seat was appealed to the Supreme Court. The Supreme Court struck out the appeal on the ground that it had no jurisdiction over such appeals. Per Chukuma –Eneh JSC;[103]

> This means that the lower court is the final court in the appeal arising from the National and State Houses of Assembly Election Tribunal. Therefore this court lacks the jurisdiction to entertain such appeals *vis-a-vis* election petition from the lower court. It is the final court in such matters whether rightly or wrongly decided.[104]

The above provisions are by no means exhaustive of the numerous provisions introduced by the newly amended 1999 Constitution. But the abovesaid provisions had become the most pronounced and recurrent provisions relative to electoral matters and relevant to this work.

[102] (2012) ALL FWLR (pt 623) 1869
[103] *Supra* p. 1881 paragraph 17
[104] *U O Udom supra p. 173-181*

CHAPTER SEVEN

THE JUDICIARY IN THE EVOLUTION OF A CONSTITUTIONAL DEMOCRACY : FOCUS ON NIGERIA

At this point the researcher will examine the nature of the Nigerian legal system. The judiciary does not operate in vacuum, but within the framework of a legal system. The Nigerian legal system in this sense consists of the totality of the laws or legal rules and the legal machinery which obtains within Nigeria as a sovereign and independent African country. As a result of its historical antecedents, Nigeria is classified under the common law system. The implication of this system to the judiciary is that it has imbibed the tradition of *stare decisis* which enjoins that earlier decisions should be binding authorities for subsequent cases. It is that principle of law that decisions of higher courts are binding on the lower court and also decisions of courts of coordinate jurisdiction are also binding on those courts.[1] The courts in which the decision is given may depart from it only in special cases while the courts below it are strictly bound by that decision.

Furthermore, as a prerequisite for the smooth operation of the doctrine of precedent, Nigeria has a well-structured hierarchy of courts as earlier adumbrated, with the Supreme Court of Nigeria being the final court of the land. Moreover, the Nigerian legal process is accusatorial or adversary in nature. Here courts that is, the judges, are advised to be detached from disputants and to maintain a neutral stand as uninterested umpires relying on the arguments from both sides for their final decisions. Under the Nigerian law, an accused is presumed innocent until proven guilty. The prosecution is required to prove his case beyond reasonable doubt. A judge will offer little or no assistance to the prosecution in securing conviction of an accused person. In the candid opinion of the Supreme Court, it is contrary to the expected role of a judge as an impartial umpire and against the spirit of fair hearing, for him to descend into the arena of conflict or act for any of the parties. According to Nnaemeka Agu J.S.C:

> There are certain fundamental norms in the system of administration of justice we operate. That system in the adversary system in contradiction to the inquisitorial system …. Basically, it is the role of the judge to hold the balance between the contending parties and to decide the case on the evidence brought by both sides and in accordance with those roles of judges. Under no circumstances must the judge under the system do

[1] C Okonkwo, *Introduction to Nigerian Law* (London: Smith and Maxwell 1950) p. 40

> anything which can give the impression that he has descended into the arena as obviously, his sense of justice will be obscured.[2]

7.1 The Role and Conduct of Judges

As Uwais, J.S.C, (as he then was) noted that,[3] 'Judges do not have an easy job. They repeatedly do what most people seek to avoid, that is making decisions, and what is more, they are expected to give reasons justifying their decisions. These reasons get examined by lawyers at their leisure in order to find errors which will enable them appeal.' According to the learned justice, these judgments or decisions constitute materials for the books and lectures of academic lawyers, who use these opportunities to show that the judges made mistakes in their decisions.

Apart from their duty to maintain discipline in their court, and to conduct trials fairly and efficiently, they are also expected to resolve disputes before them wisely, according to law, so that the parties before them can conclude that they have had a fair hearing.[4] The former President of the Court of Appeal, Akanbi PCA equally stated, at the same 1995 All Nigerian Judges Conference, that the nature of the office and functions of a judge require persons holding that office to have a high sense of duty, responsibility, commitment, discipline, intellect, integrity, probity and transparency.[5] According to the learned President of the Court of Appeal:

> Anyone who gets appointed to the exalted position of a judicial officer, without possessing these supreme qualities is sure to be a No. 1 obstacle to justice according to law. Indeed a dishonest or corrupt judge or a judge of little or no learning can be a most dangerous clog in the administration of justice.[6]

However, of the twin evils constituted by a corrupt judge and an ignorant Judge, Akanbi, makes it clear that the latter is far worse, for according to him, a judge with little or no adequate knowledge of the law may be considered a nuisance and his lack of understanding

[2] Ehotor v Osayande (1992) 6 NWLR (pt 190) 524 at 541 - 542
[3] M Uwais, 'The Court: An Instrument of Justice and Democracy', A Paper delivered at All Nigeria Judges Conference Abuja, 1995, p.1 at p. 3
[4] *Ibid* pp. 3 & 4
[5] M Akanbi, 'The Many Obstacles to Justice According to Law', A Paper delivered at All Nigeria Judges Conference Abuja, 1995, p.38 at p. 40
[6] *Ibid* p. 40

and appreciation of the law may constitute an obstacle in the path of justice, yet he is still more tolerable than a corrupt judge. For a corrupt judge is not only a dangerous obstacle, he is an anathema and disgrace to the profession or institution to which he does not deserve to belong.[7]

In a lecture delivered at the Obafemi Awolowo University, Ile Ife in 1988,[8] Justice Oputa devoted space to some of the qualities a judge must possess if he is to be capable of dispensing justice. He stated inter alia:

> The qualities of courage, honesty and integrity required of judges are meant to ensure that they do not, either under pressure or of their own volition field their moral authority, and that they do not in the process of decision making allow themselves to be swayed from the path of trust and justice. The qualities of firmness and impartiality will allow the judge to turn the wheels of justice objectively and not subjectively. In the chambers of the legislature or the Executive, it may be necessary and at times even expedient to listen to the siren of power and influence. But in the halls of justice, the battle is for truth and against expediency. It is a battle for protection from power or its abuse – the power of the police and of prosecution, the power of Business and of wealth and status and the most subtle of all, the power of the majority. It needs a man of commensurate moral fiber and moral courage to stand up to this assault from power, to maintain his balance and deliver justice. Honestly and judicial rectitude are thus, the badge of a good judge. It is a calamity to have a corrupt judge, for money – its offer and its receipt – corrupts and not only the channels of justice but the very stream itself. Honesty and judicial rectitude are therefore, the very minimal requirements of the judicial office. Less than that, no disciplined and responsible judiciary should accept and less than that no disciplined society should tolerate. The offer and acceptance of money and unlawful or immoral gratification of a judge – these ruin every other virtue of the judicial office. They snap at and break the brittle bond of confidence which unite our citizens with the court system. Thus, scandalized and morally deformed, bewildered litigants no longer expect from the court a just decision. The entire experiment of

[7] *Ibid* p. 42
[8] C Oputa, 'Access to Justice', A Paper delivered at Obafemi Awolowo University, Ile Ife, 1988

> justice through the courts thus becomes an exercise in futility, and justice becomes a sham or at best a counterfeit, for nothing is as hateful and as odious as venal justice.

In *Dickson Ikonne* v *The Commissioner of Police and The Justice Nwanna Awa-wachukwu*,[9] the second respondent, a judge, had issued a warrant of arrest against the Applicant, for private and personal motives. The Supreme Court, (Aniagolu, JSC) had this to say about him:

> Having regard to the foregoing it is unthinkable that a judge of the High Court to whom the law looks up for the protection of the fundamental rights of the people should be the one to trample upon those fundamental rights. The precise wordings of the Judicial Oath under the sixth schedule to the 1979 Constitution to which the Respondent subscribed are very significant. The said Judicial Oath to the extent to which it applies to the Respondent as judge of the High Court of Imo State reads:
>
> ……. do solemly swear that I will be faithful and bear true allegiance to the Federal Republic of Nigeria; that as a judge of the High Court of Imo State …. I will discharge my duties, and perform my functions honestly, to the best of my ability and faithfully in accordance with the Constitution of the Federal Republic of Nigeria and the law; that I will abide by the Code of Conduct contained in the Fifth schedule to the Constitution of the Federal Republic of Nigeria; that I will preserve, protect and defend the Constitution of the Federal Republic of Nigeria. So help me God'.

It is clear from the facts of this matter on appeal that the judge, the Hon. Justice Nwanna Nwa-Wachukwu, had no valid legal reasons for issuing the Warrant of Arrest complained of in this appeal. The issuance of the Warrant of Arrest was, in the circumstances of this matter on appeal, an abuse of legal process – an abuse of judicial authority. It is particularly painful that I should come to this conclusion concerning a judge of the High Court, but the conclusion is inevitable having regard to the facts and circumstances of this matter on appeal. The conduct of the judge in issuing the Warrant of Arrest upon what obviously was fictitious reason had the undesirable effect of denigrating the judiciary in the eyes of the public and of eroding the confidence of the people in judicial process and the Rule of Law.[10]

[9] [1986] 4 NWLR (pt 36) 473
[10] *Ibid* p. 496

In the case of *Onagoruwa v IGP,*[11] Niki Tobi JCA (as he then was), while commenting on the figure of a judge in a democratic government did say:

> We are paid mainly and essentially to uphold the Rule of law in the entire polity. And so, once we fail to uphold the Rule of law, anarchy, despotism and totalitarianism will pervade the entire society …. We as judges cannot afford to see the society decay to such irreparable level. We must rise up fully to our duties by indicating the tenants of the Rule of law in our practiced democracy.

These decisions made by the judges in exercise of their judicial functions are indeed social and political determinants and could be critical for a democracy. Hence for the realization of the purposes of a constitutional democracy, the question of the quality and stuff of the bench is imperative. As a matter of fact, since in a democracy, good governance is government according to law, Nnaemeka Agu JSC, the learned jurist observed that 'without judges, good judges, there can be no democratic state.'[12]

The extremely high standard required of a judge arises from the enormous and unlimited powers of a judge over all persons and institutions in Nigeria. Of the three arms of government, it is only the judiciary that has the competence to supervise and review the actions of the other two. Accordingly, if the system is working inequitably, the judges are likely to be the first to know. This privilege of the expert knowledge of the judges should make them rise to any noticed inequality in government to correct it. To do this, courage and impartiality are the most needed, especially in the face of tyranny. Timorous judges are very easily swaged to injustice for reasons of danger to life and limb while partial judges for reasons of bias, prejudice and other extraneous consideration do disservice to law and justice.

7.2 The Judiciary under a Constitutional Democracy

Section 1 (1) of the Constitution,[13] declares that 'This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal

[11] [1991] 5 NWLR (pt 193) 623 at 650

[12] N Agu, 'The Position and Role of a Judge in a Democractic State in C Nweze (ed), *Justice in the Judicial Process: Essay in Honour of Honourable Justice Eugene Ubaezuonu* (Enugu: Fourth Dimension Pub; 2002) p. 215.

[13] 1999 CFRN (as amended)

Republic of Nigeria.' Furthermore, *section 1 (3)*[14] provides that if any law is inconsistent with the provisions of the Constitution, the Constitution shall prevail and that other law shall to the extent of the inconsistency be void.

It ought to be clear that in case of any dispute as to the consistency of any action of the other arms of government with the constitution, it is the courts that have the authority to make the appropriate pronouncement as to the lawfulness of such action. This point was eloquently and lucidly made by Justice Uwaifo, then a Justice of the Court of Appeal. He not only made a conclusive case, but demolished convincingly, all arguments to the contrary as follows:[15]

> Once it is admitted that the courts are given the constitutional authority to revolve any dispute between persons and between the state and any persons, or to revolve any conflict between a statute and the Constitution in all cases properly brought before them, it must follow that their decisions should be final, conclusive and binding. Whenever they affect organs of government, in particular as to the legality of their action, they must be accepted as the constitutional position as interpreted by the court, or in case of appeal, by the final court in the land.
>
> But there has been the unfortunate tendency, even by the constitutional government, that is, the democratically elected government, to resist this decision upon spurious arguments. The issue is raised as a question whether the decision of one organ of government, namely, the judiciary (given the constitutional responsibility to interpret the laws and the Constitution) should be final, conclusive and binding upon the political organs of government. First, it is argued that the authority which can declare the acts of another, void must necessarily be superior to that other. Second, that it is intolerable that the views of a handful of men should be allowed to override those of elected representatives of the people on so crucial a matter as the interpretation of the Constitution. Third, that there is the danger that the courts might become something of a 'despotic oligarchy and that if a choice has to be made between that scenario and the possible tyranny of an elected majority, the later is the less intolerable of

[14] *ibid*
[15] S Uwaifo, 'The Court as an instrument of Justice and Democracy', A Paper delivered at All Nigeria Judges Conference, Abuja,
1995, pp 152 – 154.

> the two. To my mind, these arguments have the implicit design to destroy the very Constitution considered to be supreme. The Constitution has no room for tyranny of any kind. It has assigned responsibilities to the different organs of government and it is in the interest of the people that those responsibilities are performed within the limits prescribed in the Constitution itself. Those performing their respective responsibilities are public servants. They will necessarily do so with the personnel allowed under the Constitution. In the case of the judiciary, it is the judges of the different hierarchy, as for the executive, the President and Ministers are in charge; while for the legislature, the Senators and Legislators are concerned with making laws. The question of despotic oligarchy in relation to the judiciary can therefore, not arise as the judges simply interpret the laws and the Constitution. It must not be forgotten that the judges are trained and experienced in the art and that there is a system of appeals in the judicial hierarchy. An understanding of how it works will completely dispel the idea of any possible despotism of an oligarchy. The idealism behind the system is to arrive at the best possible result in any case determined, and when it involves interpreting the Constitution, to discover what the people have declared and hold the government bound by it. There is no question of superiority whatsoever.[16]

To further buttress the foregoing arguments, Uwaifo JCA, as he then was called in aid the famous statement of Chief Justice Marshall of the United States Supreme Court in *Marbury* v *Madison*[17] in which the Chief Justice argued that the distinction between a government with limited powers(constitutional government) and one with unlimited powers (totalitarian government) would be abolished if those limits did not confine the powers on whom they were imposed and if acts prohibited and acts allowed were of equal obligation. On acts in transgression of the Constitution he added:

> Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and if the will of the legislature, declared in its statutes, stands in oppositions to that of the people declared in the Constitution, the judges ought to be governed by the latter rather than the

[16] *Ibid* at p. 18
[17] (1803) 1 Cranch 137

> former. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution, if both the law and the Constitution apply to a particular case, so that the court must either decide its case, conformably to the law, disregarding the Constitution or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules govern the case; that is of the very essence of judicial duty. If then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution and not such ordinary act, must govern the case to which they both apply.[18]

In a Federal system of government in which powers are shared between the centre and the states under the Constitution, the supremacy of such a Constitution and the power of courts to declare infringements of the Constitution illegal, null and void is without doubt. As Where are rightly stated:[19]

> I think it is more accurate to say that if a government is to be federal its Constitution, whether it be written or unwritten, or partly written or partly unwritten, must be supreme. By this I mean that the terms of the agreement which establish the general and regional governments and which distribute powers between them must be binding upon those general and regional governments. This is a logical necessity from the definition of Federal government itself … so far as this agreement regulates their relations with each other, it must be supreme.

The Hon. Justice Chukwudi Oputa once candidly observed that:

> Justice makes democracy possible but men's inclination to injustice makes democracy very necessary …. Justice thus seems to be the most acceptable credential of democracy. There seems to be an umbilical cord linking

[18] Uwaifo *ibid* pp 154 - 155
[19] C Wheare, *Federal Government* (London: Oxford Press 1963) p. 53.

> democracy and justice. If that cord snaps the result will be injustice. It will also be failure of democracy[20].

The truism of the above dictum lies in the fact that there can be no viable democracy without justice, which is usually the finished product of an efficient, courageous and independent judiciary.

Furthermore, unlike autocratic or oligarchical forms of government, democracy prides itself in the words of Professor Oyebode "as a law-based government under which all organs of state operate in accordance with their competence as defined by the constitution or some other law"[21].

Although, in most democracies the constitution is the grundnorm of the land which is binding on all, yet it does not operate by itself, it has to be applied or interpreted. Accordingly, it is in the application or interpretation of the constitution and other laws that the pre-eminent role of the judiciary becomes discernable.

In actual practice, the judiciary, which consists principally of the courts, serves as mechanism that prevents chaos, tyranny and confusion of having inter alia, power of judicial review on the powers of the executive and legislative branches. In other words, the judiciary has been constitutionally made the arbiter of the conflict which may arise from the exercise of powers by each branch of government. Thus, people look up to the judiciary as a haven of last resort for the protection of society and particularly for protecting the weak and the oppressed.

However to live up to expectation and fulfill its constitutional role, it cannot be over-emphasized that the judiciary must be independent. Democracy is now almost a universal concept of governance. It has been opined that "The acid test to find how free and how democratic any nation is, is to look at its judiciary to find out what powers the nation is prepared to concede to its vital partner in governance. The complete and real independence of the judiciary is thus the reflection of the freedom.[22]

Essentially, in the performance of their judicial duty and exercise of judicial powers, judges and/ or judicial officers must not be subjected to any restriction, improper influence, inducement, pressures, threats or interferences, direct or indirect from any persons or

[20] C Oputa, 'Access to Justice'*op cit*
[21] *ibid*
[22] ML Uwais, 'Independence of the Judiciary,' A paper presented at the All Nigeria Judges' Conference, Abuja, 2001.

authorities whatsoever. One of the cardinal attributes of an independent judiciary is the confidence reposed in it by members of the public in the performance of its constitutional role. In the words of Chief Justice Warren Burger:

> A sense of confidence in the Courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society; that people come to believe that inefficiency and delay will drain a just judgment of its value; that people who have for long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; that people come to believe the law in the larger sense cannot fulfill its primary function to protect them and their families in their house, at their work and the public streets.[23]

Admittedly, it is the pride of any judiciary to be independent as it is beneficial to the generality of the populace in terms of orderliness, freedom, justice, good government et cetera. However, the question is how can one assess the level of independence of a judiciary? Perhaps the best way to do this is to consider those things such as the appointment and removal of judges, tenure of office, salaries, allowances, immunities and funding among other things.[24]

a. Appointment and Removal of Judges

Prior to the coming into force of the 1999 Constitution, appointment and removal of judges in Nigeria constituted a source of great concern. Thus speaking on the mode of appointment of judges vis-à-vis the independence of the judiciary, a former Chief Justice of Nigeria said:

> In order to ensure the perfection of the independence of the judiciary, the criteria for and mode of appointment of judges should be based on no other consideration than the suitability, competence, integrity, learning and incorruptibility of the appointees. Only an independent and impartial

[23] O Chukwura, 'Administration of Justice in Africa-Problem and Prospects, '(2007) 7 Federal Ministry of Justice Review series
p.60

[24] JA Ajakaiye, 'The Constitutional Role of the National Judicial Council with regards to Collection and Disbursement of Funds to the Judiciaries: Problem and Prospects, 'Apaper presented at the All Nigeria Judges' Conference, Abuja, 2001.

> body which is free from any political influence or consideration will always apply those criteria[25].

This was as a result of the fact that some of the Judicial Service Commission which were responsible for the appointment of judges in the States in the time past did not perform to enhance the independence of the judiciary. The State Governors used their influence within the Commission to secure the appointment of some judges on political and other consideration. Obviously, such appointments did not gain the public confidence in the judiciary and its impartiality[26].

Happily enough, the 1999 Constitution has established the National Judicial Council[27] which is the only body to recommend to the President or Governors as the case may be, the appointment and removal of federal and state judicial officers. In essence, the council is responsible inter alia for ensuring national uniform standards for appointment and discipline of judicial officers thus enhancing the independence of the judiciary. The National Judicial Council is made up of 23 members including the Chief Justice of Nigeria as Chairman.[28]

b. Tenure

The age of compulsory retirement for judicial officers appointed to the Supreme Court and Court of Appeal is now put at 70 years[29] while those of the judicial officers such as judges of the Federal High Court, High Court of a State, Khadi of Sharia Court of Appeal and Judges of Customary Court of Appeal remains 65 years.

This is unlike what is obtainable in Britain, where some Judges served up to the age of 82 years. For instance Lord Denning retired at the age of 82 years. In the United States, Federal Judges serve for unlimited term during "good behaviour." At 65, they are eligible for "senior status" and may continue to receive salaries. They are available for part-time judicial service upon arrangement with the active Judge until the age of 80 years.

[25] M Bello CJN in his valedictory Address delivered on Monday, 18th December, 1995 contained in (1995) 12 SCNJ 2
[26] Ibid
[27] CFRN 1999 (as amended as) s. 153
[28] *ibid Third schedule paragraph 20*
[29] *Ibid* s. 291 (1)

The conditions under which our Judges operate in Nigeria among which is writing proceeding in long hand etc is responsible for some authors to recommend that the compulsory retirement age for all our judicial officers in Nigeria should be pegged at 70.[30]

c. Funding

Paragraph 21 (e) of the Third Schedule to the Constitution empowers the National Judicial Council (NJC) to collect, control and disburse all moneys capital and recurrent for the Judiciary. Apart from the fact that this power has been criticized, inter alia as being another mechanism for federal control of its federation parts, one cannot but argue that the provisions of the Constitution will bring this to fore.

Section 81 (3) states:

> "Any amount standing to the credit of the judiciary in the consolidated revenue fund of the Federation shall be paid directly to the National Judicial Council for disbursement to the heads of the Courts established for the Federal and States under section 6 of this Constitution.

Section 84 (7) states:

"The recurrent expenditure of judicial officers in the Federation (in addition to salaries and allowances of the judicial officers mentioned in subsection (4) of this section) shall be a charge upon the Consolidated Revenue Fund of the Federation".

Section 121 (3) states:

"Any amount standing to the credit of the judiciary in the Consolidated Revenue Fund of the State shall be paid directly to the head of the courts concerned''.

Section 162 (9) states:

"Any amount standing to the credit of the judiciary in the Federation account shall be paid directly to the National Judicial Council for disbursement to the heads of courts established for the Federation and the States under *Section 6 of this Constitution*".

[30] AA Adebara 'Independence of the judiciary in Nigeria. The parameters of its measurement' (2005) NBA Journal, Vol 3 No.4 p. 76

No doubt the foregoing provisions are not only confusing but uncertain to say the least. No wonder then that Hon. Justice T.A. Oyeyipo C.J. Kwara State while commenting on Hon. Justice Niki Tobi's paper presented at the 1999 All Nigeria Judge's Conference said: [31] "The provisions of 1999 Constitution relating to funding of the judiciary are replete with uncertainties. It is my view that if past experience is anything to go by, the non-committal provisions of the Constitution may be detrimental to our judicial system"

In the same vein, Hon. Justice S.F. Adeloye, a retired Chief Judge of Ondo State said: [32]

> A situation in which the judiciary can only expect to be funded from any money that may be paid from the Consolidated Revenue Fund to the National Judicial Council (S. 81(3)) and such other amounts left in the Federal Account (S.162(9)) sounds precarious and non-committal of the constitution to really provide for the funding of the Judiciary --- the Constitution cannot prevaricate in providing funds for the third arm of government, lest the aim becomes weak and probably written.

As if the above was not enough, the situation is being worsened by the operators of the constitution by the failure to release funds to the National Judicial Council as and when due. As rightly observed by Hon. Justice J.A Ajakaiye[33] financial autonomy in the sense of self accounting will not mean much to the judiciary if the funds are not adequate and not released as and when due.

Even the National Judicial Council itself is not left out on the issue of the funding of the judiciary to make it really independent. According to the Council:

> The issue of funding has always been a thorny issue that seriously affects the independence of the judiciary. Although there are provisions in the 1999 Constitution that purport to charge the recurrent expenditure of Judicial Officers on the consolidated revenue fund, experience has shown that these provisions exist more in the breach than in the observance, particularly in the States-------- it is one thing to have a budget, it is another thing to provide funds to finance the budget. It is often the case that the judiciary is reduced to a complete state of helplessness when it

[31] *Ibid* s. 291
[32] SA Okeke "The Funding of the Judiciaries under the the 1999 Constitution". *The Guardian Newpaper*, Friday August 17,1999 p.10
[33] JA Ajakaiye, *op. cit* p. 144

> cannot have funds to perform its statutory duties---- The Judiciary is denied control over its capital vote. The result is that the implementation of its capital programme is left to the whims and caprices of the Executive. In the light of the facts listed above it is idle talking of the independence of the Judiciary----[34]

The researcher is of the view that if the judiciary is to be fully independent, it must be given full financial autonomy both at the Federal and State levels. In order words, the judiciary should be given control over its recurrent and capital expenditure.

d. Immunity

The world over, judicial independence is accompanied with immunity. Judicial immunity puts the judicial officers in a special position in the performance of the job. It guarantees to the judge, freedom from fear of possible legal proceedings against him personally for anything he says or does in a judicial capacity. In other words, for acts done and words spoken in the course of his judicial function, the law protects the Judicial Officer from harassment in any form.[35] The rationale behind this is that independence is lost once a judge feels, while performing his judicial duties, that he is likely to be sued as a result thereof. Thus it was observed that: 'Our law puts high premium on the independence of a Judge to decide case without fear or favour, affection or ill-will. For this reason, except for judicial corruption, a judge is not punished for giving a wrong judgment. Appeal is the only remedy.[36]

It is however pertinent to note that, this immunity does not open a floodgate or give the judge the opportunity of judicial recklessness since there is a right of appeal open to litigants[37] and accordingly to the former Chief Justice of Nigeria:

> Where an appellate court finds a judgment on appeal to be culpably wrong and that it manifests gross injustice that a reasonable person may conclude that the judge had some ulterior or subterranean motive, the appellate

[34] Memorandum on the Constitutional Amendments Proposed by the National Judicial Council
[35] Boyo v Atake (1971) ALL NLR 403
[36] Mohammed Bello CJN *Op.cit* p.4
[37] AM Olu: "Judicial Independence as a Guarantee for Democracy in Africa Lesson from the American System" : Paper Presented at the 14th Annual Conference of American Studies of Nigeria held at University of Lagos 2001 p. 21

> court ought to censure the Judge. We have a duty to correct our erring brothers if we cannot remove them from office[38].

Happily, the National Judicial Council under the **1999 Constitution** has power to discipline and recommend to the appropriate authority the removal of judicial officers from office for the gross and reckless abuse of power of issuing *ex-parte* injunction or assuming jurisdiction in respect of constitutional matter within the jurisdiction of an entirely different State High Court. Infact, based on such recommendation many judicial officers have been sent out of office.

Attached to judicial independence and immunity of judges is the power of court to commit summarily for contempt. The law of contempt of court secures freedom for the judge from outside influences whether from parties or others. This power has all along been enshrined in our Constitution.[39]

Finally on this issue, according to the Committee on the Review of the **1999 Constitution:**

> An independent, impartial, courageous and innovative judiciary is a sine qua non for the growth and sustenance of democracy in Nigeria. This is the key statement on which Nigeria have commonly agreed. It is in that context that the preponderant view which was canvassed nationally centered on the need to strengthen the judiciary and position it to be the ultimate protector of the Constitution and defender of the people against oppression.[40]

As noted before, while the establishment and existence of the National Judicial Council is a welcome development, the constitutional bottlenecks in its operation need to be addressed. At least in the area of recurrent expenditure, the judiciary in Nigeria as at now has fared better than in the time past. However same cannot be said in the area of capital expenditure.

7.3 Judicial Activism and Passivism in Nigerian Democracy

Judicial Activism and Passivism are two competing theories of judicial attitude to the interpretation of the Constitution or other Statutes. Passivism, attempt to literally and

[38] Mohammed Bello CJN *op. cit* p.4-5
[39] S.6 (6) of the 1999 Constitution of the Federal Republic of Nigeria
[40] Report of the Presidential Committee on the Review of the 1999 Constitution vol. 1 p.57

mechanically apply the letters of the law. This had often out-worked detriment for a democracy because at certain points in the history of every democracy there arise, the need to make a radical leap through interpretative intuitions of the law in order to save the polity from the destructive margins of injustice, anarchy or the moribund of political stagnation.

On the other hand, Judicial Activism is about a judicial philosophy of creative will and a judicial policy of vigorous action. It concerns a court's pronouncement which does not necessarily tow or observe the conservative principle of *stare decisis*. It assumes that every legislation has a purpose not always obvious in the symbols used by the draftman and that a Constitution is a charter of a dynamic society inspired by certain philosophical and ideological ancestries. The attitude of Judicial Activism in the interpretation of law is to discover those latent but motive principles underlying the laws and bring them to effectuation[41].

History finds Lord Denning (MR) at the vanguard of this legal position called Judicial Activism. According to him in *Mayor v Newport*:[42] 'We sit here to find out the intention of the Parliament and of Ministers and carry it out and we do this better by filling the gaps and making sense of the enactment.

Sagay in his book, Judicary in a Modern Democracy, argued that "in order to meet the requirements of a modern democratic society, our courts must adopt an activist approach to the interpretation of law and take a liberal view of locus standi.[43]

The researcher shall at this stage, progress to isolate the various stages of Nigerian history from 1960 and understudy what can be described as the prevailing attitude of the courts.

7.3.1 The Earlier Republics

7.3.1.1 Nigerian Courts in the First Republic

Immediately after independence, the Nigerian courts were challenged by the lawlessness and the excesses of the political class. Whether for temerity or lack of confidence the pragmatism of their judgment appeared to favour the over lords and by drawing inspiration from

[41] TA AGUDA, 'Development of Adjudicatory System" in TA Aguda (ed), The challenge of the Nigeria Nation: An Examination of its Legal Development, 1960-1985 (Ibadan: Heinemann Educational Books 1985) p. 45-46
[42] (1950) ALL E.R 1226 at 1236
[43] IE Sagay, "The judiciary in a Modren Democracy" in issues in the 1999 constitution (2000) NIALS p.76-113

extraneous legal system,[44] they almost disregarded the contingency of the nascent nationalism. In the case of *Balewa v Doherty*,[45] the court was only mid-way active. While it voided the action of the Federal Government, which empanelled a commission of inquiry into the affairs of a region; it did not go further to declare the Act pursuant to which the commission was set up void on the ground that particular non severable provisions of the said Act exceeded the powers of the Parliament.

The Tafawa Belewa Government got the Nigerian legislature to pass the Tribunals of Enquiry Act in 1961. This Act was intended to empower the Federal Government to set up a tribunal of enquiry to look into the transactions of a Western Region owned Bank, National Bank. The chairman of the Board challenged the validity of this Act of Parliament on the ground amongst others that, it infringed on a matter within the exclusive competence of the Western Region Government.[46]

It was held by the Supreme Court that in so far as the Act purported to have effect throughout the Federation, the general powers given the Prime Minister under *section 3 (1) of the Act* to appoint tribunals to enquire into any matter or thing within federal competence anywhere within the Federation was in excess of the powers of Parliament under the Constitution.

Indeed, the Act was guilty of many crimes against the rule of law, namely attempting to oust the jurisdiction of the courts in hearing and determining the civil rights of Nigerians, and the right of imprisonment (an exclusive power of the courts) was granted the tribunals to be set up under the Act. The Supreme Court held that *section 3 (4) of the Act* was unconstitutional because it purported to limit the jurisdiction of the courts, and that a commission of enquiry could not be granted power to imprison because imprisonment by order of such body was one of the enumerated grounds by which a person could be deprived of his constitutional rights to personal liberty[47].

But in the case of *Akintola V Adegbenro*,[48] the court took a notable quasi active stance. Here, upon the receipt of a letter signed by 66 members of the Western House of Assembly purporting loss of confidence, the Governor, Sir Aderemi removed the Premier (Akintola) and replaced him with Adegbenro. Interpreting *section 33(10)* of the Constitution of Western

[44] Inspiration were drawn from the Privy Council and other Common wealth court notably India, Canada and Australia
[45] (1961) 1 ALL N.L.R 604, (1963) I.W.R 961
[46] Doherty v Balewa (1961) 1 All NLR 604.
[47] D Aihe, Selected Essays on Nigeria Constitutional Law (Idodo: Umeh Publishers, 1985)pp.83-88
[48] (1993)3 WLR 63 (PC)

Nigerian which provides that the Governor can remove the Premier if "it appears to him that the premier no longer commands the support of the majority of the members of the House of Assembly''

The Supreme Court held the action of the Governor unconstitutional. Reading the judgment of the court, Ademola CJF submitted that "…….. the Governor cannot validly exercise the power to remove the Premier from office except in consequence of proceedings on the floor of the house……'' This decision evaded ''literal mechanism'' in favour of evolutionary result in stable governance. However, the legislature, made a retroactive law, abolishing appeals to the Privy Council during the pendency of this matter but the Federal Supreme Court did not declare that retroactive legislation illegal. In failing to make this judicial review, it mildly enforced the supremacy of the parliament over the Constitution.

Another timid decision came in *DPP V Chike Obi*[49]. In this case Chike Obi published a material that was critical of the government and thus was charged for the offence of sedition. The issue canvassed in the Court was whether the offence of sedition provided *in section 50(2) of the Criminal Code* is inconsistent with the freedom of expression guaranteed by *section 24(2) of 1960 Constitution.* The Supreme Court held that it is not inconsistent.

It appears that the court did not advert its mind to the fact that the colonial masters used the offence of sedition to suppress the press so as to inhibit independence. This is a loss for democracy because "a society that is afraid of trying public figures at the bar of public opinion cannot be considered a democratic society.[50]" It is even more unfortunate when such necessary criticisms are "declared by the court at the instance of public official under the label of libel[51]."

Usually, the technical question of *locus standi* [52] has been used to frustrate aggrieved citizen seeking redress in the court. The Nigerian Courts during the time under study have not been different. In the case of *Olawoyim v AG Northern Nigeria***,** the court declined to declare on such important matter as the political education of children just for the reason of purported lack of *locus standi.*

[49] (1961) 1 ANLR 194

[50] A Oyebede "Democratic imperative" unpublished paper at the Armed Forces Legal Seminaron Military, Justice and Democracy, December, 1992p.6-7

[51] New York Times Company v Sullivan (1964) 376 US per Golberg

[52] Locus Standi refers to a person interest in a case that qualifies him to take action

Also in *AG of Eastern Nigeria V AG of the Federation,*[53] the Supreme Court declined to pronounce on the irregularity of the 1963 census figure for the reason that the plaintiff could not establish sufficient interest. By so doing, in the words of Emiri O.F., the "Court lost a unique, singular opportunity to put the country in proper perspective in terms of a more accurate population figure… If the court had looked at the merit of the complaint therein, without recourse to legal formalism, it may have employed its verdict to lay to rest the census hiccup and the figures generated in our national life.[54]"

Notwithstanding, the decision in *Adegbenro V AG of Federation*[55] is unimpeachable as the court refused to declare the *Emergency Act of 1961 and Emergency Power (General) Regulation of 1962* unconstitutional at the instance of Adegbenro, until the issue of whether he was the duly appointed Premier, pending in another court was determined.

Similar scourge of earlier legal timidity struck the court in *Williams V Majekodumi*[56] and in *Awolowo v Minister of Internal Affairs.*[57]

In this era, the judiciary appeared not to have fostered the principles of rule of law. It largely permitted the abuse of executive powers. This tacit approval of executive lawlessness and legislative supremacy led to the collapse of the supposed democracy[58]. Military rule was thus ushered in by January, 1966.

7.3.1.2 Nigerian Courts in the Second Republic

During the Second Republic, operating under the 1979 Constitution, which is in *pari materia* with the present Constitution, the courts also reviewed legislations passed by the National Assembly and some actions taken by the executive, to determine whether they were consistent or inconsistent with the provisions of that Constitution. Thus, in *A.G. Bendel State v A.G. of the Federation,*[59] a money bill, purportedly passed into law by the National Assembly was declared null and void because the bill was directly signed into law by the President after a joint committee meeting of the Senate and the House of Representatives. By the provisions of the Constitution, the final decision ought to have been taken by a joint

[53] (1964) 1 ALL NLR 224
[54] O E Emiri Democracy, Rule of law and the judiciary in Dukor M., 2001 P.211
[55] (1962) 1ANLR 150
[56] (1962) 1ANLR 327
[57] (1966) 1ANLR 171 at 185
[58] O.E.Emiri, Op Cit p. 211
[59] (1981) 10 SC.1

sitting of the Senate and the House of Representative[60]. The joint committee had, therefore usurped the constitutional powers of the National Assembly. The Supreme Court held that the procedure adopted for the enactment of the bill was unconstitutional.

On the executive side, it will be recalled that in the famous *Shugaba*'s case,[61] it was held by the Supreme Court, confirming the decisions of the High Court and Court of Appeal, that the deportation of a citizen of Nigeria to another country was illegal and was a breach of the human rights provisions of the Constitution.

In *Unogu v Aku,*[62] the appellant was the defeated candidate in the Benue State Governorship election in July 1983. His petition to have the results of the election nullified was frustrated by an Act of National Assembly[63] which stipulated that any election petition filed before a High Court, which was not disposed off within 30 days, was time barred and would become null and void. The thirty days elapsed in the middle of the case, which had involved an appeal to the Court of Appeal on some interlocutory matters. The question which arose for the consideration of the Supreme Court was whether a law which effectively fettered the operations of the judiciary was not in breach of the constitutional doctrines of separation of powers, and the independence of the judiciary. It was held that the relevant section of the Electoral Act[64], was null and void for these very reasons and also for infringing the right to fair hearing. Bello JSC, as he then was, in delivering his judgment adopted the following relevant passage from the judgment of Fatai-Williams CJN, in *Attorney General of Bendel State v Attorney General of the Federation and 22 ors:*[65]

> By virtue of the provisions of *section 4(8)* of the Constitution, the courts of law in Nigeria have the power, and indeed, the duty to see to it that there is no infraction of the exercise of legislative power, whether substantive or procedural as laid down in the relevant provisions of the Constitution. If there is any such infraction, the courts will declare any legislation passed pursuant to it unconstitutional and invalid.

[60] 1979 Constitution S. 59 (3)
[61] Minister of internal Affairs v Shugaba Abdulrahaman Darman (1982) 3 NCLR 915
[62] (1983) 2 SCNLR 332
[63] Electoral Act, 1982
[64] Section 140
[65] *Op cit*

What is more, whilst conceding the basic principle that a court must not interpret its jurisdiction under *section 4(8)*[66] to include the internal proceedings of the National Assembly, unless the Constitution made provisions to that effect, the learned Justice of Supreme Court added however, that if the Constitution makes provisions as to how the legislature should conduct its internal affairs, or as to the mode of exercising its legislative powers, the court is duty bound to exercise its jurisdiction to ensure that the legislature complies with the constitutional requirements.[67]

In concluding his judgment, Bello, JSC, referred to the requirement that each arm of government should respect the rights of the other thus:

> As the courts respect the right of the legislature to control its internal affairs so the constitution requires the legislature to reciprocate in relation to the jurisdiction of the courts. It may be observed that *section 73(1)(c), 111(1)(1), 233* and *239* of the Constitution empower the National Assembly or a House of Assembly, as the case may be to make laws for regulating the practice and procedure of the Federal High Court and the High Court of a State. It seems to me, if in the purported exercise of the powers under these sections the National Assembly makes any law which hampers, interferes with or fetters the jurisdiction of a court of law such law shall be void for being inconsistent with the provisions of the second limb of *section 4(8).*

At the threshold of this period was the test case of *Awolowo v Shagari.* **[68]** In other to establish whether the respondent was the rightful winner of the presidential election, the court was called to interpret *section 34(1)(C) of the Electoral Act 1977* and to see whether it was complied with (where the elected President was required to score ¼ of the votes cast in at least 2/3 of 19 States). The issue before the court was, what was 2/3 of the nineteen states of Nigeria? In declaring Shagari as the winner, both the Special Electoral Tribunal and the Supreme Court held that 2/3 of 19 states of Nigeria meant 12 2/3 states and not 13 States using the Golden rule to arrive at its interpretation and pronouncement.

Dismissing the decision as a show of literalism and semantics, Professor Nwabueze pointed out that it confused numerical superiority with geographical spread and as well introduced

[66] CFRN
[67] A.G of Bendel State v A.G. of Federation
[68] (1979) 6-9 S.C 51

inconsistency in judicial interpretation by isolating 2/3 as applied to presidential elections for special treatment[69]. From all indication, the decision was calculatedly mechanized to achieve a strange result. It was on this shaky stubble foundation that civil rule was introduced into the country. Hence, immediate cracks on the democracy houses were bound to occur[70].

In a number of other election petitions that followed, the courts attracted ever greater reproach. Little wonder Obinna Okere lamented the fact "that elections can be won on mere technicalities or that a minority candidate could be pronounced "Victor" by default…. Is not only incomprehensible, but also affronts the sense of democratic and natural justice.''[71] Awolowo's case canvassed above and perhaps *Nwobodo v Onoh*[72], where the court left the issue at hand and dismissed the petition on the basis that the standard of proof, which is proof beyond reasonable doubt, and required for proof of falsity of result (a criminal offence) in civil cases, was not proved. These cases are sufficient illustrative. However, the performance of the court in *Omoboriwo v Ajasin* was an improvement.

Apart from the Election Petition cases, the courts also did not show sufficient courage in *Archbishop Okogie v AG of Lagos State*[73] (where the issue appertained to non-justiceable provisions) and in *Adesanya v President of Federal Republic of Nigeria*[74] **(**where the issue was about *locus –standi)*

What is obvious is that in this period, the judiciary's response to democratic motives were staggering between passivism and activism, the passivity being more noticeable in election petition matters. Yet for Emiri O.C., by and large "this was a period when judges stood their grounds against the excesses of politicians and state authority in its bid to instill democratic norms in our society.[75]

7.3.1.3 Nigerian Courts in the Third Republic

The Third Republic was the planned Republican Government of Nigeria in 1993 which was to be governed by the Third Republican Constitution. This Constitution was drafted in 1989, when General Ibrahim Badamasi Babangida (IBB), the military Head of State promised to

[69] Nwabueze B. The Presidential Constitution of Nigeria, Hurst, London, 1981, P.1981, P.190-201
[70] Emiri O.E Op Cit., P.15
[71] Okere O. "Judicial Activism or Passivity in interpreting Nigeria Constitution" (unpublished) p. 48
[72] (1984) ISCNLR 108
[73] (1982) 3NCLR 1; (1981) 10 SC1
[74] (1981)2 NCLR 358
[75] Emiri O.E *op cit* p. 217

terminate military rule by 1990- a date which was subsequently pushed back to 1993. IBB lifted the ban on political activity in the spring of 1989 and his government established two political parties: the center right National Republican Convention (NRC) and the center- left Social Democratic Party (SDP).

Gubernatorial and State Legislative election were conducted in December 1991, while the Presidential election was postponed till 12th June, 1993, due to political unrest. Chief MKO Abiola, won a decisive victory in the Presidential elections on the SDP platform. On 23rd June 1993 IBB had the election annulled and refused hand-over power to him on the pretext that it was characterized by legal controversies.

The Babangida regime announced its decision to annul the presidential elections of 1993 following a court order by the Federal High Court in Abuja charging the National Electoral Commission (NEC) to desist from announcing the results of the election. The order of the Abuja High Court that the election be stopped seems clearly wrong, if not perverse, partly because the court's jurisdiction to make it is in clear unequivocal terms, ousted by Decree.[76]This is because the Babangida regime had set up a parallel tribunal (which included one military office) to regulate its transition programme and completely excluded the regular courts from having a say in it. The Court of Appeal had also in the case of *Resident Electoral Commissioner for Anambra State v Nwocha*[77] held that with or without an ouster clause, the regular courts lacked jurisdiction to adjudicate on electoral matters arising out of transition.

The annulment of the elections plunged the country into a political crisis. In the case of *Attorney General of Anambra State & 13 others v Attorney General of the Federation &16 other,*[78] 14 States of the Federation initiated proceedings before the Supreme Court of Nigeria, seeking to nullify the annulment and compel the regime to complete the transition by declaring the final results of the presidential elections. In its decision, the Supreme Court declined jurisdiction to hear the suit holding that by virtue of the monolithic command structure of the military, the States could not sue the Federal Government under a military regime.

General Babangida announced on 18th August, 1993 that he would be "stepping aside' on 26th August, 1993, on which date, an interim National Government (ING) was to be constituted. On the said date, General Babangida purportedly issued four decrees including the Decree

[76] BO Nwabueze, *Nigeria 93 :The Political Crisis and Solution* (Ibadan: Spectrum Books 1994)p. 41
[77] (1999) 2 NWLR (PT176),732: 746-747
[78] (1993) 3 NWLR (PT 302) 692

No. 59, [79] which formally terminated his regime and Decree No. 61,[80] formally constituting the Interim National Government (ING). This was the background of the case of *Bashorun MKO Abiola & Anor v National Electoral Commission &Another,* [81] in which the winner of the presidential elections of 1993 challenged the legality of the ING. In its decision given on 10th of November, 1993, the High Court of Lagos held that having terminated his regime through Decree No. 59, President Babangida lacked legislative competence when he signed 'Decree No 61' constituting the ING which was therefore illegal and void, thus the Third Republic died even before it was born.

7.3.1.4 Nigerian Courts in the Present Republic

Throughout the political history of Nigeria, whatever appears to be a democracy is always aborted by the supervention of military rule. It is only the present democratic government which started in 1999 that has handed over to another democratically elected government without such "abortion".

It is only within the last nine years of the current democratic dispensation that one can say that Nigeria has sustained a democratic dispensation to a great extent. Within the period in question, given the constitutional empowerment and safe environment it has, the judiciary has done a lot of self-clearance. The judiciary exhibited greater activism in the present democratic dispensation. A number of cases, especially those that are of constitutional importance were handled with great and commendable activism.

In *Ladoja V Oyo State House of Assembly,*[82] the judiciary, rising to the occasion of frequent impeachments in the country, made a judicial review of the acts of the aforestated House of Assembly to ensure compliance with the procedure as set out under *Section 188 of the 1999 Constitution*. This it did with a view to finding the real legal effect of *Section 188 (10)* thereof which sought on the face of it, to oust the court's jurisdiction. When the matter went up to the Supreme Court, "it affirmed the judgment of the Court of Appeal by finally laying down the law that "the ouster clause contained in *Section 188 (10) of 1999 Constitution* will only operate where the legislators fully comply with the conditions set out in *Section 188* thereof.

[79] (Constitution suspension and modification Repeal Decree No. 59 of 1993)
[80] Interim Government Basic constitutional provisions Decree No. 61 of 1993
[81] Unreported, suit No. M/573/93 of 10 November 1993
[82] (2007) 9 MJSC 1

Any omission to follow the laid down procedures makes these actions susceptible to judicial review."[83]

This decision fundamentally altered the constitutional platform on the law of impeachment in Nigerian democracy. Akpo Mudiaga Odje[84] said that this is " a case where the judiciary made another bold statement that has subtly reduced the tension in our land and upheld the Rule of Law in Nigeria.[85] It rendered the retinue of impeachments from Diepreye Alamieyesiegha of Bayelsa State to Peter Obi of Anambra State null and void.

Democracy has a lot to do with multiplication of options and sufficient allowance of freedom for people to choose from available options. Thus one of the most decisive matters that challenged our nascent democracy and therefore the judiciary was that of "whether it is for INEC to decide how many political parties we should have in Nigeria". Thus in *INEC V Musa,*[86] the court held that the constitution has not provided for the number of the political parties and what INEC has to do is to register as many political parties that meet the constitutional requirements. Election petition is where the judiciary had constantly not lived over board example as in the cases of *Awolowo v Shagari; Nwobodo v Onoh; Buhari v Obasanjo* and many others.

However, it is a different story in this new era. The judiciary as the watch dog of the constitution was clearly established in a lot of landmark cases

The present democratic order, the fourth Republic is founded on the 1999 Constitution, which came into force on 29th May, 1999. This constitution does not have much remarkable departures from the 1979 Constitution in respect of the judiciary. It broke a new ground by establishing the National Judicial Council[87] who recommends appointment of justices and judges, recommend removal from office of this judicial officers and exercise disciplinary control over such officers. It also collects, controls and disburses all moneys, capital and recurrent expenditure for the judiciary. In addition to the National Judicial Council is the Federal Judicial Service Commission and the State Judicial Service Commission.[88] Basically they adore the National Judicial Council in nominating judicial officers and recommend the removal from office of this judicial officer. It also appoints, dismisses and exercises

[83] *Daily Independent*, Thursday, Feb. 22 2007,P.11
[84] *Ibid*
[85] *Ibid*
[86] (2004) 9 NWLR (PT 796) 412 at P.447
[87] CFRN 1999 (as amended) s. 153(1) (i) and 162(a) and third schedule pt 1 paragraph 20
[88] *Ibid* s. 153(1)(e) and s.197(1)(i) and Third schedule pt 1 paragraph 12

disciplinary control over the Chief Registrar and Deputy Chief Registrars of the Supreme Court, Court of Appeal and the Federal High Court. All these measures are to secure the independence of the judiciary from external control and influence.

The question is: How has the judiciary fared in driving Nigeria along the part of rule of law under democratic dispensation? The ensuring chronicle demonstrates the uncommon zeal of the judiciary in leading the change against every form of arbitrariness and particularly, the Supreme Court, which has lately been acting with so much spine quite unlike in the military days when the judiciary was treated with contempt. Some of these cases would be dealt with in this chapter.

In the case of *Atiku Abubakar v A.G. Federation,* [89] the issues before the court were whether a Vice-President who was elected together with the President on one political platform as provided under *section 142(1) of the Constitution*[90] could, while holding office legally defect to another party; whether Mr. President has the powers under *section 142 (1) (c)* of the same Constitution to declare the seat of the Vice-President vacant. The Supreme Court held that the defection, though immoral, is quite legal. It further held that pursuant to *section 239 (1) (c),*[91] the President acted *ultra vires* when he declared the seat of the Vice-President vacant. This decision provided a heaven to the political history of the country.

Equally in the area of customary law, the courts have been called upon to test customs for consistency with public policy, natural justice, equity and good conscience and to strike such custom down[92] where it fails the test. Hence in *Mojekwu v Mojekwu,*[93] the custom prescribing that, female children cannot inherit from their families were struck down as contrary to natural justice, equity and good conscience. In *Mojekwu v Ejikeme*[94] too, Nrachi, a Nnewi custom which makes a wife an object of inheritance was also struck down. It was held to encourage promiscuity and prostitution which are anti-social conducts condemned by Article 6 of United Nations Committee on the Elimination of Discrimination Against Women (CEDAW). What is more, through judicial law making, interpretation and by a tacit emphasis on substantive justice than formal justice, the judiciary has also taken the Nigerian society to the next level in her march to civilization.

[89] [2007] 3NWLR (pt 1022) 601
[90] CFRN 1999 (as amended)
[91] *Ibid*
[92] Evidence Act LFN, 2004, s. 14(3)
[93] [1997] 5NWLR (pt 512) 208
[94] [2000] 5NWLR (pt 812) 208

7.3.2.1 The Supreme Court Interpretation of Governor Peter Obi's Tenure

The researcher will at this point examine in details the Supreme Court interpretation of Governor Peter Obi's tenure against the criticism of notable Nigerians like Chief Gani Fawehinmi, learned Senior Advocate of Nigeria (SAN) in the celebrated case of *Mr Peter Obi v INEC*.[95] The political and electoral problems of Anambra State became pronounced after the 2003 general elections which brought Dr. Chris Nwabueze Ngige into power. His election was challenged by some of the gubernatorial aspirants including Mr. Peter Obi. Sadly enough, the Election Petition Tribunal sitting at Awka, which was seized of Peter Obi's petition was unable to deliver judgment until almost three years after. When the judgment finally came, the tribunal nullified the election and return of Dr Ngige as the Governor of Anambra State and upheld Mr. Obi as the winner of the election. The tribunal's judgment was also upheld by the Court of Appeal in March, 2006. On March, 17, 2006 Mr. Peter Obi was sworn in as the governor of Anambra State based on the 2003 April general election. While Mr. Peter Obi was only about a year in office, the Independent National Electoral Commission, carried out elections in April 2007 for all elective offices nation-wide including that of the Governor in Anambra State. This led to the swearing in of Dr. Andy Uba as the new Governor of Anambra State.

Mr. Peter Obi went to the Supreme Court[96] through the process of appeal for the court to determine:

i. whether having regard to *section 180(2)(a) of the 1999 Constitution*,[97] the tenure of the office of Governor begins to run when he took the Oath of Allegiance and Oath of Office.

ii. whether the Federal Government of Nigeria through the defendant, being its agent, could conduct the governorship election in Anambra State in 2007 when the incumbent Governor took the Oath of Allegiance and Oath of Office on March 17, 2006 and had not served out his four years tenure as provided under *section 180(2)(a) of the 1999 Constitution*.[98]

The Supreme Court on the 14th day of June, 2007 answered the above questions through its judgment and restored Mr. Peter Obi to his position as the Governor till March 17, 2010. The

[95] (2007) 9MJSC 1
[96] (2007) 7KLR (pt 243)3515
[97] As amended
[98] *Ibid*

judgment had raised question of law, particularly whether Obi's case ought to have gone to the Election Tribunal, thereby divesting any court of jurisdiction in the first instance. Notable among the proponents of this view is the Lagos lawyer and Senior Advocate of Nigeria, Chief Gani Fawehinmi. According to him, the judicial institution empowered by the Constitution of the Federal Republic of Nigeria, 1999 to determine whether the tenure of office of any person under the Constitution has expired or ceased are: -

a. the Election Tribunal; and

b. The Court of Appeal to which appeals from the election Tribunals decision lie.[99]

Under the 1999 Constitution[100] the decision of the Court of Appeal is final. The relevant constitutional provisions are *sections 285(2)* and *246(3)*. This used to be the position before the amendment of the Constitution. *Section 285(2)*[101] stated as follows:

> There shall be established in each State of the Federation one or more election tribunals to be known as the Governorship and Legislative Houses Election Tribunals which shall to the exclusive of any court or tribunal have original jurisdiction to hear and determine petition as to whether any person has been validly elected to the office of Governor or Deputy Governor or as a member of any legislative house.

Section 246(3)[102] states that the decisions of the Court of Appeal in respect of appeals arising from the election petition shall be final. In interpreting the above provisions the learned SAN said:

> *Section 285(2) of the Constitution* of Nigeria has vested the authority to determine the extent or otherwise of any office holder and in this case the Governor of Anambra State in an Election Petition Tribunal and not any other judicial body not even the Supreme Court.[103]

Chief Fawehinmi further concluded that:

> There is nowhere in the Constitution of the Federal Republic of Nigeria, 1999, where it is provided that the Supreme Court is vested with the

[99] G Fawehinmi, 'Supreme Court jurisdiction', National Mirror Newspaper June 21, 2007 p.20
[100] CFRN
[101] *ibid*
[102] *Ibid*
[103] G Fawehinmi *op cit* p.20

jurisdiction to take an appeal from the Court of Appeal on an election matter determined by the Election Tribunal.[104]

The issue now in controversy is whether the Supreme Court of Nigeria has jurisdiction to do what it did in the interpretation of Mr. Peter Obi's tenure as a Governor? That is, whether the issue of Mr. Peter Obi's tenure as a governor is in the domain of the State Election Tribunal? In order to isolate this proposition for overview, it will be pertinent to examine the concept of jurisdiction in its entirety with recourse to the Constitution and decided authorities. The court having held in the case of *Tukur v Governor of Gongola State*,[105] that it is the claim before the court that determines jurisdiction.

The Concise Oxford Dictionary defines jurisdiction as: 'Administration of justice over or of legal or other authority; extent of the territory it extends over.'[106] Osborn concise law Dictionary defines it as: 'The power of a court or judge to entertain an action, petition or other proceedings. The district or limits within which the judgments or order of a court can be enforced or executed.'[107]

In *National Electoral Commission v Agbo and Anor*,[108] the Court of Appeal in line with numerous Supreme Court decisions on jurisdiction expounded and set down the boundary of the two definitions given above. It stated that a court of law is only competent to adjudicate over a matter before it, if and only if it has jurisdiction to do so, that is when;

a. It is properly constituted with respect to the number and qualification of its members;

b. The subject matter of the action is within its jurisdiction; and

c. Any condition precedent to the exercise of its jurisdiction has been fulfilled.[109]

The above ratio by the Court of Appeal is only a basic requirement for a court to assume jurisdiction under the Nigerian legal system. There are other multiple determinants of jurisdiction like *locus standi*, legal personality and in criminal matters, venue of the commission of the offence, etc. The law on jurisdiction is one that requires a lot of proficiency and subject to wrestle with, whether the person is a Senior Advocate or a

[104] *Ibid*
[105] (1989) 4NWLR (pt 177)517
[106] J Sykes, (7th edn, England: Claraendon Press, 1983) p. 545
[107] P Osborn, *Concise Law Dictionary*,(4th ed, Chancery Lane: Sweet and Maxwell, 1954) p.545
[108] (1992) 4NWLR (pt 236) 437
[109] *Ibid* p. 438

Supreme Court Justice. Apart from the provisions of the law, one should also be very conversant with the facts of the case to be able to state the law required in a particular case.

Mr. Peter Obi's case is not a tribunal matter but a constitutional issue. It is the researcher's view that the learned Senior Advocate's position in respect of Mr. Peter Obi's tenure interpretation is, with due respect, misconceived against the clear words of both the 1999 Constitution and the Supreme Court Act. The Supreme Court Act provides:

> The Supreme Court may from time to time make any order, necessary for detecting the real question in controversy in the appeal…. and generally shall have full jurisdiction over the whole proceeding as if the proceeding have been instituted and prosecuted in the Supreme Court as court of first instance and may rehear the case in whole or in part.[110]

The Constitution, on its own part provides thus:

> The Supreme Court shall have jurisdiction to the exclusive of any other court of law in Nigeria, to hear and determine appeals from the Court of Appeal.[111]

An appeal shall lie from the decision of the court of appeal to the Supreme Court as of right in the following cases:

a. Where the ground of appeal involves question of law alone, decision in any civil or criminal proceeding before the Court of Appeal.[112]

b. Decision in any civil or criminal proceedings on questions as to the interpretation of the constitution.[113]

It is very clear from the provisions of *section 231(1) (a)* and *233(2) (b) of the Constitution*[114] that the Supreme Court had properly assumed jurisdiction over Peter Obi's case. In the Nigerian Legal System, we have criminal and civil cases. Obi's case is not and cannot be a criminal matter. The issue of tenure of a sitting governor which is what *section 180(2)(a) of the 1999 Constitution*, is all about, is a civil one and falls into the provisions of *section 233(2)(a)* of the same Constitution. Even if Obi's case were a matter for the tribunal and

[110] Supreme Court Act Cap 515 Laws of the Federation, 2004,s.22
[111] 1999 (as amended)s.233
[112] *Ibid* s.233(2)(a)
[113] *Ibid* s.233(2)(b)
[114] *Ibid*

therefore a civil matter, the Governor could invoke the jurisdiction of the Supreme Court as provided in *section 233(2) of the 1999 Constitution* for the proper interpretation of *section 180(2)(a)* of the same Constitution. Asking the apex court to exercise this potent and judicial power is fundamental to the sustenance and the growth of the Constitution. The Supreme Court held in *Tukur v Gongola State*[115] that by virtue of the provisions of the 1979 Constitution,[116] it has jurisdiction to interpret the Constitution. In *Paul Unogu v Aper Aku*[117] the Supreme Court took enough pride in its constitutional interpretation role to state that it is a supervisor-at-large established by the Constitution to do justice to all manner of people that come before it.

The critics of Obi's victory at the Supreme Court, equally argued that Obi should have gone back to the tribunal as provided in *section 285(1)*(old law) which was re-produced earlier. This suggestion is unimaginable and suggests that Obi's case is a tribunal matter. It is not. Would Obi have filed his petition at a non-existent tribunal which wound up in late 2005 having sat over *Obi v Ngige*'s case for nearly three years? The appeal took off in November, 2005 and terminated in March, 2006 when Obi was sworn in. Besides, the State Election Tribunal for 2007 began sitting several months after Dr. Andy Uba had been sworn in as Governor in place of Mr. Peter Obi on May 29, 2007, but even at that, Obi's right of action arose when the governorship election was held in April 14, 2007.

Mr. Peter Obi was not inviting the apex court to determine whether his tenure had 'ceased'[118] but rather to interpret *section 180(2)(a) of the constitution* which provides that:

> Subject to the provisions of subsection (1) of this section the Governor shall vacate his offence at the expiration of a period of four years commencing from the date when (a) in the case of a person first elected as Governor under this constitution, he took Oath of office.

The above provision is clear enough and the Supreme Court rightly and judiciously presided over the case and gave a landmark judgment. Assuming that Mr. Peter Obi went back to the Election Tribunal (although none was in existence at the time his right of action accrued), his claim before the tribunal would not fit into the provisions of *section 285(2) of the 1999 Constitution*[119] as canvassed by Chief Fawehinmi. From the provisions of *Section 285(2) of*

[115] *Supra*, p.158
[116] *Ibid* s.251(1)(q) and (r)
[117] (1983) 2 SCNLR p.322
[118] *Ibid* section 285(1)(b)
[119] CFRN

the 1999 Constitution, it undoubtedly shows that it is for the State Election Tribunal to determine whether any person had been validly elected to the office of the Governor. Mr. Peter Obi had been elected, sworn in and in fact served for about a year in office and he cannot, therefore, seek any redress pursuant thereto.

The criticism against the well deserved Supreme Court verdict, which is strengthened by the Constitution,[120] the Supreme Court Act[121] and legal authorities on the role of the apex court in constitutional interpretation is unjustified. The Supreme Court in affirming its competence and jurisdiction in the aforesaid case held:

> As at 14th April, 2007 when the Independent Electoral Commission (INEC) was conducting gubernatorial election in Anambra State, the seat of the Governor of that state was not vacant. That election was a wasteful and unnecessary exercise. The INEC was aware at that time that the appellant (Peter Obi) was in court pursuing his legal rights. A body that has respect for the rule of law which INEC ought to be would have waited for the outcome of the court proceedings particularly when it was aware of it.[122]

On the issue of jurisdiction, the apex court held that it had jurisdiction to hear and determine the case. According to the court, the trial court (the Federal High Court, Enugu) which heard the case erred in law to have declined jurisdiction to determine the matter. Furthermore, the Court of Appeal ought to have taken the advantage of the Court of Appeal Act[123] to make orders which the trial court ought to have made but failed to do so. The Supreme Court further held that:

> …. the court below (the Court of Appeal) erroneously failed to take the advantage of the aforesaid provisions of the Court of Appeal Act. Would this then be the end of the road for a citizen who had approached the citadel of justice seeking remedies for wrong done to him? I think not.

The law must not fail to dispense justice. Since justice according to law is the pre-occupation of the court, a court must always rise to the occasion. What injustice could be more to a citizen who won an election but was denied the *res* for thirty-four months? Perhaps that

[120] *Ibid*, s. 233(1)
[121] Supreme Court Act, *op cit* s. 22
[122] Obi v INEC & ors *supra* p. 3525
[123] Court of Appeal Act Cap. 36 LFN 2004, section 16

underlying index and the raw application of the naked law of the land turned the table around for justice to stand on its feet on the Governor Obi's tenure case. The factors that strengthened the will and resolve of the Supreme Court to upturn the Court of Appeal and the Federal High Court in giving its reasons for the verdict on July 13th, 2007, stressed that the provisions of the Supreme Court Act[124] and the Court of Appeal Act[125] was rooted on well known and established conditions which must exist before both courts can assume jurisdiction in Peter Obi's case or the like, and that all the conditions were in place yet the Court of Appeal failed to act.

Some of the conditions according to the Supreme Court are:-

i. That the lower court or trial court can entertain it;

ii. That the real issue raised by the claim of the appellant at the lower court or trial court must be seen to be capable of being distilled from grounds of appeal;

iii. That all necessary materials must be available to the court for consideration; and

iv. That the need for expeditions disposal of the case or suit to meet the end of justice must be apparent on the face of the materials presented and that the injustice or hardship that will follow if the case is remitted to the court below must clearly manifest itself.[126]

The Supreme Court finally ordered as follows:

> That the office of Governor of Anambra State was not vacant as at 29th May, 2007. That the tenure of office of Peter Obi as Governor of Anambra State which is four years certain will not expire until 17th March, 2010 for the reason of the fact that he being a person first elected as governor under the 1999 Constitution took Oath of Allegiance and Oath of Office on the 17th of March, 2006.[127]

It is respectfully submitted that Chief Gani Fawehinmi (of blessed memory) and other critics seem not to advert their minds to the provisions of the Supreme Court and Court of Appeal Acts relied upon by the learned Supreme Court Justices, which emboldened their resolve to

[124] Cap 515 Laws of the Federation 2004
[125] Court of Appeal Act *Ibid* section 16
[126] Obi v INEC *supra* p.3551
[127] *Ibid* p. 3552 - 3553

assume superintendence over the case. They did not also appear to cast a glance at the appellate jurisdiction of the apex court as enshrined in the 1999 constitution.[128]

Besides, it is necessary to also draw attention to the constitutional provision on the jurisdiction of our superior courts particularly the basic grant of power to the Nigerian Courts, which provides that, 'The judicial power of the Federation shall be vested in the court of which this section relates, being a court established for the Federation."[129] The courts established for the Federation with particular reference to Mr. Peter Obi's case can only be the Federal High Court, the Court of Appeal and the Supreme Court. Having provided the Federal High Court with the basic ground to oversee the matters that come before it, the Constitution goes on to elaborate that particular ground in section 251 of the 1999 Constitution thus:

> Notwithstanding anything to the contrary in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters.
>
> a) subject to the provision of this Constitution, the operations and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies.[130]
>
> b) any action or proceeding for a declaration or jurisdiction affecting the validity of an executive or administrative action or decision by the Federal Government or any of its agencies.[131]

Karibi-Whyte JSC (as he then was) in *Utih v Onoyivre*[132] held that:

> The jurisdiction of our courts is derived from the Constitution. Hence, where the Constitution has declared that the courts cannot exercise jurisdiction, any provision in any law to the contrary will be inconsistent with the provision of the Constitution and void.

[128] As amended,s. 233(2)(a)
[129] CFRN 1999 (as amended) s. 6(1)
[130] *Ibid* s. 251(1)(q)
[131] *Ibid* s. 251(1)(r)
[132] (1999) I NWLR (pt 166)258

The 1999 Constitution provides that "an election to the office of a Governor of a State shall be held on a date to be appointed by the Independent National Electoral Commission."[133] The said Constitution further states that 'An election to the office of the Governor of a State shall be held on a date not earlier than sixty days and not later than thirty days before the expiration of the term of office of the last holder of that office.'[134]

The above quoted provisions of the Constitution confer authority on INEC to appoint a date for the election to the office of the Governor of a State with a provision that such a date shall not be earlier than sixty days and not later than thirty days before the expiration of the term of office of the last holder of the office. The question is: Who qualified as the last occupier of the office of Governor in Anambra State at the time of the election in 2007? When was he sworn in? In otherwords, when did he take the Oath of Allegiance and Oath of Office? Surely, the answers are, Mr. Peter Obi took the Oath of Office and Oath of Allegiance on the 17th March, 2006. Consequently, the Electoral Commission had no business with any election in Anambra State in 2007 upon proper application of *section 178 of the Constitution*[135] discussed above.

The decision in the instant case is one notable accomplishment of the judiciary in advancing the hope of Nigerians in the judiciary and the future of democracy in the country as well. Mr. Yusuf Ali, the learned Senior Advocate of Nigeria, SAN said of the judgment thus: 'The recent Peter Obi matter has also proved that the judiciary is not only the last hope of the common man but the last hope of all those who believe in the rule of law and the sustenance of democracy.'[136] The Supreme Court was indeed bold in delivering the said judgment.

7.3.2.2 The cases of Mohammed Buba Marwa & Others v INEC and Murtala Nyako & Others v INEC consolidated on appeal as Mohammed Buba Marwa & others v Murtala Nyako & others

The researcher will also examine the role played by the court in *Mohammed Buba Marwa & Others v INEC and Murtala Nyako & Others v INEC* consolidated on appeal as *Mohammed Buba Marwa & others v Murtala Nyako & others*.[137] In view of the circumstances in which

[133] *Ibid* s. 178(1)
[134] *Ibid* s. 178(2)
[135] *Ibid*
[136] M Yusuf Ali, 'Hope in Obi's judgment', *This Day Newspaper*, June 19, 2007 p.59.
[137] *[2012] All FWLR (pt 622)1622*

this case was brought to Court, the decision of the Supreme Court can be described as a landmark decision. However, it is fair to state that the main issue in the case turned upon the interpretations of the constitutional provisions. The facts of the consolidated appeals are simple. The facts relevant to the appeals are a fallout of the general election conducted in Nigeria in 2007. The Governorship election results of Adamawa, Bayelsa, Cross River, Sokoto and Kogi States were challenged at Election Tribunal. This challenge followed the electoral victories of each of the Governorship candidates.

The candidates were installed as governors of the respective States on the 29th of May, 2007 following the April 2007 elections. In accordance with the provisions of *section 180 (2) (a) of the 1999 Constitution,*[138] the governors took their Oaths of allegiance and Oath of office and were sworn in.

The various petition filed by other candidates challenging their victories on grounds of lawful disqualifications, electoral malpractices, total absence of election and the appeals thereon were successful and orders for re-run elections were made. The fresh elections yet again produced them as winners and they were sworn in a second time. INEC thereafter published in national dailies that it would conduct gubernatorial elections in all the States of the Federation in January 2011. The Governors of the aforementioned five States therefore commenced personal actions by originating summons in the Federal High Court, Abuja seeking *inter alia,* declarations that their tenure in office as elected Governors would only expire after four years calculated from the time they assumed office after the re-run elections and not four years from the first time they assumed office on 29th May, 2007. The five matters were consolidated by order of court. The trial court granted the reliefs sought. Aggrieved, INEC filed appeals against the decision which were also consolidated. The Court of Appeal dismissed the appeal. Yet aggrieved, INEC appealed to the Supreme Court. The Congress for Progressive Change (CPC) party and Brigadier Buba Marwa obtained leave of court to appeal against the decision of the Court of Appeal. The six appeals were consolidated by order of court. Peoples Democratic Party (PDP) and Alhaji Ibrahim Idris filed preliminary objection to the appeals on grounds that it had become academic and was unconstitutional.

Finally, at the conclusion of hearing of all the appeals, the Supreme Court allowed the appeal of INEC and held that the tenure of the affected Governors began to run on 29th May, 2007 and terminated on 28th May, 2011 being the four years allowed by the Constitution notwithstanding their fresh oaths taken after winning the re-run elections. The Supreme Court

[138] *as amended*

per Onnoghen JSC opined that the main issue before them was of great constitutional importance and does not deserve to be trivialized. Apart from the fact that this was a very pertinent point to make, his lordship particularly made this point in respect to interlocutory matters raised by way of preliminary objections to the substantive suit. This is an extremely important point that was being made by the court. The court by this, shows that it is fundamentally a court of law.

The relevant constitutional provisions before the courts in this case are as contained in section 180 (1) (2) & (3) of the 1999 constitution.[139] The section provides thus:

1. Subject to the provisions of the Constitution a person shall hold the office of governor of a State until:

    a. When his successor in office takes the Oath of that office or

    b. He dies whilst holding such office or

    c. The date when his resignation from office takes effect or

    d. He otherwise ceases to hold office in accordance with the provisions of this Constitution.

2. Subject to the provisions of subsection (1) of this section, the governor shall vacate his office at the expiration of a period of four (4) years commencing from the date when:

    a. In the case of a person first elected as governor under this Constitution, he took the Oath of Allegiance and Oath of office, and

    b. the person last elected to that office took the Oath of Allegiance and Oath of office or would but for his death, have taken that Oath.

3. If the Federation is at war in which the territory of Nigeria is physically involved and the President considers it is not practicable to hold elections, the National Assembly may by resolution extend the period of four (4) years mentioned in subsection (2) of this section from time to time, but no such extension shall exceed a period of six (6) months at any one time.

[139] *Ibid*

The court of first instance and the Court of Appeal held that the relevant point at which the four years tenure of the governors is to be calculated is the date they took their second Oaths. The reasoning of the courts turned upon the literal interpretation of *Section 180 (1) (2)&(3)of the Constitution*. In interpretation of statutes and constitutional provisions, courts have overtime developed aids and canons of interpretation.[140] The canon of interpretation referred to therein by the Supreme Court developed over time in the common law jurisdictions especially in the United States where they have a written constitution. The court per Obaseki JSC in *A.G Bendel v A.G Federation & other*[141] laid down 12 canons of interpretation as it relates to constitutional interpretation. Onnoghen JSC[142]in this tenure elongation case said:

> Over the years the Supreme Court has devised guidelines to the interpretation of not only Statutes but most importantly our constitutional provisions, including the now famous twelve (12) point rule of constitutional interpretation propounded by Obaseki, JSC.

The canons of interpretations laid down by the Supreme Court per Obaseki JSC are:

a. Effect should be given to every word used in the Constitution.
b. A Constitution nullifying a specific clause in the Constitution shall not be tolerated, unless where absolutely necessary.
c. A constitutional power should not be used to attain an unconstitutional result.
d. The language of the Constitution, where clear and unambiguous must be given its plain and evident meaning.
e. The Constitution of the Federal Republic of Nigeria is an organic scheme of government to be dealt with as an entity hence a particular provision should not be severed from the rest of the Constitution.
f. While the language of the Constitution does not change, the changing circumstance of a progressive society for which it was designed, yield new and further import of its meaning.
g. A constitutional provision should not be construed in such a way as to defeat its evident purpose.
h. Under the Constitution granting specific powers, a particular power must be granted before it can be exercised.

[140] *A.G Bendel v AG Federation & Ors (1982) 3 NCLR 1*
[141] *ibid*
[142] *1700*

i. Declaration by the National Assembly of its essential legislative functions is precluded by the Constitution.
j. Words are common signs that men make use of to declare their intentions one to another, and when the words of a man express his intentions plainly there is no need to have recourse to other means of interpretation of such words.
k. The principles upon which the Constitution was established, rather than the direct operation or literal meaning of the words used, should measure the purpose and scope of its provisions.
l. Words of the Constitution are, therefore, not to be read with stultifying narrowness.

The issue for determination in the present case generated a lot of anxiety within the polity and especially amongst those governors and States directly affected. The issue however was not that complex. It turned upon the construction to be given to *Section 180 (1) (2) & (3) of the 1999 Constitution*. The most pertinent of these sections is *Section 180 (2) (a)*. The language of the provision appears to create room or rather created room for differing and different interpretations. The parties directly affected and who will benefit from an interpretation to elongate their tenure in office (the governors) interpreted *section 180 (2) (a)* to mean that their term of office commenced upon their taking a fresh Oath of allegiance and Oath of office. This meant that although they had been in power for a year or more prior to the order of the election tribunals for a re-run election, their stay in power will be extended having won the re-run elections.

The Independence National Electoral Commission (INEC) was of the view that the four year term was static and it could not be extended especially in this particular case where the parties (governors) that won the re-run elections had all been previously elected. They canvassed what can best be described as the intent of the framers (even though they did not quite put it in this way)

The problems faced by the courts and counsel when dealing with the interpretation of statutory and particularly (in this case) constitutional provisions, is that they have to deal with provisions that are enacted that may relate to present, past or futuristic circumstances. Indeed, in many cases, the provisions may have lacunae and circumstances that were not and could not possibly have been envisaged by the drafters of the Statutes or the framers of the

Constitution. Courts and lawyers overtime have had to rely on canons of interpretation which have been extremely helpful and have become handmaids in the interpretative process.

Those canons are varied but with regard to the Constitution and particularly the Nigerian Constitution, it is fair to say that the decision of the Supreme Court in *A.G Bendel v AG Federation & other*[143] has assumed a *locus classicus* status and has become the starting point when dealing with the interpretation of the Constitution.

The question is: What is the true meaning of *section 180 (2) (a)*? The researcher thinks that there is really no right answer to that in view of the differing factual circumstance that different interpretations can lead to. What the court was striving to achieve is an adequate answer. The Court of Appeal reasoned that the words "in the case of a person first elected as governor" in *section 180 (2) (a)* meant a person who was duly elected in law. Therefore a person whose election was nullified could not have in law been first elected as envisaged by this provision. If the literal meaning is followed that is effect given to every word used in the Constitution or indeed the language of the Constitution being clear and unambiguous', there is no reason why a court of law could not possibly arrive at the decision the Court of Appeal arrived at. This is given more force by the fact that no governor can legitimately commence work as governor without taking the Oath of Office.

Indeed the Supreme Court stated that 'it is therefore clear and I hereby hold that the second Oath of allegiance and of office taken in 2008, though necessary to enable them continue to function in that office, were clearly superfluous in the determination of the 4 year tenure under *section 180 (2) of the 1999 constitution*[144] with profound respect to the Supreme Court, if it is necessary to engage in an act, it cannot be said to be superfluous. They are mutually exclusive, therefore if it is necessary to take the oath, the oath taking itself must be an imperative, when it is tied to the reasoning of the Court of Appeal, it seems that there is a nexus that gives the decision of that court solid foundation in its decision.

However, the Supreme Court being the final court and a policy court has the wisdom to look at such constitutional problems broadly. The court[145] said:

> To accede to the argument of the Respondents is to bring uncertainty into these clear provision of *section 180 (2) of the 1999 constitution* which will render the tenure of governors indefinite and what it will take an elected

[143] *Supra*
[144] *Ibid p. 1673*
[145] *ibid p. 1670*

> governor whose election is nullified to remain in office almost indefinitely or for life is to continue to win the re-run elections which would then be nullified to continue the cycle of impunity.

This is a clear indication of the Supreme Court applying the 7th principle stated in *AG Bendel v AG Federation*[146] that 'a constitutional provision should not be construed in such a way as to defeat its evident purpose.' And of course 12th principle which states that 'words of the Constitution are therefore not to be read with stultifying narrowness.' The Court also relied on their decision in *Ishola v Ajiboye*[147] where Ogundare JSC added four points of Construction to the 12 points in *AG Bendel State v AG Federation*,[148] the most relevant point to the subject matter was the first point which stated that 'Constitutional language is to be given a reasonable construction and absurd consequences are to be avoided.'

The Supreme Court held that: from the language used in section 180 of the 1999 Constitution, it is very clear that the Constitution, intended that a Governor of a State shall have a tenure of four years from the date he took the oaths of allegiance and of office and nothing more. Though he may spend less where he dies, resigns or is even impeached. In all, a Governor has a maximum tenure of eight years under the Constitution.

The researcher is of the view that the provision is not so clear. It is actually the use of the aids and canon of interpretation that helps the court to reach a just and reasonable decision. There were technical legal argument as to whether the decisions of the governors who erroneously extended their tenure engaged in void or voidable acts. Whether the acts of governance such as administrative functions carried out in that period were all void because in law, they were not supposed to be in office. Very heavy weather was made of this and indeed the court [149]said:

> However when you consider the nature and consequences of an election petition which produced a winner who was sworn in on the presumption that the election that produced him was regular and legally valid than when that election is set aside or nullified, the nullification is only limited to the election and does not affect acts done while the person occupied that office. In effect, what it all means is that the election that was later

[146] *Supra*
[147] *(1994) 7-8 SCNJ p. 1 at 35*
[148] *Supra*
[149] *ibid 1674*

> nullified was only voidable, not void because if it is to be taken literally as void *ab initio* as is being contended by some of the parties, it means the country would be plunged into chaos as all acts done by the governors must of necessity be null and void and of no effect whatsoever.

This is a distinction without a difference. There is no need for the courts to get caught in the booby trap of void and voidable. These are concepts more apt to contract law. In Administrative and Public law, it is obvious that its application is not practical. It cannot also be lost on the learned minds of the Justice of the Supreme Court that law is prescriptive. Rather than state that the acts of these public officers are voidable, it is safer to say that the concepts of void and voidable do not apply in this particular situation. If the decisions are stated to be voidable, this leaves open the possibility of the decisions made by a governor or administrative officer who lacked capacity being challenged legally. This in itself will lead to chaos.

The end result of the decision of the Supreme Court in this case is that elections into the governorship positions in the five States affected ought to have been held in April, 2011. The court held that the consequence thereof is that the continued tenure of the affected governors without election in April 2011 was illegal. The further consequence is that INEC should conduct elections into those positions within ninety days of the judgment of the Supreme Court.

Looking at the circumstances of what transpired in those four affected States (Bayelsa, Cross River, Sokoto and Adamawa), fresh primary elections were held by the party and the persons that emerged as candidates for the re-run elections ordered by the Supreme Court were the same candidates that had elongated their tenure previously, while in Kogi State, primary elections held in January 2011 in preparation for the April 2011 governorship elections were not cancelled. The questions that arose are, when does their tenure commence, does it commence from the period in office when they were not supposed to be there or does it commence from the date in which they were subsequently elected pursuant to the order of the Supreme Court. If one follows the decision of the court, it appears that the tenure of those four governors who were exactly the same persons who held office prior to the court ordered elections will commence from the new date. No elections were held in April 2011 so it cannot be argued that their tenure commenced in April 2011.

The ludicrous result is that there has been an extension of tenure achieved by default. Although they were not supposed to be in power legally in the period preceding the decision

of the Supreme Court in this tenure elongation case, the cold facts are that they were indeed in power. In effect, although the Supreme Court has reached an adequate result in the circumstances of the case, the factual results thrown up by the ambiguity and perharps lacunae in section 180 (2) (a) has still produced an absurd result. However, the comfort provided by the present decision of the Supreme Court is that it corrects the problem for future purposes.[150]

7.3.2.3 Disqualification of Candidates in an Election

Looking at the issue of disqualification of candidates in an election, Nigeria's Economic and Financial Crimes Commission (EFCC) has a laudable record in building cases against numerous allegedly corrupt Nigerian politicians in recent years. But as the 2007 elections drew near, its actions sparked considerable controversy. In early February, 2007, the EFCC produced a list of 135 would be candidates whom it claimed were corrupt and thus unfit to stand for election. The majority of those listed were either opposition candidates or individuals within the PDP seen as having ties to the then Vice President Atiku Abubakar. Relations between the then President Obasanjo and his Vice have long been tense and degenerated into open political warfare when the vice president spearheaded opposition to Obasanjo's failed bid to secure a third term in office. The list has been attacked in many quarters for its apparent selectivity. While numerous members of the opposition were included on the list, it omitted the names of several powerful people within the PDP who are widely seen as corrupt and whom the then EFCC Chairman Nuhu Ribadu had publicly denounced as corrupt on previous occasions. None of those individuals were on the list published and reviewed by the administrative panel.[151]

Although the EFCC claimed that its list was merely 'advisory' to political parties, the federal government promptly set up the ad hoc 'Administrative Panel' to investigate the individuals named by the EFCC. It reviewed 77 cases and on February 13, 2007 issued a report that purported to "indict" 37 of them after sitting for only 48 hours. Those indicted were not given any real opportunity to appear before the panel to defend themselves.

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[150] *A O Inneh, 'The Tenure Elongation: A Review of the Supreme Courts Decision in the cases of Mohammed Buba Marwa & Others v INEC and Murtala Nyako &others v INEC (2012) 3 NIALS Supreme Court Review, 103*

[151] *Newspaper reports around this period in question carried stories as to the selective nature of the list reviewed by the Administrative panel*

The government and INEC stated that the indicted candidates concerned are barred from running for office under the Nigerian Constitution, which clearly states that anyone who has been indicted for embezzlement or fraud by an "Administrative Panel" is ineligible to stand for election.[152] Critics have argued that because of their lack of due process and because the "indictments" are not meant to be followed with any form of legal proceeding but appear designed to allow the disqualification of certain individual from the polls, the relevant constitutional provisions should not be held to apply. In any case the defendants' fundamental and constitutional rights to a fair hearing appear to have been disregarded.

Prof Ben Nwabueze argued that:[153]

> *Section 137 (1) (i) of the Constitution* must be read in the context not only *Section 36 (1)-(12)*, but also of the provision of S.6 vesting judicial powers in the court (*Section 6(1)*) and defining the power to extend to all matters, between persons, or between government or authority and any person in Nigeria, and to all actions and proceeding relating thereto, for the determination of any question as to the civil rights and obligations of that person"……. the provisions of *Section 6 (6) & (6)* show that the application or invocation of the qualification in *Section 137 (1) (i)* require the process of a court and is outside the competence of INEC. To disqualify a person from contesting election for the office of President solely on the basis of an indictment for embezzlement or fraud made against him by an administrative panel of inquiry, with the presumption of guilt for those offences implied, runs completely counter to the purpose and significance of the judicial powers in the courts by *Section 6 (1) of the Constitution*…… *Section 137 (1) (1)* could not have intended to stultify the purpose and significance of *Section 6 (1)*; it must therefore be interpreted in the context of *section 6 (1)*, in order to avoid such stultifying effect.

The court was confronted with this scenario in a number of cases, chiefly amongst which is the case between Alhaji Atiku Abubakar and INEC.[154] The appeal was centered on the disqualification of Alhaji Atiku Abubakar, Vice President of the Federal Republic of Nigeria,

[152] 1999 Constitution (as amended) s. *137 (1) (i)*
[153] BO Nwabueze, *How Obasanjo subverted the Rule of Law and Democracy*(Ibadan: Gold Press Limited, 2007)
[154] *Independent National Electoral Commission v Action Congress and Alhaji Atiku Abubakar, supra*

as a candidate or any other candidate for the 2007 general elections by the Independence National Electoral Commission. The Plaintiffs applied to court for the determination of:

> whether the Defendant (INEC) has powers under the provisions of the Constitution of the Federal Republic of Nigeria, 1999 and the Electoral Act, 2006 to conduct any verification of the credentials /papers and/or screening out and/or disqualifying candidates including the 2nd Plaintiff for the 2007 General Elections.

The lower court ruled in favour of the plaintiffs and on appeal by the defendants (INEC), the Court of Appeal ruled in their favour. On appeal by the Plaintiff, from the decision of the Court of Appeal, the issue for determination was whether the Defendant/Respondent, as an Executive, non judicial agency of Government, has the power, under the provisions of the 1999 Constitution, to apply, invoke or enforce against the 2nd Plaintiff/Appellant, a presidential candidate nominated/sponsored by the 1st Plaintiff/Appellant for the 2007 general elections, the disqualification provided in *section 137 (1) (i) of the Constitution* read in the context of the other relevant provisions of the constitution, in particular *sections 6 (i)* and *36 (i) (4), (5)* and *(6)- (12)* as well as in the context of the system of constitution democracy established for the country by the Constitution.

The Supreme Court unanimously allowed the appeal on the following grounds:

1. <u>On whether *section 137 (1) of the 1999 Constitution* empowers the Defendant Electoral Commission to disqualify a candidate from contesting in general election:</u> There is no provision relating to the Defendant in *Section 137 (1) of the Constitution,* except (j) where the candidate has presented a forged certificate to it (INEC). In the circumstance, the Defendant cannot claim that the power to disqualify any candidate, the 2nd Plaintiff inclusive, is conferred on it by *section 137 (1)*. There is also nothing in the provision where the power can be implied. In any event, there is no provision in the Constitution that confers the power to disqualify candidates on the Defendant either expressly or by necessary implication.

2. <u>On whether the ground of disqualification in *Section 137(1)(i) of the 1999 constitution* is self-executing:</u>

   A dispassionate reading of *section 137(1)(i)* will reveal that it is not self-executing. To invoke against any candidate the disqualification therein provided would require an inquiry as to whether the tribunal or administrative panel that made the indictment is

> of the nature or kind contemplated by *section 137(i)* read together with other relevant provisions of the Constitution, in particular, *section 36(i)* which provides that 'in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by court or other tribunal established by law and constituted in such manners as to secure its independence and impartiality' as well as the provision in *sub-section (5) of section 36* that 'every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty.' The disqualification in *section 137(1)(i)* clearly involves a deprivation of right and a presumption of guilt for embezzlement or fraud in derogation of the safeguards in *section 36(1) and (5) of the Constitution*. The trial and conviction by a court is the only ground for the imposition of criminal punishment or penalty for the criminal offences of embezzlement or fraud.

Considering the prevailing political tension between President Olusegun Obasanjo and his Vice, the judiciary saved the country from a major political crisis. This controversy came at a time when the office of the Vice President was almost made redundant by the President. If INEC had succeeded, it would have created a precedent where the government in power can routinely use indictment which need not require any judicial participation to shut out perceived opponents. Before such issues would be resolved by the court, the damage would have been done.

Another important point underscored in this case is the primacy of the right to fair hearing in the resolution of disputes. The court was very firm in stating that it is for the court to establish guilt and that function cannot be usurped by any other agency.

INEC no longer has the right to share the power of disqualification with the High Courts, as *section 31(i)*[155] expressly provides that INEC shall not reject or disqualify candidates for any reason whatsoever. The power to disqualify is now exclusively that of the High Court, whether Federal, State or the Federal Capital Territory, FCT, Abuja.

7.3.2.4 Removal of the Vice President

On the issue of removal of the Vice President, the questions are: To what extent is an elected member of the executive branch accountable to his party? Who is elected after the voting? Is

[155] *Electoral Act 2010 (as amended)*

it the party or the candidate or both? These are some of the questions that had remained unanswered before now. The primacy of the party in the discharge of executive functions especially at the state level often give the impression that we are federal system operated as a unitary system since the party policies are often formulated at the national level. Blind allegiance to party polices often mortgages the genuine needs of the people or place the interest of the party above public interest.

Ideally when a candidate is elected, it is expected that such a candidate places public interest above party interest. However the question still subsists as to the level to which the candidate is to be held accountable to the party principles under which he was elected. Most importantly, what would be the political and legal implication if an elected executive defects from his party? These questions and more came up for determination in the case of *Attorney General of the Federation & 2 Ors v Alhaji Atiku Abubakar & 3Ors.*[156] Alhaji Atiku Abubakar, the Vice President of the Federal Republic of Nigeria commenced an action at the Court of Appeal under the original jurisdiction of that Court. The events leading to this suit was that Vice President traveled to the United States for his annual leave having obtained permission from the President. Mallam Sani Uba, Special Assistant to the President on Public Affairs announced that the office of the Vice President of the Federal Republic of Nigeria is vacant and that his constitutional immunity conferred on him had been withdrawn. It was further alleged by the Vice President that the President had withdrawn all privileges and entitlements. The President subsequently informed the National Assembly that he will send a nominee to replace the Vice President.

The Court of Appeal in its judgment resolved all the questions formulated by the Vice President in his favour. The Appellants were dissatisfied with the judgment and filed an appeal against it to the Supreme Court. The issues that came before the Supreme Court was as to:

1. Whether or not the constitutional union between the Vice President and the President under section 142 of the 1999 Constitution of the Federal Republic of Nigeria automatically expires immediately after the election that brought both Vice President and President to office.

[156] *supra*

2. And if not, whether the constitutional union demands from the Vice President undivided loyalty, trust and confidence as Vice President as long as he remains the Vice President. The Court held as follows:

1. **<u>On whether the President can remove the Vice President from office.</u>**
   Unlike the Minister, the Vice President cannot be removed by the President. The process of removal of the President or the Vice President is provided in section 143 of the Constitution. It is through the process of impeachment which is to be conducted by the National Assembly as set out in that section.

2. **<u>On what should be the relationship between the President and the Vice President and what should happen in a situation where it is shown that the holders of those offices are incapable of operating harmoniously as expected of them as envisaged under the Constitution.</u>**
   The Court of Appeal was therefore wrong in holding that the 1st Respondent could, while the Vice President still retained his office as Vice president, openly criticize the same government, or join another political party and start to campaign for election to the office of the President. The action cannot be justified by the fact that he (1st Respondent) had been suspended or expelled from the ruling political party under which he was jointly elected with the President or that he was exercising his fundamental right of association guaranteed under the Constitution. What is required of him is to first resign and even after resigning from that office, he would still be precluded from dissociating himself from the collective responsibility from decisions taken by the cabinet while he was in office. In spite of the above, it is not the duty of the court to pronounce on his behaviours or action or declare his office vacant. But that decision is that of the National Assembly.

It is important to mention at this point that the problem between the President and the Vice President came to head when the President wanted to effect a constitutional amendment that will afford him a third term in office. That plan failed. The Vice President was openly against it. Relationship between the two broke down and the Vice President was expelled from the ruling party and consequently the presidency sought to remove him from power. The Supreme Court judgment underscored a number of foundational points. One of which is the sanctity of separation of power. It is the duty of the National Assembly to effect impeachment

of a member of the executive not just because the law says so but because it is more objective to do so. The President is still a creation of the Constitution and in spite of the exulted nature of his office, all his actions must be within the law. It is not for one man to determine when the office of the Vice President is vacant or not. The judiciary again established its primacy position in the interpretation of the law. What would have happened if the removal from office had succeeded is that the term of the Vice President or Deputy Governors will be not at the mercy of the Constitution but at the mercy of the President or Governor. This would of course detract from the basic principles of rule of law. Again the court saved the country from an executive dictatorship.

Finally, apart from electoral matters, accolades have been showered on the court for its stand on due process and constitutional provision in the matter of preservation of the sanctity of the Nigerian Federation and fiscal Federation especially with a domineering President in the driving seat. Such decisions that resolved constitutional issues included the cases of *Attorney General of the Federation v Attorney General of Abia State and 35 others*[157] in which the court defined the boundaries of the littoral states and dealt with other principles of derivation and revenue allocation. There was also the case of *Attorney-General of Lagos State v Attorney General of the Federation and others,*[158] in which the court held that urban and regional planning matters are within the competence of the States and not the Federal governments.

7.4 Challenges of the Judiciary

For a better understanding of the role and limitations of the judiciary who are the bastion of constitutional democracy, it is important to take stock of the challenges that judiciary grapples with.

1. The lack of independence of the judiciary especially at the state level, in terms of funding, political manipulation of the process of appointment and removal of judges by some State Chief Executive and their respective Houses of Assembly. It is regrettable that some State Chief executives treat the judiciary as an appendage of the executive arm. While it is true that, in some cases, this is self inflicted (because of the way some judges portray themselves). It does not invariably follow that a distinct arm of government should because of the actions of few, be treated with disdain. Sadly,

[157] (2002) 6NWLR (pt 764) 542
[158] (2003) 12 NWLR (pt 833) 1

the judiciary, in some States still goes cap in hand to the executive begging for funds. By *section 162(9) of the constitution*[159], any amount standing to the credit of the judiciary in the Federation Account is paid directly to the National Judicial Council (NJC) for disbursement to the heads of superior courts, including those at the state level. However, a significant part of the funding requirements of State judiciaries, especially in the area of the provision of infrastructure and welfare of Magistrates and other lower court judges, remain the responsibilities of State. The plight of the State judiciaries compounded by the fact that, inspite of the best efforts of the NJC, the processes of appointment and removal of judges/security of tenure is the subject of political theatrics.

2. Delay in the dispensation of justice: This remains a major challenge due, in large measure, to institutional in capacities in the area of infrastructure (especially e-infrastructure), in –built delay mechanisms in the law, as well as failings in the part of some judges, the official and private Bars, Law enforcement agencies, litigants and witness. As Hon. Justice T.A Aguda, succinctly puts it:

> The chorus "justice delayed is justice denied" has become a senseless nuisance to most of the persons and institutions which are intimately connected with the administration of justice in our country and a saddening reminder to those directly affected of a totally bankrupt system of administration of justice. This is of course sad, since that chores is absolutely true.[160]

3. Corruption: The judiciary is sadly not insulated from the monster of corruption that is ravaging the society. Whatever the motivation and predilections, as judges, they must be mindful of the fact that:

> A poor judge (in terms of integrity) is perhaps the most wasteful indulgence of the community. You can refuse to patronize a merchant who does not carry good stock, but you have no recourse if you are haled before a judge whose mental or moral goods are inferior. An honest……

[159] 1999 (as amended)

[160] T A Aguda: "The challenge for Nigeria Law and the Nigeria Lawyer in the 21st century" being Nigerian National Merit Award Winners Lecture September 14, 1988 at 3-4

able and fearless judge is the most valuable servant of democracy, for it illustrates justice as he interprets and applies the law….[161]

4. Political Manipulation and Control: The Extent to which prevalent societal currents have engulfed the judiciary demands great concern. The judiciary is atimes beheld to the apron strings of political parties, pressure groups, religion, racial or ethnic group, sex, geo-political entity etc.

7.5 Contentious Issues in Electoral Matters

There are various contentious issues in our electoral matters which have not been resolved by the legislators. Some which the legislators tried to resolve by enactment of laws, but which still have some aspects to be looked into. These issues are numerous but the researcher will state some of them which are important to this discourse. They include:

7.5.1 Right to Recall

Blacks' Law Dictionary [162] defines recall as removal of a public official from office by popular vote. The said dictionary further defines recall election as 'an election in which voters have the opportunity to remove a public official from office.'[163]

The Ace Encyclopaedia in turn defines recall as the name given to a mechanism by which voters can end an elected official's period of office before the next scheduled election for the office.[164]

Furthermore, Hiram Johnson a reformist (then, Governor of California), once referred to the recall process as a 'precautionary measure by which a recalcitrant official can be removed. According to him, no illegality has to be committed by politicians in order for them to be recalled. If an elected official commits a crime while in office, the state legislature can hold impeachment trials. For a recall, only the will of the people is necessary to remove an

[161] Charles Evans Hughes, quoted in I Sagary: *Recent Trends in the Status and Practice of the Rule of law* (Ibadan: ASUU Press, 1988) p.36
[162] *B Garner, op cit, p. 1295*
[163] *Ibid p. 557*
[164] *ACE Electoral Knowledge Network at Wtp;//aceproject.org/ace-en/focus/direct-democracy.recall accessed on the 30/1/15*

official.[165]This assertion is based on the American System whereby governors can also be recalled. In Nigeria, however only members of the legislature can be removed by the recall system.[166]

In the context of the Nigerian Constitution, the recall process is described as "the right voters have or the procedure used to remove an elected public official from office before his term expires based on a petition signed by a required number of voters from his constituency.[167]

A cursory view of the above definitions suggest that recall relates to any public official and thus if applied to Nigeria may be misleading. This is because, the provisions of the Nigerian Constitution relate specifically to members of the legislature and not to other elected official, such as the President and Governors who can only be removed by impeachment. For the purpose of this discourse, recall can be defined as a process by which voters can terminate the tenure of a member of any legislative house from their constituency on the basis of loss of confidence.[168] Several reasons may be adduced for a recall. They include allegations of misconduct, poor representation or loss of confidence resulting in a prevalent estrangement from the particular constituency etc.

The provisions of the Nigerian Constitution are however vague on what the grounds of a petition may be. The term loss of confidence may mean several things ranging from grandstanding, claiming credit for constituency projects that were never executed, failure to consult the constituency, working against the creation of a state, gross under representation, non-performance and poor representation.[169]

Proponents of the recall provision see it as a device to ensure regular and close monitoring of elected public officials and to make them continuously, rather than periodically, more responsible and responsive to the will and desires of the electorate. With the recall system, it is argued, there is no need for the electorate to tolerate an incompetent, corrupt, and unresponsive legislator until that official's term is over.[170]

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[165] *Wikipedia, the free encyclopedia at http://en.wikipedia.org/wiki/2003 califonia recall p.10 accessed on 30/ 1/15*
[166] *JM Asagh, "The Right of Recall under the 1999 Constitution in DA Guobadia and E. Azinge (eds), Current Themes in the 1999 Constitution (Lagos: Nigeria Institute of Advanced Studies, 2007) p. 381*
[167] *SI Nchi, Powers and Function of Nigeria's National and State Legislature Assemblies (Jos: Green World, 2001) p. 221*
[168] *op cit p. 382*
[169] *Ibid p. 383*
[170] *ibid*

Section 69 of the Constitution[171] provides that:

A member of the Senate or House of Representatives may be recalled as such a member if:

> (a) there is presented to the Chairman of the Independent National Electoral Commission a petition in that behalf signed by more than one-half of the persons registered to vote in that member's constituency alleging their loss of confidence in that member; and
> (b) the petition is thereafter, in a referendum conducted by the Independent National Electoral Commission within ninety days of the date of receipt of the petition, approved by a simple majority of the votes of the persons registered to vote in that member's constituency.

Section 110 of the Constitution[172] provides that

A member of the House of Assembly may be recalled as such a member if:

> (a) there is presented to the Chairman of the Independent National Electoral Commission a petition in that behalf signed by more than one half of the persons registered to vote in that member's constituency alleging their loss of confidence in that member and which signatures are duly verified by INEC; and
>
> (b) the petition is thereafter, in a referendum conducted by the Independent National Electoral Commission within ninety days of the date of the receipt of the petition, approved by a simple majority of the votes of the persons registered to vote in that member's constituency.

The above provisions of the Constitution, give the electorate, the power to recall a member of a legislative house, following due process. A recall initiative is launched, when a petition is made to the Chief Electoral Officer, the Chairman of the INEC stating the reasons for recall. The petitioners are then required to gather a specified number of signatures in support of the recall measure, which is one –half of the total number of voters registered to vote in that constituency. If and when the recall petition receives enough valid signatures, the signatures are verified. The legislator involved, is contacted to verify and comment on the signatures of the petitioners after which INEC, would in turn commence its action by verifying the

[171] *CFRN 1999 (as amended)*
[172] *Ibid*

authenticity of the signatures of the registered voters in the district constituency or council ward as the case may be. Where the chairman of INEC determines that the recall meets the requirements of either section 69 or 110 of the 1999 Constitution, he will forward to the Speaker of the House of Assembly a certificate to that effect. The Speaker, in observance of section 109 (2) of the Constitution, must then present evidence satisfactory to the House in compliance with the requirement of the Constitution.

A number of recall attempts have been initiated since the beginning of this civilian dispensation in 1999. The popular ones have all originated from the National Assembly. It is possible that similar moves may have been made in the State House of Assembly. The researcher will however focus on some of the moves made in the Senate and House of Representatives.

7.5.1.1 The Attempt to Recall Senator Ibrahim Mantu

Moves to recall Senator Ibrahim Mantu, the Deputy Senate President began on the 14th of December 2005, when thousands of members of the constituents from his Plateau Central Senatorial District were led by Chief Joseph Mangtup Din to the INEC headquarters to submit a petition, signed or thumb printed by 208, 483 voters of the registered 388, 835 voters in the constituency. The petitioners alleged loss of confidence in Senator Mantu's capacity to represent them.[173] In the covering letter forwarding the petition, the constituents stated thus:

> The people of Plateau Central District collectively and unanimously took this decision (recall) because they have studied, scrutinized and analyzed the kind of, mode and style of Senator Ibrahim Mantu's representation and have come to the irreversible conclusion that the Senator has performed far below expectation of the people.[174]

At a press briefing, following the submission of the petition, the leader catalogued the allegations against Senator Mantu in a statement titled 'The Mantu we know', accusing the Deputy Senate President, among other things, of 'grandstanding, claiming credit for constituency projects that were never construed, failure to consult the constituency and poor

[173] JM Asagh *op cit* p. 385
[174] *Ibid*

representation.[175]The genesis of Mantu's recall could however be traced to the seeming feud between him and the Governor of Plateau State, Chief Joshua Dariye. This much was confirmed by Senator Mantu's sharp riposte to the recall move. He discountenanced the allegation against him saying:

> This has been an ongoing matter since the state of emergency was declared. These people are like a negligible minority because most of them were people who were benefiting from the Governor who was suspended and because they are no longer getting their N40,000 a month.[176]

This assertion was however rebuffed by the petitioners who averred that their grouse was that the senator is more of a disappointment to them than an asset. They complained of lack of effective representation in Senate even though 'their Senator occupies the post of Deputy Senate President. They further accused him of stirring trouble in his home state by using federal security agents to intimidate the people and government of Plateau State.

The process could not run its full course as Senator Mantu went to court seeking for an injunction to restrain INEC from commencing the verification of signatures as a necessary step towards a referendum.[177] The petitioners' leader filed a counter suit at the Federal High Court, Abuja seeking the recall of Mantu. The suit was however struck out. The court held that it had no jurisdiction to grant an order of mandamus compelling INEC to conduct a referendum for the recall of Mantu. The court further held that for an order of mandamus to be made, fifty percent of the electorate in the constituency ought to endorse the recall.[178]

7.5.1.2 The Attempt to Recall Senator Arthur Nzeribe

On the 30th of May 2006, a petition for Senator Arthur Nzeribe's recall was submitted to INEC by representatives of Orlu Constituency in Imo State. The promoters of this recall process led by Dr. Samfo Nwankwo, hinged their action, among other things, on non-performance of the Senator and his support for the creation of Orasi State (which excluded vital parts of Orlu) as against Orlu State.(which had constituents from the district and neighbouring parts of Anambra State) Prior to the submission, a One Million march to drum up support for the recall was held on the 18th of April 2006 in Orlu. According to the leader,

[175] [14] *Ibid*
[176] *op cit*
[177] *ibid*
[178] *ibid p. 386*

the march was to sensitize the people of the zone on the need to recall Senator Nzeribe quickly from the Senate so that he would not continue to work against the interests of those who elected him.[179] This bid did not succeed as it was stalled at INEC. The signatures were not verified and so the process could not be completed.

A number of reasons can be put forward as being responsible for the relative failure of the electorate to exercise the right of recall as provided for in the 1999 Constitution. One cannot rule out the effect of injunctions granted by courts stalling the recall process as evidenced in the above analysis on the Mantu example. What is more INEC in most cases appears reluctant to complete the process of recall. Other factors identified can be subsumed within each of the following possibilities: the novelty of the provisions, political and selfish considerations, cumbersome procedures and money politics. Firstly, the provisions of the Constitution relating to recall are relatively novel as they are only found in the 1999 Constitution.[180] Nigeria therefore does not enjoy the requisite historical experience of their implementation. This may be responsible for the relative failure of the provisions. The implementation of the procedure relating to recall has similarly been bedeviled by lack of precedent for INEC to be guided by. It has thus been groping in the dark in much the same way as the constituents wishing to exercise their right of recall.

Secondly, the Nigerian experience has shown that attempts to exercise the right of recall have been largely fraught with political colouration and selfish motives. This means that previous attempts to recall erring members of the National and State legislative House have not been altruistic. Most often than not, agitations for the exercise of the right to recall legislators emerge as a result of political disagreement among the major players in a political party jostling for dominance or the major players in the theatre of conflict seeking to impose their will on the populace. These factors have been responsible for the derailment of the process over time. Until political actors are guided by the letter and spirit of the Constitution, the successful exercise of this right may remain illusory.

Thirdly, the procedure for recall is itself cumbersome. Gathering signatures of one-half of those registered to vote in the member's constituency, verification of the signatures by both INEC and the member being recalled, holding a referendum within ninety days approved by a simple majority of votes of members of a constituency is quite an unwieldy a process. The size of a constituency in the country alone is an impediment; getting genuine signatures

[179] *JM Asagh op cit p. 388*
[180] CFRN 1999 (as amended)

amounting to the required percentage may also be difficult. The fact that these processes were stalled either at the stage of collecting signatures or verifying them, demonstrates the cumbersome procedure. Alternatively, the cumbersome procedure could be a design to deter reckless resort to the right of recall. The fact that the majority of the populace who are supposed to steer the process are ignorant of these constitutional provision also exacerbates the problem.

Fourthly, the pervading influence of money in Nigeria politics is one of the inhibiting factors to the successful exercise of the right to recall. As already noted above, the cumbersome procedure provided in the Constitution is rather capital intensive. A lot of resources are required to gather signatures and to go through the whole procedure. Thus, without massive support from the government that often controls the resources, the exercise of this right may not be feasible for the ordinary people. By the same token, a rich politician with the necessary financial power may scuttle the process inspite of overwhelming public opinion in support of the recall process.[181]

7.5.2 Cross-Carpeting

Cross Carpeting refers to the defection of a party member from one party to another. Section 109(1) (g) of the Constitution [182]states that:

A member of a House of Assembly shall vacate his seat in the House if

> (a) being a person whose election to the House of Assembly was sponsored by a political party, he becomes a member of another political party before the expiration of the period for which the House was elected:
>
> (b) provided that his membership of the latter political party is not as a result of the division in the political party of which he was previously a member or of a merger of two or more political parties or factions by one of which he was previously sponsored.

Subsection 2 provides that the Speaker of the House of Assembly shall give effect to subsection (1) of this section, so however that the Speaker or a member shall first present evidence satisfactory to the House that any of the provisions of that subsection has become

[181] *JM Asagh art cit*
[182] *CFRN 1999(as amended)*

applicable in respect of the member. The same applies to members of the Senate and the House of Representative in *Section 68 (1) (g).*[183]

Looking at this constitutional provision, it is evident that the vacation of a member's seat does not follow automatically upon the defection of such member to another party. The Speaker must upon satisfactory evidence presented by him or a member to the House that the provision has become applicable give effect to the declaration of vacancy. Defection is allowed where a party is factionalized or in cases of merger of the said party with another party.

There are various instances where several legislators in various States cross carpeted from their party, in whose platform they won the election, to another party. In Jigawa State, the State Governor Saminu Turaki, and all the members of the House of Assembly were elected in 2003 on the platform of the ANPP. Sometime in 2006, Governor Turaki defected to the PDP to seek that party's platform for his presidential ambition. The Speaker, Hon. Mustapha Makama Kiyawa, and all the other members of the House followed suit out of loyalty to the Governor. Thus the defections involved all the members with none left to invoke the sanction provided in section 109 (1) of the Constitution. With no member of the House of Assembly left to put in motion, the process of enforcing the provisions in section 109 (1) of the Constitution, the Jigawa State Chapter of ANPP, through one of its members in the House of Representatives, filed an action in the Federal High Court praying the court to declare vacant the seats of the defecting members, and at the same time requested INEC to hold bye-elections to fill them. The request to INEC was premature because the seats had not been declared vacant by an authority competent to do so (INEC itself has no power to do so); it is also incompetent because the Jigawa State Chapter of the ANPP has no right to make the request. A court decision declaring the seats vacant will of course cast on INEC an inescapable duty to hold bye-elections without request by anyone.

The Constitution did not make any provision for instances where there is no Speaker or member of the House of Assembly to give effect to subsection (1) of section 109[184]as in the above scenario. This shows the many challenges that our Constitution face especially when it comes to enforcement. Human element continues to be a major challenge to our democracy. From a combined reading of the provisions of the two sections, it is clear that the section

[183] CFRN 1999 (as amended)
[184] [23] CFRN 1999 (as amended)

refers to a member of a House of Assembly and members of the Senate and House of Representative. But the Constitution in section 50 (2) provides thus:

The President or Deputy President of the Senate or the Speaker or Deputy Speaker of the House of Representative shall vacate his office:

> (a) if he ceases to be a member of the Senate or of the House of Representative as the case may be, otherwise than by reason of a dissolution of the Senate or the House of Representatives, or
> (b) when the House of which he was a member first sits after any dissolution of that House or
> (c) if he is removed from office by a resolution of the Senate or of the House of Representative, as the case may be, by the votes of not less than two-thirds majority of the members of the House.[185]

From the readings of the about provisions of the Constitution it is not clear whether section 68 (1) (g)[186] will apply to the President or Deputy President of the Senate or the Speaker or Deputy Speaker of the House of Representatives since section 50 (2)[187] provided instances where the said officers can vacate their office. Such instance does not include cross-carpeting from the party on whose platform they won the election. There has not been any judicial pronouncement in this respect.

As regards the President and Vice President, section 131 of the Constitution [188]is not as elastic as sections 68(1)(g) and 109(1)(g)[189]respectively. Unlike the position of the Constitution in respect of members of the legislative Houses switching political affiliation, there is no provision in the Constitution that suggests that the President or Vice-President will lose office or be disqualified from contesting elective office by switching parties before the end of their tenure. One wonders why the provisions are merely for the legislators.

7.5.3 Death of Legislators before the End of their Tenure

In Nigeria, there has been several legislators, members of the National Assembly and Houses of Assembly, who due to death could not complete their tenure. These include:

[185] *ibid*
[186] *ibid*
[187] *ibid*
[188] *ibid*
[189] *ibid*

7.5.3.1 Senator Dantong Gyang Dalyop: He was the Senator representing Niger East Senatorial District. In 2012 he died before completing his tenure as a Senator.

7.5.3.2 Senator Pius Ewherido: He was the Senator representing Delta Central Senatorial District. In 2013, he died before completing his tenure as a Senator.

7.5.3.3 Senator Dahiru Awaisu Kute: He was the Senator representing Niger East Senatorial District. He died in 2014 before the end of his tenure as a Senator.

7.5.3.4 Senator Uche Chukwumerije: He was the Senator representing Abia North Central District. He died in 2015 before the end of his tenure as a Senator.

7.5.3.5 Senator Ahmed Zannah: He was the Senator representing Borno Central District. He dies in 2015 before the end of his tenure as a Senator.

There are a lot of other Senators and members of the Houses of Assembly, who died before completion of their tenure as members of those Houses of Assembly. What then happens to those slots from constituencies which they represent? What happens to the vacancies created due to the unfortunate death of those members. There is no provision in the 1999 Constitution[190] for filling of those vacancies. These vacancies ought to be filled up to get adequate representation for those constituencies for democracy to be achieved. This is an area our legislators need to advert their minds to.

[190] *as amended*

CHAPTER EIGHT

COMPARATIVE ANALYSIS OF THE JUDICIARY IN OTHER JURISDICTION

The researcher will at this point do a comparative analysis of the judiciary in other jurisdiction. The issues that will be considered are appointment and removal of judges, tenure, funding and immunity. The jurisdictions that will be considered are United States of America and United Kingdom.

8.1 United States of America

The United Stated has a federal judiciary of roughly 900 life tenured judges and 800 term limited judges, and 28,000 judges of the 50 states the District of Columbia and Puerto Rico[1]. Their 53 jurisdictions are all largely free to structure their judiciaries as they wish. The lesson from United States experience is that there is no single set of provisions guaranteed to achieve an independent judiciary. Judicial independence takes various forms, shaped by different legal provisions, political traditions and cultural expectations that have evolved over time and continue to inspire debate and self reflection.

The provisions in the United States to promote judicial independence on the one hand and to promote democratic control of the judiciary on the other may be arrayed on a continuum. The United States employed a mechanism to protect and balance independence and accountability of the judiciary.

8.1.1 Measures to Protect Judicial Independence

a. Secure tenure and compensation

The Declaration of Independence (1776) indicted King George III because he made colonial "judges dependent on his will alone for the tenure of their offices and the amount and

[1] To simplify somewhat, state court judges generally have plenary jurisdiction over all matter except those that Congress consigns solely to the federal courts. Federal judges have jurisdiction over federal crimes, cases to which the United States is a party, cases involving federal laws, and cases between citizens of different states. There is another category of federal judges whom we do not treat in this paper at all, due to space limitations. These are the judges of courts established within the executive branch agencies, such as the judicial system of the armed forces, the U.S.A Tax Court and numerous "administrative law judges"

payment of their salaries". Such a dependence Blackstone taught, meant that, instead of deciding cases according to "fundamental principles," judges would likely "pronounce…. for law, which was most agreeable to the King or his officers". Thus Article III of the U.S. Constitution (1787) vests the "judicial power of the United States" in federal judges, who "shall hold their offices during good behavior, "and "shall'', at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." For federal judges, tenure during "good behavior" is essentially life tenure; Supreme Court Justices, Court of Appeals Judges, and District Judges may serve as long as they wish[2] (although a generous retirement system enables them to reduce their workload after 65 or 70 years of age[3]). Life tenure for federal judges has been regularly criticized but never seriously placed in jeopardy. Criticism came early in the century from those who believed that federal judges were too sympathetic to business interests and comes today from some who believe that federal judges are too sympathetic to minority interests and criminal suspects.

There have not been similar attacks on Article III's ban on reducing federal judicial salaries. Judges, however, have argued throughout history that their salaries are insufficient. Although federal judicial salaries today are no doubt in the top percentile of all salaries in the United States[4] in many parts of the country beginning lawyers, at least in commercial practice, sometimes earn more than federal judges. Judges do not content that congress refuses to raise their salaries in retaliation for their decisions. They note, though, that refusal to allow judicial salaries to keep pace with inflation may contain the seeds of threats to independent decision making.

Although secure tenure and compensation are often described as the hallmarks of an independent judiciary in the United States, life tenure and irreducible salaries are formally bestowed on only about three percent of U.S judges: the roughly 900 U.S Supreme Court Justices, Court of Appeals and District Court Judges; and the Judges of the State of Rhode Island (Judges in two other States are tenured until age 70). The over 800 federal bankruptcy

[2] It is not uncommon for federal judges to serves well past their 70's. There of the nine U.S Supreme Court members are over 70 and is over 80. Federal judges serving for "good behavior" may be removed from office by the legislative impeachment process, but that has occurred only seven times in the nation's history.

[3] Judges over 65 whose age and years of services total 80 may retire from office but retain the salary of the office (including any increases) as long as they perform a specified amount of reduced services, and, if they elect to provide no judicial service, may retain the salary they were earning at retirement. See 28 U.S.C 8371

[4] Annual, pretax salary of a federal district judge in 2000 is $141,300 court of appeals judges earn some $149,900 and supreme court justice $173,600. Magistrate and bankruptcy judges earn about 0 percent less than district judges. The average annual pay in the United States in 1999 was $ 31,908 (Bureau of Labor Statistics 2000) Salaries for state court judges are somewhat lower than federal judicial salaries. Nevertheless, the salaries of higher ranking state court judges place them well above the national median income for analysis of state court judicial salaries, see survey of judicial salaries (National Center for state Court 1999 Vo. 25. No.2)

judges and magistrate judges, both exercising judicial power on delegation of life-tenured federal judges, serve for 14-and 8-year terms respectively. Life tenure for State Judges, while provided in the 18th century, quickly gave way to limited terms in an effort to promote judicial responsiveness to popular preference. Today almost all state judges serve for terms, which range from 4 to 15 years[5] and most must stand for some kind of popular election to retain their posts. These limitations on state judges' tenure have allowed voters to remove judges for unpopular decisions, but the limitations have generally not posed pervasive institutional threats to state judges' independent decision- making. Almost all state judicial salaries are lower than those of corresponding federal judges.[6]

Despite these differences in the federal and state system, most judges in the United States are accorded significant professional respect and receive salaries higher than other public officials in their respective jurisdictions. Salary and professional status alone do not guarantee judicial independence, but by enhancing the prestige of the judges, they make it easier for them to behave independently.

b. Self administration of the judicial branch

The federal courts, from their creation in 1789 until 1939, were the administrative responsibility of, in turn, the Department of State, Treasury, Interior, and Justice. State courts were the administrative responsibility of state executive agencies. Executive branch agencies, federal and state, developed annual legislative requests for funds to operate the courts and administered the funds granted, which, until the early 20th century, consisted of little more than paying judges and staff (when they were not paid directly by fees) and providing courtrooms and furniture.

As the size and complexity of the judicial operation increased, however, judges and others argued that secure salary and tenure were no longer sufficient to enable the federal judiciary to defend itself from the other branches, and that state judiciaries, whose judges stood for re-election, were in even greater jeopardy. Federal judges complained both that the Justice Department was an indifferent administrator and that its control over judicial administration threatened the fact and appearance of judicial independence.

[5] Data computed from Rottman 1995, tablet 4 and 8 The modal term for some appellate judges is 8 years and the average is 7.8 years. For judges of the major trial courts, the mode is 6 and the average 7years.

[6] One scholar's review of empirical research on judicial independence suggests that the topic, at the least has been little studied (Hensler 1999: 718)

In 1939, Congress responded to these concerns by creating the Administrative Office of the U.S Court to assume from the Department of Justice responsibility for Federal Court budget and personnel administration and compiling statistical data on the business of the courts. More important, Congress directed that the Administrative Office be supervised by a council of federal appellate judges. (This organization, now the Judicial Conference of the United States, comprises 26 appellate and trial judges, with the chief justice as presiding officer).[7] State governments followed suit, starting in the 1940s, creating State Court Administrative Offices, and generally providing for their supervision by the State Supreme Courts.

Today, the importance of a separate judicial branch administrative entity to judicial independence is part of the conventional wisdom in the United States. These areas illustrate why:

Court, administration and jurisdiction: Before judicial branches had budget-preparation and administration responsibilities and administrative offices to execute them, executive branch agencies assessed the courts' financial needs, submitted those needs to the legislature for decision, negotiated with the legislature, and administered the funds provided. Although they usually did so in consultation with judicial officials there remained the potential to deny the courts general, and specific judges in particular, financial support in retaliation for decisions contrary to the pleasure of the executive branch, a major litigator in the courts.

Under the current regime, judicial branches develop their own estimates of need and present them either directly to the legislature or to the executive for the ministerial task of incorporation, without change, into a government-wide budget document. The judicial branch also defends the request before the legislature and administers the funds granted.

The current procedures for judicial budgeting however, hardly free courts from oversight and even some control by the other branches. The executive branch, for example, can influence judicial funding levels by its recommendations to congress on fiscal policy and of course Congress still determines the level of judicial branch funding. Legislators can use their funding power to show their approval or disapproval of how judges administer the courts and although it probably happens rarely, to show their approval or disapproval of judicial decisions. Congress has other means to control the effects of judicial decision making and,

[7] The members are the chief judges of the 13 federal courts of appeals, a district judge from each of the 12 regional circuits, and the chief judge of the court of International Trade. The conference makes policy for the administration of the federal courts, operating through a network of committees that examine such subjects as automation, criminal sentencing, and judicial salaries and benefits

perhaps by the threat of such action influence future decisions. Congress, for example, can limit the jurisdiction of the federal courts, as it did in 1995 to make it more difficult for prisoners to obtain judicial orders directing changes in the administration of prisons or orders directing review of their convictions.[8]

Education: Although most U.S. judges bring extensive legal experience to the bench, they do not receive formal judicial education before appointment; they learn on the job. When the judging was less complicated, judicial education could operate informally. Formal programs of judicial education within the judicial branch were created in the mid 20th century as judges faced more difficult case management problems and cases presenting complicated statutory schemes and complex scientific and economic evidence. Congress created the Federal Judicial Center in 1967 to provide orientation and continuing education for federal judges and the employees of the court. Most state judiciaries also provide educational opportunities for judges and staff.

There has been controversy over whether some alternative, private judicial education programs offered by organizations that appear to have policy preferences in respect to commonly litigated matters, are a threat to independent judicial decision-making. Supporters of such programs defend them against charges of bias and note furthermore that judges are in the business of hearing and weighing many different points of view. Critics argue that judges practiced ability to receive information with skepticism may not help them recognize skewed information in highly complex and esoteric field, and contend that, regardless, the fields, and contend that, regardless, the appearance of private judicial education compromises public faith in judicial independence.

Judicial Selection: Some European and Latin American countries vest responsibility for judicial selection in councils of judges, executive and legislative officials, academics, and others. The goal is to limit the influence on the judiciary of the other branches of government. Judicial selection in the United State is making increasing use of commission that have some superficial similarity to councils in other countries. In the United States, these groups are largely advisory and have specific rather than plenary jurisdiction for administration of the judicial system and its personnel. They play basically an advisory role retaining substantial opportunity for participation by the people or their representative.

[8] These statutes are codified at 28 U.S.C $195 and 2254

Presidential Appointment of Federal Judges: The constitution provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States (including today federal appellate and district judges), whose appointments are not herein otherwise provided for and which shall be established by law."[9] Congress has enacted no statues to regulate the appointment of life- enacted judges and has adopted no age, professional, or training prerequisites. The country relies on the selection process to screen potential federal judges for quality and integrity.

Although federal judges are generally regarded as among the most independent in the world, political parties play a significant role in the process by which they are selected. In filling a vacant judgeship, the president receives suggestions from leaders of his party (mainly U.S senators) in the region of the vacancy (and nationally for Supreme Court Justices). Around 90 percent of any president's judicial nominees are at least nominal members of his political party; in the most recent four presidential administrations, the percentage of judges who were active party members ranged between 73 percent (Carter) and 56 percent (Clinton). Government investigators, however also scrutinize potential nominees' personal backgrounds. And since the 1950s, a special committee of the American Bar Association has undertaken detailed evaluations of each potential nominees' professional competence; potential nominees rarely survive a "not qualified" ranking. The Committee on the Judiciary of the U.S Senate conducts its own investigation of each presidential nominee. After confirmation, federal judges almost universally honor the provisions of Canon 7 of the Code of Conduct for U.S Judges that tell judges not to hold office in political organizations, endorse candidates, solicit funds, or attend political gatherings of any type.

Some commentators say that, because each president draw appointees almost exclusively from members of his political party, the judges so appointed are in effect party functionaries on the bench. This is a frequent charge of foreign observers, including those from countries with formal arrangements similar to those in the United States but where judges are traditionally heavily dependent on their executive appointers. There is, to be sure, a clear although relatively slight correlation between U.S federal judges prior political party membership and decisional tendencies. Carp and Rowland's analysis of their data set over

[9] Article II, sec 2. Federal supreme court justice, court of appeals judges, and district judges all have the tenure and salary protections of Article III. They comprise roughly 900 of the 1,700 or so federal judges (including retired judges who still perform some judicial work) Bankruptcy and magistrate judges are selected, respectively, by the courts of appeals of their circuits and by the district judges of their districts, in what is referred to as a "merit selection" process because of formal requirements for review of qualifications

57,000 published opinions of district judges appointed by Presidents Woodrow Wilson through William Clinton, confirms, not surprisingly, that decisions of judges who had been Democrats were more "liberal" than the decisions of judges who had been Republicans, although the differences were slight.[10]

What do the differences suggest about judicial independence?. There is little evidence that these contrasting decisional tendencies reflect judges' conscious efforts to discard controlling legal provisions in favour of the wishes of their appointing presidents or former political parties. Rather, judges, when confronting the relatively small number of cases in which the precedents and evidence are not dispositive, fall back on other factors to make decisions. It is not surprising that their decisions are influenced by the same outlooks on life and the law that influenced their party preferences before they became judges. In fact, some argue that this influence, give that it is relatively slight, serves a healthy function in a democracy. As Chief Justice William Rehnquist has said (1996:16) because both the president and the Senate have felt free to take into consideration the likely judicial philosophy of any nominee to the federal courts… there is indirect popular input into the selection of federal judges[11] (The chief justice was contrasting this type of input with efforts to influence judges' decisions through threat of impeachment).

No doubt some of the over 3,000 persons who have served as federal judges since 1789 have decided specific cases with an eye to pleasing the presidents who appointed them. However, references to this fact inevitably call forth a long list of examples of judges who confounded their appointments. President Theodore Roosevelt, for one, complained of justice Oliver Wendell Holmes that" the nominal politics of the man has nothing to do with his actions on the bench…. Holmes should have been an ideal man on the bench. As a matter of fact, he has been a bitter disappointment". Presidents Richard Nixon and Clinton were no doubt disappointed that unanimous Supreme Courts, including their appointees, decided respectively that executive privilege did not protect the "Watergate tapes" and that presidents could be sued in civil court while in office.

[10] For example, whether decision-not only those disposing of non-jury cases, but also on motions for admission of evidence and various procedural rules favored the defendant in criminal cases, the regulator in government economic regulation cases, and so forth Overall, Democratic judges made "liberal" decisions 48 percent of the time, versus 39 percent of the time, versus 39 percent of the time foe Republican judges (Carp and Stidham 1998)

[11] This benign view of the influence of partisan affiliation on executive appointments may not necessary hold in other countries

A final claim that the federal appointive system may compromise independent decision making of life-tenured federal judges involves, not loyalty to those who appointed them, but rather efforts to please those who could appoint them to a more prestigious court. In the 18th century, judicial promotions were very rare. By contrast, 36 percent of the 253 judges on the U.S Court of Appeal in 2000 first served as U.S district judges[12] and seven of the nine current members of the Supreme Court in that year served previously on the U.S Court of Appeals. Judges considered for appointment to a higher court are subject to the same selection and review process described above. It is plausible that the prospect of such appointment could lead some judges to decide cases to curry favor with those responsible for the appointments,[13] a tendency observed in two quantitative studies of district judges' decisions in case challenging the constitutionality of the U.S. Sentencing Commission. On the other hand, there are many more district judges than vacancies on the courts of appeals, and many more court of appeal judges than Supreme Court vacancies, leading one student of the subject to conclude that" the typical judge's chance of promotion is so low that it is unlikely that desire for promotion affects the decisions of more than a handful of judges"

Elections of judges: Over the 19th century, most States replaced gubernatorial appointment of state judges with either partisan or non-partisan election. Twentieth century court reformers in turn sought to replace election systems with gubernatorial appointment from lists of nominees developed by commissions of judges, lawyers, and lay persons (labeled "merit selection system"). Judges so selected stand for periodic "retention elections" in which the voters are asked, not to chose between two candidates, but simply to vote "yes" or "no" on whether to retain the judge in office.

Most U.S judges and court reform organizations regard elections as a poor method for selecting judges. They believe judges can be influenced by the fear of electoral retaliation against decisions that conform to the law but not popular preferences. They also fear that judges may compromise their independence by incurring obligations to those who provide financial support to their election campaigns. Judicial elections present a complicated landscape, in part because of many variations in types of elections. A State Supreme Court

[12] As of July 1, 2000 Numbers include both active judges and those in "senior status", a form of semiretirement for active only, the figures are 52 and 158(32 percent). The source of the data is the federal Judicial Center's Federal Judicial History Office's database.

[13] One federal judge acknowledged to a public forum his view that younger district judges "aspire to the court of appeals, and they know their votes are being watched" as do court of appeals aspirants for the Supreme Court (American Judicature Society 1996.81)

Justice who must mount a vigorous media campaign against a well-financed opponent is in a different position than a State Trial Judge facing a low visibility retention election.

The rhetoric about judicial elections is heated and not always informed by empirical evidence. What impact do elections have on judicial decision-making? There is no shortage of examples of judges who have been the object of campaigns to defeat their re-election or retention because of unpopular decisions. Three well-known cases involve the defeats of Chief Justice Rose Bird of California and Justice Penny White of Tennessee (both for decisions limiting death sentences), and Justice David Lanphier of Nebraska(for decisions involving laws limiting legislators' terms in office, citizen ballot initiatives, and the state's second degree murder statute). It is reasonable to assume that these and similar experiences[14] have made some other judge more cautious about making decisions that are legally meritorious but unpopular.

Judicial Discipline and removal: Although the federal constitution provides federal judges tenure during "good behavior", it also authorizes removal of life-tenured judges and other official by impeachment (indictment) by the lower house of the legislature and trial in the upper house. Almost all state constitutions have similar provisions. The grounds for impeachment on the federal level are vague "treason, bribery or other high crimes and misdemeanors" The failure of an 1804 effort to impeach a controversial Supreme Court justice for his judicial actions established for most observers that the federal impeachment provision is only to be used to punish judicial malfeasance.

Furthermore, impeachment and conviction are laborious and time- consuming. For both these reason, in the history of the republic, the House of Representatives has impeached only II federal judges (the Senate convicted seven of them). Despite periodic calls for increased use of impeachment to remove judges who some perceive have exceeded their authority[15]. There does not appear to be any serious possibility on the horizon of making impeachment a form of discipline for judicial decisions.

One the state level, impeachment is similarly rarely used. There are, however, among the states additional means of removing judges from office, such as recall elections. Then states

[14] Additional examples are available at <http://www.ajs.org/cji/fire.htm/>., the website of the American Judicature Society's Centre for Judicial Independence.

[15] In 1997, for example the House Judiciary Subcommittee on courts and Intellectual Property held hearing on whether "judicial activism" is an impeachable offense, during which House Majority Wipe Thomas Delay told the subcommittee that impeachment should not be used for "partisan purpose, but when judges exercise power not delegated to them by the constitution, I think impeachment is a proper tool" (U.S House of Representative 1997: 16)

and the U.S Virgin Islands have recall provisions for state officials, including judges. Due to the fact that impeachment is an inappropriate remedy for the vast majority of allegations of judicial transgressions, all states have established, within the judicial branch, commissions for judicial discipline and removal. In some states, these commissions only investigate and refer charges to other bodies, in other states they investigate and any take action. All state bodies include mixes of judges, lawyers and laypersons.

In the federal system, regional councils of judges handle claims of judicial misconduct or disability. Anyone may present a complaint to the chief judge of one of the regional federal appellate courts alleging that a federal judge in that region "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or …. Is unable to discharge all the duties of the office by reason of mental or physical disability" in 1999, about 899 complaints were filed, and almost all of them were dismissed, many because they were, contrary to the statue, "directly related to the merits of a decision or a procedural ruling." [16] Occasionally councils exercise their authority to discipline judges, as through private or public reprimand or the removal of cases, and the courts have generally upheld these efforts and the underlying statutory provisions against constitutional challenge. The situation is similar in the state courts, where judicial conduct commissions generally dismiss more than 90 percent of the complaints filed with them each year. Some judges have expressed concern that enabling other judges to determine whether a judge is, for example, derelict in carrying out the duties of the office or abusive to litigants has the potential to chill independent judicial decisions making.

Accountability Through Legislative Oversight: As discussed earlier, U.S judicial branches have primary responsibility for their own administration, but the legislature retains the authority to determine how much public funds to spend each year on the courts and to direct within broad categories at least, how to spend it. Legislatures furthermore often have the constitutional authority to changes court organization and jurisdiction. The legislature's power of the purse and, in the federal and some state systems, the authority to structure the courts creates a legislative oversight role that promotes a form of public accountability.

Accountability Through Statistical Reporting: Reporting systems that provide descriptive statistics on judicial activity promote accountability. They can indicate, for example how

[16] Of the 826 complaints acted upon during the year ending September 30, 1999, chief judges dismissed 406 complaints, 300 of them because they were directly related to a decision or procedural ruling. Chief judges forwarded the other 420 complaints to councils of judges for review, which dismissed 416 of them. (Grounds for council dismissal not available) (source Report of the Director of the Administrative Office, 1999 :8081

many cases were presented to the courts for decision and how many the courts disposed, and by what methods. These data can be compared to pre-established standards (e.g. not more than six months should elapse between filing of a major civil case and its disposition) or among courts. The federal judicial system has one of the world's most elaborate reporting system (Administrative Office of the U.S Courts) and many state court systems are also highly developed. This reporting system describes case processing activity. They usually report activity in the aggregate (example by an entire trial court) rather than by individual judge. The fact of reporting such data may exert some pressure on judges to change their behavior to conform to that of their peers. Some reporting requirement, have behavioral changes as a specific objective. For example, in 1990 Congress directed the Administrative Office of the U.S Court to disclose, semiannually, for each federal judges by name, the number of motion pending for six months, the number of non-jury trials with no decision for over six months, and the number of cases pending for over three years (along with the names of the cases involved) (28 U.S.C$476). The object was to encourage judges to dispose of cases with sufficient promptness to avoid the embarrassment of a public report. The legislation, and similar state legislation, probably has that effect to some degree although such requirements are amenable to manipulation. For example, some courts had adopted a practice of accepting notice from an attorney that she would filed a motion but then giving the filing party 30days to collect all papers, briefs, and other documents necessary for a "fully submitted" motion, even if some documents were not necessary for a decision on the merits. The courts then used the "fully submitted" date instead of the initial motion filing date as the start date for the six month pending period, thus creating an extra 30days to decide the motion (The judicial conference similar practices).

c. Cultural Expectation

The cultural expectation is that judges ought to behave independently. To be a judge in the United States is to decide cases according to the law and the facts despite the pressure of political sponsors and even popular opinion. "Judicial independence," is in part a state of mind, a matter of expectation, habit, and belief among not just judges, lawyers, and legislative, but millions of people. This expectation is strongest with respect to direct intervention in cases. A 1996 survey revealed that 84 percent of U.S citizens regard it as "not reasonable" for political actors to attempt to influence a judge's decision in a case. Certainly, the press stands ready to dig out and report such tampering. As one U.S judge put it during a

hemisphere judicial conference, the "media would have a field day" if it learned that a political party or government official had tried to influence a judge's decision behind the scenes. Courts in the United State are not perceived as simply instruments of the State. Rather courts are to be impartial, regardless of the parties and the issues, and must enforce the rights of the individuals against the government, even when it may be unpopular to do so.

While most people think individual interventions to influence judicial decisions are improper, there is probably less popular support for judges' deciding cases contrary to widely held public preferences. A noted, voters have removed from office some state judges who have done so and some federal judges subjected to demands impeachment in retaliation for their controversial decisions in certain cases. Despite such examples, the U.S public has regularly shown a high level of tolerance for independent decision-making. Recurring call for term limits for federal judges have never gotten very far, and for the last several decades States have been incrementally changing their judicial selection system away from partisan elections and toward nominating commissions and retention elections. To the degree people have attitudes toward the courts, public trust in the judiciary is general high. Americans express more confidence in the judicial branch (78 percent giving it a high rating) than the executive and legislative branches of government. Maintaining that confidence, furthermore, presents a challenge for those who select judge at every level. This challenge involves they ensure that the bench is not only competent and honest but also that it reflects the demographic makeup of the society it serves. These efforts are important not so that loyalty to demographic interests replaces independence decision making. They are important rather so that all members of society will have confidence that the judicial decisions affecting them were made by a judiciary accountable to and representative of the diverse interests of society.

8.2 United Kingdom

a. A Brief Outline of the Governmental Structure of the UK

The basic governmental structure of the UK is simple[17] There are two Houses of Parliament: the Commons, whose members are elected and the Lords, whose members are appointed and were hereditary until 1999. The government is selected from both Houses by the Prime

[17] For a thorough outline of the governmental structure, see Rodney Brazier, *Constitutional Practice: The Foundations of British Government* (3 ed .1999)

Minister.[18] However, the House of commons is considered the dominant House and the base of sovereign authority[19]. By the early nineteenth century, parliamentary sovereignty had been accepted by lawyers and political theorists[20]. The Power to enact and repeal legislation officially resides in the King Lords, and Commons jointly[21] with the role of the Crown now reduced to a mere formality. By reducing the role of an independent crown, Parliament has consolidated the governing power of the UK.[22]

The House of Commons is the directly elected House of Parliament.[23] The Commons carries out almost all of the legislative and governing functions in Parliament.[24] While the current proposals for constitutional reform do not seek to alter the responsibilities of the Houses of Common directly, the reformation of the House of Lords into a functional legislative House would create a balanced bicameral legislature that would naturally check some of the current Commons" power[25] The Prime Minister is elected as the leader of House of Commons and acts as the UK's executive as the head of government.[26]

Representing the upper house of Parliament, the House of Lords has a traditionally hereditary membership.[27] Although constructed as a house of nobility to balance the power of the public in the House of Commons[28] Beside its deferential legislative role, the House of Lords also serve a judicial function.[29]

[18] Eric Taylor, *The House of Commons at Work ix* (Macmillan Press 9th ed. 1979)

[19] Lord Irvine of Lairg, Sovereignty in Comparative Perspective Constitutionalism in Britain and America, 76 N.Y.U.L Rev 1, 13 7 NN56-58(2001)

[20] Jeffery Goldsworthy. The Sovereignty of Parliament: History and Philosoghy 221 (199) for example in 1830, Samuel Taylor Coleridge stated that: The Omnipotence of parliament, in the mouth of a lawyer, and understood exclusively of the restraints and remedies within the competence of our Law-courts (as opposed to restraints and remedies within the competence, nd understood courts (as opposed to resistance by the nation as a whole) is objectionable only as bombast. It is but a puffing pompous way of stating a plain matter of fact….(Within the sphere of the Courts quicquid Rex cum Parliamento voluit, Fatum sit (whatever the King with Parliament has decided, let it be fate)

[21] *ibid*

[22] *ibid*

[23] Taylor, *supra* note 37 at ix

[24] Meg Russell, Reforming the House of Lords: Lessons from Overseas II (2000) (noting that the House of Commons (is) where most major legislation begins)

[25] *op cit* at 254-59

[26] *ibid*

[27] *ibid*

[28] Walter Bagehot The English Constitution 71 (2001)

[29] Supreme Court supra note 4,& 8. The judicial role of the House of Lord lies at the center of the supreme court proposal see infra part I.E for an historical look at the judicial role of the House of lords, see Robert Stevens Law and Polities: The House of Lords as a judicial Body 1800-1976 (hereinafter Stevens Law and Politics)

The House of Lords is a house in transition[30]. Recent New Labour reforms have resulted in the appointment of some Labour Lords on the basis of achievement rather than heredity[31].

The House of Lord Act 1999[32] reformed the upper house into a transitional chamber[33] and more reforms are proposed.[34] If realized, the new reforms would result in a U.S Senate like house with expanded legislative and governing functions. The realization of the bi-cameral remodeling remains uncertain because unlike most constitutional reforms they are not taking place during a national crisis and are subject to political sacrifice[35].

The executive branch has grown in power despite the obsolescence of the Crown. Traditionally, the Prime Minister is simply the first minister and part of the Parliament[36]. In practice, the Prime Minister a member of the House of Commons selected to lead the government, has become a presidential figure over the last 30 to 40 years[37] while still holding a seat in the legislative Parliament, the Prime Minister selects a Cabinet of advisors, conducts the foreign policy of the UK and proposes legislation and constitutional reforms.[38] Without a formal system of checks and balances or an internal balance of parliamentary power, the Prime Minister can act unilaterally to create a Supreme Court of the UK[39].

b. Parliamentary Sovereignty, a Balance of powers, and the Separation of Powers.

The political theories contributing to the distribution of governing power in the UK are quite complicated. Scholars and politicians both frequently use the terms "parliamentary sovereignty," "balance of powers," and "separation of powers" in combination to describe the

[30] Russell *supra* note 43
[31] HOL's Next Step *supra* note 17& 24-28
[32] House of Lord Act, 1999 c 34 & 2(2) (Eng) available at http://wwwlegislation.hmso.gov.uk/acts1999/1990034htm accessed on 6/12/16
[33] Russell, *supra* note 43 at 340
[34] *ibid* at 15 261-92 (discussing the role and functions of the reformed chamber)
[35] *ibid* at 339 Russell noted that "{e}ven true democrats in government will find it hard to prioritise a parliamentary reform which will involve their work being scrutinized more closely." Id at 340
[36] Picker *supra* note 22, at 19
[37] *ibid* at 19-20 (In fact, if not in theory, the Prime Minister is Head of State, Chief Executive and Chief Legislator, and while in office is not circumscribed by any clear or binding constructional limitations."
[38] *ibid* at 19
[39] *ibid* at 20 If the Prime Minister and the Cabinet, collectively the Executive, are together in the Parliament, then the parliament can act as a check on the Executive's power. If the executive and the Parliament are formally separate, then checks and balance can be built into the system as in the United States. However, if the Executive and the Parliament are not formally separate, yet are in fact separate, there will then be no structural checks and balances and the Executive will have carte blanche power to act as it so desires.

British system[40]. Therefore, a simplistic description and general understanding of the relation of the three concepts is necessary for the purpose of this work: Parliamentary sovereignty vests Parliament with supreme legal authority[41], the balance of powers required that the government informally share its legislative, executive, and judicial powers[42] while the separation of powers although always historically recognized, rises in prominence with the increased focus on individual rights flowing from the HRA.

1. Parliamentary Sovereignty

The historical explication of parliamentary sovereignty is clearly set out by A.V Dicey, one of the preeminent British constitutional scholars at the turn of the 20th century[43]. Dicey argued that, Parliament was sovereign because it has "the right to make or unmake any law whatever[44]. Dicey's original conception held that then "Queen in Parliament" gave parliament supremacy over British political institutions[45]. Since Dicey, scholars have refined the concept to illustrate the growing preeminence of parliament and the reduction of the Crown's role. Jeffrey Goldsworthy, a constitutional lawyer and a professor at Monash University, examined the historical emergence of parliamentary sovereignty and defined the historical conception of the doctrine: "Parliament is able to enact or repeal any law whatsoever, and…. The courts have no authority to judge statutes invalid for violating either

[40] Stevens, *supra* note 6 at 85-86 for example, in the Supreme Court proposal the government suggests that a Supreme Court is necessary to ensure the separation of powers but, retains the concept of parliamentary sovereignty. Supreme Court, *supra* note 4 . Executive summary 20, 23 see also infra Part 11.A

[41] AV Dicey, *Introduction to the study of the Law of the Constitution* (10 th ed 1961); Douglas W.Vick, *The Human Rights Act and the British Constitution* 37 Tex Int'l LJ. 329 335 & nn.38-41 (2002) Prof. Vick is a lecture of Law at the University of Stirling at 329.

[42] Stevens, *supra* note 6 at 89 Because all members of the House of commons and Lords, the Prime Minister and the Law Lords are members of Parliament, all three governing powers reside in Parliament. Taylor, *supra* note 37 at ix

[43] Dicey, *supra* note 60at 39-40 For a discussion on the sovereignty of parliament see id at xxxiv-xcvi 39-85, 138-80 (setting forth the definitive explication) see also Goldsworthy, supra note 39 (providing a recent historical account) Lord Irvine of Lairg, supra note 38 (articulating a modern definitions).

[44] Dicey, *supra* note 60 at 40, cited in Vick *supra* note 60 at 335 n.42 Sir William Blackstone famously noted the extensive power of parliament{I}f the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statue is unreasonable the judges are at liberty to reject it: for that were to set the judicial power above the legislative, which would be subversive off all government. Scott Douglas Gerber. The Myth of Marbury v. Madison and the origins of Judicial Review, in Marbury Versus Madison: Documents and Commentary 2 (Mark A Graber &Michael Perhaceds, 2002) (discussing the origins of legislative supremacy and quoting Blackstone (citation omitted)

[45] Dicey, *supra* note 60 at 39

moral or legal principles of any kind[46]. Lord Irvine of Lairg offered a modern version of parliamentary sovereignty in his article on comparative constitutionalism that focuses on the popular sovereignty of the Hoses of commons, but the supremacy of parliamentary legislation remains[47]. This modern conception of parliamentary sovereignty focused more on the democratic election of the House of Commons: "The legal sovereignty exercised by Parliament now is viewed as deriving its legitimacy from the fact that Parliament's composition is in the first place, determined by the electorate in whom ultimate political sovereignty resides[48].

The Supreme Court proposal facially retained this conception of parliamentary sovereignty by not allowing the court to overturn any legislation[49]. To make parliamentary sovereignty functional and responsive to the needs of its citizen, the UK needs a "self-correcting democracy….. effected by the political mechanisms of ministerial responsibility and parliamentary scrutiny" to preserve individual rights[50]. This concept represents a "working relationship" between the branches of government known as the balance of power[51].

2. Balance of Powers

Premised on parliamentary sovereignty, the British constitutional government uses a balance of power-legislative, judicial, and executive among governing bodies without a formal or explicit delineation of those powers[52]. The premise of this delicate balance is that parliament is the sovereign head of the government, and no derivative part of that government can usurp the power of Parliament as the final arbiter of legislation[53].

The Act of Settlement of 1701[54] marked the first attempt to articulate a separation of powers in the UK[55]. The Act attempted to limit the power of the throne to interfere with the power of

[46] Goldsworthy, *supra* note 39 at I, Dicey *supra* note 60 at 39-40. The deference shown to parliament in the apparent in the proposal for the new supreme court: The power of a court to overturn legislation is unnecessary in the UK because (i)n our democracy parliament is supreme court supra note 4, 23
[47] Lord Irvine of Lairg *supra* note 38 at 13
[48] *ibid*
[49] Supreme Court, *Supra* note 4, 7,23
[50] Vick, supra note 60, 341
[51] Stevens *supra* note 6 at 85
[52] Dicey, *supra* note 60: see also Stevens, supra note 6 at 85-86
[53] Dicey, *supra* note 60, at 39-40 (N)o person or body is recognized by the law of England as having a right to override or set aside the legislation of parliament)
[54] The Act of Settlement, 1701 12 &13 will 3, e.2 (Eng), reprinted in sources of English Constitutional History. A selection of Documents From A.D 600 to the Present at 610 (Carl Stephenson & Frederick Marcham eds, 1937)

Parliament[56]. By failing to separate the powers of the judiciary from the legislature and executive, the Act limits the necessity of and rationale for an independent judiciary.[57]

Without an explicit separation of power, the UK government relies on a balance of powers that informally checks the legislative, executive and judicial power[58]. Lord Simon of Glaisdale has described the balance of powers as "something far more subtle and far more valuable" than a separation of Powers[59]. He reasoned that separation is useless without a proper balance of the legislature and the judiciary[60]. In practice, Lord Simon said, "a balance of powers… will vouchsafe liberty of the subject and individual rights[61]. But some believe that ensuring individual rights and preserving liberty would require formally separating the powers of government.[62]

3. Separation of Powers

As opposed to the balance of powers, the doctrine of separation of powers seeks to empower different branches of government with legislative, executive, and judicial powers independent of each other[63] perhaps the most pointed declaration of the separation of powers was drafted by John Adams in the 1780 Massachusetts Constitution[64]. The founders of the United State

[55] Stevens, supra note 6, at 9 The effort to keep the executive out of the legislature and to offer a measure of protection to the judiciary could have led to a concept of the separation of powers along what became the American model. Yet balance of powers rather than separation of powers was the British choice.
[56] *ibid*
[57] *ibid*
[58] *ibid* at 85
[59] Parl. Deb, H.L (5 th Ser.) (1999) 719 Lord Simon's Statement reads, what we had was not separation of powers but something far more subtle and far more valuable a balance of powers. It is no use separating your executive if it has powers over the individual which are considered inordinate. The executive's powers should be balanced by that of the legislative and the adjudicature. That is threatened by advocacy of a system purely based on separation of powers. It is a balance of powers that will vouchsafe liberty of the subject and individual rights at 85-86
[60] *ibid* at 85
[61] *ibid* at 86
[62] infra Part 1. B.3
[63] Writing in favor of the division of governmental authority in his book. The Spirit of laws, Montesquieu wrote: There is no liberty if the judiciary power be not separated from the legislature and the executive. Were it joined with the legislative, the life and would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. Charles de secondat Montesquieu. The Spirit of the Law (Anne M. Cohler et al trans and eds 1989) (1748) cited in RMA Chongwe Judicial Review of Executive Independence. A Commonwealth Approach 103, 105 (John Hatchard & Peter Slinn eds 1998) (hereinafter Chongwe, Judicial Review of Executive Action)
[64] Adams's Article reads: In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them. The executive shall never exercise the legislative and judicial powers, or either of them. The judicial shall never exercise the legislative and executive powers or either of them: to the end it may be a government of laws and not of men Ma. Const. art XXX cited in Morrison v Olson 487 U.S 654,679 (1988) (Scalia, J. dissenting); see also Robert Stevens, A Loss Robert Stevens, A loss of

established a government with formal separation of powers with the legislative Congress, the executive President, and the judicial Supreme Court, although it was not as strict as Adams' conception[65]. As Vick notes, the English conceive the separation of powers as "essential to the protection of the individual from the arbitrary exercise of power by the state.[66]

Unfortunately, the modern separation of powers in the UK proves difficult to define succinctly[67]. One scholar found that UK scholars paid little attention to the principle of the separation of powers and instead focused on the balance of powers[68]. When they did discuss the separation of powers, UK scholars dismissed the doctrine for lack of coherence preferring the balance of powers to protect individual liberties.[69]

Instead of Montesquieu's conception of strictly separated powers, scholars have found a highly modified form of separation powers in the UK. Professor Vick, in a 2002 article, offered perhaps the most succinct version of the emergence of the separation of powers in the UK[70]. He traces the early exposition of the concept to the thirteenth century reign of Edward I[71]. He notes that the modern system of internal checks and balance is more complex than Montesquieu's conception[72]. The legislative functions are intimately related to the executive power. Indeed, executive power, referred to as the government, consists mainly of members of parliament[73]. This close interaction between the executive and the legislature is viewed as"{t}he efficient secret of the {British} Constitution[74]. Similarly, as N.W Barber noted in his recent article, the Montesquieu ideal is never seen in practice[75]. Instead modern states have "many interlinked legislative bodies," the judicial power is shared by administrators and courts, and the executive picks up any power the other two leave behind[76]. In a 1995 article, Barendt found that the executive and legislature were not effectively separation because there

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Innocence? Judicial Independence and the Separation of Power, 19 Oxford J.L.S 365 384-85(1999) (hereinafter Stevens Loss of Innocences)

[65] Chongwe, Judicial Review of Executive Action, *supra* note 82 at 105

[66] Vick, *supra* note 60 at 341

[67] Maurice John Crowley Vile, *Constitutionalism and the Separation of Powers* (2nd ed. 1998) N.W Barber, Prelude to the Separation of Powers, 60 Cambridge L.J 59 (2001) (arguing that efficiency, not liberty, is the basis of separation of powers) Eric Barendt, Separation of Powers and Constitutional Government, 1995 Pub L. 599 606 (defining the separation of powers doctrine as preserving liberty and individual rights)

[68] Barendt, *supra* note 86, at 599

[69] Id at 599-600(describing the doctrine's treatment by Sir Ivor Jennings) (citing Sir Ivor Jennings. The Law and Constitution 7-28 and app 1 (5th ed 1969)

[70] Se Vick, supra note 60 at 342 nn.90-100

[71] Id at 342 & n.90

[72] Id at 342 & n.92

[73] Id at 342 & n.93-94

[74] Id at 342 (quoting Bagehot surpa not 47, at 10)

[75] Barber, supra note 86 at 70-71

[76] Id at 71

was no system of checks and balances[77]. But argue that judicial power was separated from the legislative and executive[78]. Barendt also expressed concerns that, although separated from parliament, the judiciary needed the power to check Parliament[79].

The muddled state of the separation of powers in the UK provided the Labor government with the recent impetus to reform the House of Lords[81]. But Barendt argued that no major party "would favour constitutional reform which would impose more effective checks and balances on the executive[82]. And indeed, the government's proposal explicitly limited the judiciary's ability to overturn legislation[83]

c. A Brief Outline of the United Kingdom's High Courts

Two courts presently divide the functions of the highest court in the UK[84]. The Appellate Committee of the House of Lords hears appeals from the courts of England, Wales, and Northern Ireland, as well as civil cases in Scotland[85]. The Judicial Committee of the Privy Council considers questions involving the devolved powers of the Scottish Parliament, the National Assembly for Wales, and the Northern Ireland Assembly[86].

1. The Appellate Committee of the House of Lords

The Lords of Appeal in Ordinary ("Law Lord") are members of the House of Lords and sit on both the Appellate and Judicial Committees[87]. Currently, twelve Law Lords have been specifically appointed under the Appellate Jurisdiction Act of 1876[88]. In addition, retired

[77] Barendt, Supra note 86 at 614
[78] Id at 615 (finding that judges could not sit in the House of Commons, are protected from removal, and the House of Lords appellate functions were limited to judicial peers). However, Barendt also noted that the position of the Lord Chancellor and "the freedom.. of the Law Lords to participate in the legislative debates of the Upper House, contravene the principle, albeit moderately and perhaps acceptably" Id
[79] Id at 617 (Judicial control of parliamentary privilege is vital to prevent the legislature, or one branch of it abusing its powers)
[81] Supreme Court, supra not 4 foreword
[82] Barendt, supra note 86 at 617
[83] Supreme Court, supra note 4, 23; see infra Part III
[84] Supreme Court, *supra* note 4, 2
[85] *ibid*
[86] *ibid*
[87] *ibid* 3
[88] Appellate Jurisdiction Act, 1876 39 & 40 Vict. E. sched 6, 25 (Eng) reprinted in Sources of English Constitutional History. A Selection of Documents from A.D 600 to the Present, at 753 (Carl Stephenson & Frederick Marcham eds (1937): Supreme Court, *supra* note 4,9.

judges who are otherwise members of the House of Lords are eligible to sit on both committees[89]. All law Lords are full members of the House and hold lifetime peerages.[90]

Historically, the role of the House of Lords in the judiciary developed from Parliament and the courts of early medieval monarchs[91]. Attempts to formally abolish appellate jurisdiction and set up a separate court of appeal during the 1870s achieved some limited success[92]. The Act was passed in 1873 but was never put into effect.[93]

The appellate jurisdiction of the Appellate Committee reaches most of the UK[94]. That jurisdiction is generally discretionary[95]. Each case is heard by a panel of five Law Lords[96]. Judgments are delivered in the chamber of the House and are reported from the committee to the House[97]. The Law Lords have taken steps to remove themselves from apparent conflict by limiting their activities in the House of Lord.[98]

[89] Supreme Court, supra *note* 4, 8-9 ("A)ny holder of high judicial office who is a member of the House under the age of 75 is also eligible to sit). There are fourteen Lords who currently fit this requirement , bringing the total number of judges allowed to sit on an appeal to the House of Lords to 26 Id 8

[90] Id 9

[91] Id 10 Early advisors to the King formed a court of parliament which included judges and the "Lords spiritual and temporal. Id Around the fourteenth century, the Lords look control of appellate jurisdiction Id. The practice fell into disuse in the sixteenth century but was revived during the seventeenth century as Parliament asserted its authority against the Crown Id. The judicial work of the Lords was so poor that by the mid-nineteenth century, the Crown began to appoint" life peers judges" to improve the judicial functions of the House Id. The Appellate Jurisdiction Act 1876 confirmed the Lords Jurisdiction and allowed the appointment of judicial peers. Id. The right to appeal from the court of session to the Scottish Parliament in civil was added in 1707Id. The House of Lords' judicial role remain largely unchanged Id See generally Stevens, Law and Politics, *Supra* note 48

[92] Supreme court, *supra* note 4 ,10

[93] Id

[94] The Law Lords hear appeals from: the Court of Appeal in England and Wales and Northern Ireland (both civil and criminal): the Courts of session in Scotland (civil); the High Court in England and Wales and High Court in Northern Ireland (criminal); the Courts Martial Appeal Court; and in rare cases certain civil cases from the High Courts in England and Wales and Northern Ireland Id

[95] Almost all appeals required either the permission of the court below or of the House before a party can make an appeal Id

[96] *ibid*

[97] *ibid*

[98] On June 22, 2000 Lord Bingham of Cornhill announced the principles guiding the Law Lords' Participation in the House As full members of the House of Lords the Lords of Appeal in Ordinary have a right to participate in the business of the House. However, mindful of their judicial role they consider themselves bound by two general principles when deciding whether to participate in a particular matter, or to vote: first the Lord of Appea l in Ordinary do not think it appropriate to engage in matters where is a strong element of party political controversy; and secondly the Lords of Appeal in Ordinary bear in mind that they might render themselves ineligible to sit judicially if they were to express an opinion on a matter which later be relevant to an appeal to the House 614 Parl. Deb, H.L (5th Ser) (1999-2000) 419 see also Supreme Court, supra note 4, 13

2. The Judicial Committee of the Privy Council

The Privy Council Appeals Act of 1833[99] established the Judicial Committee of the Privy Council. The Judicial Committee retains the right to receive appeals from within the common wealth. The membership of the Judicial Committee is wider than the Appellate Committee.[100] Besides the Law Lords and all other members of the Appellate Committee, the Judicial Committee includes other Privy Counsellors who have been or are senior judges of court with the UK[101]. The Judicial Committee has three main functions. First it is the final court of appeal for many commonwealth jurisdictions and Crown Dependencies[102]. Second, the Committee hears devolution cases[103]. Third, the Committee has technical jurisdictions, such as appeal against pastoral schemes in the Church of England[104]. The Judicial committee is not affected by the proposed Supreme Court beyond the cases concerning devolution[105]. The future of this court structure is now the subject of prospective reform because of the passage of the HRA, an Act of Parliament that positive individual right to a trial before an independent and impartial tribunal.

d. Defining Judicial Impartiality and Independence

Article 6 (1) of the Human Rights Act 1988 recognizes the right to a fair trial before an independent and impartial tribunal[106]. Judicial independence and impartiality are related but distinct concepts that required definition before this Comment can examine their impact on the new Supreme Court.

[99] Privy Council Appeals Act, 1833 3 &4 Will,c 41 (Eng) reprinted in Sources of English Constitutional History. A selection of Documents From A.D 600 to the present, at 725 (Carl Stephenson & Frederick Marcham eds, 1937)

[100] Supreme Court, *supra* note 4, 15 Originally, the Judicial powers of the appeals to the sovereign in foreign and domestic cases but the judicial powers of the Privy Council in England and Wales were abolished in 1641 Id 182 Id , 16

[101] *ibid*

[102] The Crown Dependencies include Jersey, Guernsey, and the Isle of Man Id

[103] Id Devolution cases come" from the court in Scotland, Northern Ireland or England and Wales or directly by the UK Government or one or other of the devolved administration."Id. The Committee determines issues of legal competence of the devolved organization, regarding the relevant devolution legislation Id. For general discussion on devolution see Picker supra note at 22, at 22-52 (discussing devolution in general and devolution in general and devolution in Scotland specifically)

[104] Supreme Court, *supra* note 4, 17

[105] See Supreme Court, supra note 4, 21,28

[106] *ibid* at 331 & n. 14

1. Impartiality

To uncover the proper understanding of judicial impartiality, this research looks to the Human Rights Act, 1998 (HRA) and its subsequent case law. Article 6 (1) of the HRA required that a court must be impartial[107]. In their book discussing the judicial review of the HRA, Richard Gordon and Tim Ward reviewed the case law definition of impartially[108]. To determine impartiality, the court must decide whether there is a "real danger of bias on the part of the relevant member of the tribunal[109]. Additionally, there are automatic grounds for judicial recusal including financial involvement and person interest[110].

The House of Lords expanded the circumstances for automatic disqualification in *Reina v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinocher Ugarte (No. 2)*[111]. There, the Law Lords clarified the impartiality standard to include matters where the judge is involved with one of the parties in the promotion of the cause[112]. The expanded rule is that a man cannot be a judge in his own cause[113]. Previously, the grounds for automatic recusal related to a judge's monetary or economic interest[114]. This expanded definition of impartiality has cast serious doubt on the actions of the Law Lords[115]. Given their potential dual role of legislator and judge, Law Lords would run afoul of the Human Right Acts and Pinocher if

[107] Human Rights Act, 1998 c. 42 sched 1 art 6 (1) (Eng) available at http://www.legislation.hmso.gov.uk/acts/acts1998/80042-d.htm accessed on 14/12/16

[108] Id: see Richard Gordon QC & Tim Ward, Judicial Review and the Human Rights Act 183 (2000)

[109] Regina v Gough I.A.C 646, 670 (H.L.1993) The court defined the general test for impartiality in domestic judicial review as having ascertained the relevant circumstance, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour or disfavor, the case of a party to the issue under consideration by him Id (emphasis added).

[110] See Gordon & Ward, supra note 116, at 183-84

[111] (2000) I.A.C. 119 (H.L 1999)

[112] See id at 132-37 Lord Browne-Wilkinson, Discussing the reasoning of the bias rule found that: although the (previous) cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact: therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judges decision will lead to the promotion of a cause in which the judge is involved together with one of the parties id at 135; see also Gordon & Ward, supra note 116, at 183-84 (citing and discussing the same)

[113] I.A.C at 135

[114] See supra text accompanying note 119

[115] Since Law Lords retain the right to speak on causes in the House of Lords they could judge in their own cause CF Lord Steyn, supra note 7 at 383

they did not recuse themselves if speaking for a proposal in the House of Lords is considered acting in their own cause[116].

In *Locabail (U.K) Ltd v Bayfield Properties Ltd and Others*[117] the Court of Appeal narrowed the grounds of personal interest recusals[118]. The court found that these disqualifications would be extremely rare[119]. It suggested that the preferred test for protecting the Article 6 (1) right was by providing for the disqualification of judges when there was a real danger of bias.[120]

The "real danger" test, as set out in *Regina v Gough*,[121] sets up a less demanding test than that envisioned by the Strasbourg Court. A review of the case law indicates that few situations violate Article 6 (1) on impartiality grounds[122] In *Davidson v Scottish Ministers (No.2)* [123]the court found that a Scottish Lord failed the "real danger" test. There, the Lord had spoken three times in the House of Lords on the issue at trial. These legislative actions created "a real possibility of bias[124]By limiting their involvement in the legislative activities of the House of Lords, the Law Lords can satisfy the requirements of Gough and Pincochet.[125] Judicial impartiality then requires the freedom from bias of an individual judge in an individual case, but the judicial independence from Parliament focuses on the structural foundations of the UK's high court[126].

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[116] See Lord Steyn supra note 7 at 382

[117] 2000 Q.B 451 (Eng. C.A)

[118] Id at 452-53; Gordon & Ward, supra note 116 at 184

[119] Gordon & Ward, supra note 116 at 184

[120] *ibid*

[121] *supra* note 118 and accompanying text

[122] Compare R. (Anderson) v Sec'y of State for the Home Dep't I.A.C 837 (H.L 2003) (holding that secretary of state fixing minimum sentence tariff for prisoner despite recommendation of judiciary violated Article 6 (1) and Davidson v Scottish Ministers (No.2), 2002 S.L.T 1231(2d Div Sept11, 2002) (holding that Lord Hardie's Legislative actions in the House of Lords cast real doubt and "when looking at the issue objectively, the fair minded and informed observer would have concluded that there was a real possibility of bias") available at 2002 WL 31173554(case summary) with Coppard v Customs and Excise Commissioners, 2003 Q.B 1428(Eng. C.A) (dismissing Article 6 (1) argument) and Adan v Newham London Borough Council, I.W.L.R. 2120 (Eng. C.A 2002) (dismissing Article 6 (1) argument

[123] 2002 S.L.T 1231 available at 2002 WL 31173554 (case summary)

[124] [102] Id at 1240

[125] In fact, the Law Lords have taken significant steps to lessen any concerns of impartiality by ceasing almost all legislative functions see Supreme Court, supra note 4,3; Lord Steyn, supar note 7 at 383-84 (noting that, while the Law Lords have no official bar to taking part in legislative action, the practice of participating in legislative hearing has" wither(ed) away")

[126] Because under the balance of powers the executive and legislature are not separate, the current structure may violate Article 6 (1) see infra notes 141, 343-48 and accompanying text.

The United States Supreme Court recently examined the definition of judicial impartiality. In Republican Party of Minnesota v White[127] a case involving campaigns for judicial office, Justice Scalia, writing for the five justice majority, defined judicial impartiality as "the lack of bias for or against either party to the proceeding[128]. The court was faced with the issue of whether a state statute could limit judicial candidates from discussing their opinions on political or constitutional issue[129]. It found that the statute violated the positive individual right of free speech protected by the First Amendment because the statute was not narrowly tailored to preserve a compelling state interest of impartiality[130]. By looking at the plain meaning of the term impartial the court decided that judicial impartiality can exist even where judges have expressed opinions on particular issues[131]. Although informative, the U.S Supreme Court's view on impartiality does not control here.

2. Independence

In defining judicial independence under Article 6(1), the European Court on Human Rights has said that the court must be independent of the parties involved and the executive[132]. Factors to consider when examining independence include the manner of appointment, the duration of office protection against external pressure, and whether the body presents an appearance of independence[133]. Another factor is whether the court can give a binding decision[134]. The government's Supreme Court proposal focuses on the "appearance of independence" requirement[135]. When examining the Law Lords presence within the House of Lords, few cases question their independence[136].

[127] 536 U.S 765 (2002)
[128] Id at 775. The court considers three definitions of judicial impartiality: (1) requiring an absence of bias to a party(2) requiring a lack of preconception in favor of or against a particular legal view(3) requiring "openmindedness," which "demands… that he be willing to consider views that oppose his preconceptions and remain open to persuasion, when the issue arise in a pending case" Id at 775-78
[129] Id at 768
[130] Id at 776-77
[131] *ibid*
[132] Gordon &Ward, supra note 116 at 185 (citing Ringeisen v Austria No. 1,1 Eur H.R. Rep. 455-490 (1979-80)
[133] Campbell & Fell v United Kingdom 7 Eur H.R.Rep.165, 198-99 (1985)
[134] Findlay v United Kingdom, 24 Eur H.R Rep 221 (1997)
[135] Supreme Court supra not 4,3(noting that the HRA "now requires a stricter view to be taken not only of anything which might undermine the independence or impartiality of a judicial tribunal, but even of anything which might appear to do so")
[136] Gordon & Ward, *supra* note 116 at 174-77, 185-86

The cases that do focus on independence generally deal with administrative actions[137]. In Vv United Kingdom,[138] the ECHR held the actions of the Home Secretary in setting the punishment of a detained child violated Article 6 (1). In *Smith v Secretary of State for Trade and Industry*[139], an English court questioned whether employment tribunal could properly adjudicate claims against the Secretary of State for Trade and Industry[140]. These cases highlight the dual roles of administrative agencies and the lack of separation of powers between the executive and judicial.[141]

The independence of individual British judges when ruling on a particular case has only recently been seriously questioned[142]. English judges share common "hallmarks of {judicial} independence security of tenure, fiscal independence, impartiality and freedom from executive pressure[143]. English judges have significant protection against arbitrary removal. Under the Act of settlement of 1701[144] judges could only be dismissed with the agreement of both House of Parliament[145]. Historically, fiscal independence provides evidence of judicial independence. The Law Lords receive a salary for their judicial work paid from a account separate from the House of Lords[146]. A third hallmark of judicial independence is freedom from political pressure and executive influence[147]. But while the traditional hallmarks of independence and impartiality may be satisfied, the HRA may require maintaining the appearance of both as well.

3. The Appearance of Independence and Impartiality

The continued integration between the UK and the European Union generally, and the passing of the HRA specifically, brings the appearance of judicial independence from

[137] *ibid* at 186 (noting that "much administrative decision making fails to satisfy (the Strasbourg) requirement(s)
[138] App. No. 24888/94, 30 Eur. H.R.Rep 121 (1999) (discussing conviction and sentence for abduction and murder of two year old boy)
[139] Smith v Sec'y of State for Trade and Industry No. EAT/747/97, 199 WL 809053(EMP.App. Trib. Oct 11,1999)
[140] *ibid*
[141] Gordon & Ward supra note 116 at 174-77
[142] infra notes 188-95
[143] Stevens, *supra* note 6, at 79
[144] Act of Settlement 1701, 12 &13 Will. 3 c.2 (Eng.) reprinted in sources of English Constitutional History. A selection of Documents from A.D 600 to the Present, at 610 (Carl Stephenson & Frederick Marcham eds. 1973)
[145] *ibid*
[146] Supreme Court, *supra* note 4, 9. The Law Lords are" paid from the Consolidated fund not the budget of the House of Lords" Id
[147] Stevens, *supra* note 6, at 79

Parliament into greater relief[148]. The adoption of the HRA into British domestic law demonstrates the increasing importance of similar governing structure within the EU nations[149]. While the individual nations retain their forms of national government, the protection of positive individual rights forces the UK to separate at least the structural dependence of the judiciary on parliament[150].

While the judiciary already may be both independent and impartial in practice the appearance of conflict may warrant constitutional reform. To conform to the expectations of modern European federalism the UK judiciary must appear independent and impartia[151]l. When the UK's highest court sits in a hereditary house of parliament an obvious potential conflict arises[152]. In fact, the government specifically addresses the appearance of judicial independence with the proposal for the Supreme Court.[153]

The appearance of impartiality, however, will not likely be affected by the proposed court. Impartiality concerns the potential for bias of an individual judge in an individual case[154]. The constitutional reforms aimed at the appointment of judges are of greater consequence to impartiality concerns[155]. With a working understanding of judicial independence and impartiality, this comment details the structure of the UK's high courts of appeal, which would be directly affected (if not supplanted) by the proposed Supreme Court.

e. The Impact of the Human Rights Act

The passage of the HRA delivered on the campaign promises that swept the New Labour party into power. Following May 1997 elections, the New Labour government rose to power[156]. As part of its platform, New Labour promised to reform the House of Lords, to consider proportional representation in the House of Commons, to devolve power to Scotland

[148] The future of parliamentary sovereignty, the basis of the British constitutional structure is challenged by EU Membership see Lord Irvine of Lairg supra note 38 at 3 & n.11
[149] Vick, supra note 60 at 350 see also Ashcroft supra note 9 at 18-19 (describing the relationship between the EU and the ECHR)
[150] See Lord Irvine of Lairg supra note 38, at 3 &n.11
[151] See id
[152] Supreme Court, supra note 4,2,3
[153] See infra Part 11.A.
[154] See supra Part 1.D.1
[155] The appointment reforms will create a standard method for dealing with concerns of impartiality see A New Way of Appointing Judges supra note 17
[156] Stevens, *supra* note 83 at 368

and Wales, and to incorporate the ECHR into British domestic law[157]. This last promise became a reality with the HRA.

Before the adoption of the HRA, British citizen could only seek redress for human rights violations from the Strasbourg court[158]. The court Strasbourg questioned the independence of the British judiciary in a series of cases[159]. These cases focused attention on the growing separation of powers in the UK[160]

In McGonnel v United Kingdom[161] the Strasbourg court found that there was a lack ofseparation of powers that violated Article 6 (1) of the ECHR[162]. This line of reasoning, directly question the separation of powers in much of n court the British judiciary. The Lord Chancellor had executive, legislative and judicial duties while the Lords of Appeal in Ordinary had judiciary and legislative duties[163]. The muddled state of the UK's judiciary appeared prominently in Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinocher Ugarte (No.1)[164]. In October 1998, the former dictator of Chile, General Pinochet, was arrested in the UK while receiving medical attention[165]. The arrest warrant was challenged on the ground that the arresting magistrate had not met the provisions of the Extradition Act 1989 and the sovereign immunity protected the general[166]. The Appellate Committee panel read the requirements of the Act broadly and held that the violation of international human rights took precedence over the strict requirements of England law[167]. In response to these cases and political pressure, Parliament passed the Human Rights Act of

[157] *ibid*
[158] *ibid*
[159] Mc Gonnell v United Kingdom App. No 28488/95, 30 Eur H.R Rep 289 (2000) (finding the impartiality of the Royal Court of Guernsey) see also Procola v Luxembourg App No. 27/1994, 22 Eur H.R Rep. 193 (1996) (finding the impartiality of Judicial Committee of Conseil d'Etat)
[160] Stevens, *supra* note 6,at 104
[161] App. No. 28488/95, 30 Eur. H.R. Rep 289 (2000) (impartiality of Royal Court of Guernsey)
[162] The European court found that the court of Guernsey did not meet the standards of Article 6 id at 309. The court stated. The principal judiciary officer who sat on the case, the Bailiff, was not only a senior member of the judiciary of the Island, but was also a senior member of the legislature as president of the State of Deliberation and, in addition, a senior member of the executive as titular head of the administration presiding over a number of important committees. It is true as the Government point out, that the Bailiff spends most of his time in judicial functions, but the Commission considers that it is incompatible with the requisite appearance of independence and impartiality for a judge to have legislative and executive functions as substantial as those in the present case. Id at 300-01
[163] Stevens, *supra* note 6, at 105
[164] I.A.C. 61(H.L.1998) For a further discussion of a related case regarding the definition of judicial impartiality, see supra note 120-25 and accompanying text
[165] Stevens, supra note 6, a 107
[166] See Id
[167] See Id

1998, which incorporated much of the ECHR and allowed international law to apply directly to British domestic law[168].

After the adoption of the HRA, defendants could argue that the reasoning in McGonnel meant that the British judiciary failed the independent and impartial requirements of Article 6 (1) without traveling to the Strasbourg court[169]. A few judges have agreed with them[170]. Most of the Article 6 (1) violations have been of two varieties: either an executive official acts as a judge and violates the independence requirement, or a judge is found in violation of the impartiality requirement[171]. While the case law impact of the Human Right Act has been minimized, "much of the impact of the Human Rights Act has been psychological[172]. Rather than judges actively declaring their dependence and partiality, political momentum led to the government's calling for a clearer separation of powers and new Supreme Court.[173]

In an effort to reduce the perception of dependence, the Law Lords have decided to refrain from legislation that they may later be called on to adjudicate[174]. Law Lords speak rarely to avoid the risk of challenges in the Appellate Committee[175]. The Law Lord have acted affirmatively to maintain the appearance of impartiality and independence, but the current system still allows for the Law Lords to take an active role in the legislative process[176]. It is that potential and apparent conflict which their Supreme Court proposal addresses.

[168] See Ashcroft, supra note 9, at 14-15

[169] See supra notes 191-95 and accompanying text: see also Stephen Grosz et al., Human Right. The 1998 Act and the European Convention 240-41 (2000)

[170] Regina (Alconbury Developments Ltd) v Sec'y of State for the Env't 2 A.C 295 (H.L 2003) (holding the Department of the Environment, Transport and the Regions was not "independent and impartial" under Article 6) see also supra notes 116-50 and accompanying text.

[171] See Grosz, supra note 201, a 240-41

[172] Stevens, supra 6 ,at 114

[173] See generally Lord Steyn, supra note 7

[174] Supreme Court, supra note 4,3

[175] See Lord Steyn, supra note 7, at 383. Over the last three years, Law Lords have spoken in House of Lords on only a handful of occasions: In 2000 a Scottish Law Lord spoke three time. No other Lord of Appeal in Ordinary spoke in that year. In 2001 the same Scottish Law Lord spoke twice, both on debates on reports of the European Union Committee which he had chaired. In 2001 a (sic) English Law Lord made a maiden speech which enabled him to speak to the Hunting Bill Id at 383-84.

[176] *ibid* at 384

CHAPTER NINE

CONCLUSION AND RECOMMENDATIONS

9.1 Conclusion

The researcher in the statement of problem/Research question posited certain questions to be addressed in this work. They are:

a. How is the doctrine of Separation of Powers practiced in Nigeria.

b. What are the roles performed by the judiciary under the various republics?

c. Is the Nigerian Judiciary in exercise of its functions passive or active.

d. What are the various challenges facing the Nigerian judiciary under a Constitutional Democracy

e. What efforts have been made to address these problems/challenges

f. What possible/practicable solutions can be suggested to help address these problems/challenges.

The researcher will at this stage, show that these problems have been treated in this work. On the issue of the doctrine of separation of power, the researcher in chapter Two of the work proffered that in Nigeria, the constitution made provision for the division of the government powers into various branches. These branches are legislative, executive and judicial powers. The legislatures, are the lawmaking arm of government, executive are implementers of the law while the judiciary are the interpreters and judges of the law. The researcher furthers stated that the roles of these three arms of government are distinct and separated by the constitution. It means in essence that one branch of government should not encroach on the domain of another branch of government or exercise the powers of another branch of government. This division of powers of government into three branches is a means of check and balance in the government structure, inorder to protect the people against tyranny. The researcher noted that the provisions of section 6 (6) (d) of the constitution negates this principle of separation of power by exempting the legislative powers of the military from the searchlight and interpretative function of the judicial arm of government in a constitutional democracy.

On the roles performed by the judiciary under a constitutional democracy the researcher stated in chapter seven that according to Uwasi, J.S.C (as he then was) judges do not have an easy job. His Lordship further stated that judges repeatedly do what most people seek to avoid, that is making decision and giving reasons to justify the decision. They have to conduct the matters before them wisely, according to law, so that the parties before them can conclude that they have a fair hearing. In addition, the former President of the Court of Appeal, Akanbi PCA equally stated that by the nature of the office and functions of a judge, the position requires persons with high sence of duty, responsibility, commitment, discipline, intellect, integrity, probity and transparency. The researcher made reference to various case laws in respect thereof but adumbrated that in the case of *Onagoruwa v IGP*, Niki Tobi JCA(as he then was) stated that judges were paid mainly and essentially to uphold the Rule of law in the entire polity. And so, that once judges fail to uphold the Rule of law, anarchy, despotism and totalitarianism will pervade the entire society. Nnaemeka Agu JSC observed that without judges, good judges, there can be no democratic state. The researcher concludes that for a realization of the purposes of a constitutional democracy, the quality and stuff of the judges are imperative.

On the roles performed by the judiciary under the various republics, the researcher further stated in chapter seven that soon after Nigerian gained its independence, the powers of our courts to exercise their functions under the constitution was put to test. The court was called upon to determine the validity or otherwise of the Tribunals of Enquiry Act of 1961. This Act was guilty of many things against the rule of law, namely attempting to oust the jurisdiction of the courts in hearing and determining the civil rights of Nigerians, the right of imprisonment was granted to the tribunals and so on. The Supreme Court held amongst others that section 3(4) of the Act was unconstitutional. During the second republic, the courts in various case laws reviewed legislations passed by the National Assembly and some actions taken by the executive to determine whether they were consistent or inconsistent with the provisions of the 1979 constitution.

Under the military regime, the judiciary still endeavored to see that whenever possible, human rights are protected and justice done despite the psychological situation inherent in a military regime.

Under the present democratic order, the fourth republic, which is founded on the 1999 constitution, accolades have been showered on the courts for its stand on due process and

constitutional provisions in various matters like election, impeachment, constitutional issues and so on, which decisions helped to promote democracy and good governance.

On the issue of whether the Nigerian judiciary in exercise of its function is passive or active, the researcher showed that the courts were passive under the military regime but under democratic dispensation, the courts were active. Considering the various decision of the courts under the present dispensation, one can say that the courts are very active. The researcher made reference to lots of case laws in respect thereof.

On the issue of the various challenges facing the Nigerian judiciary under a constitutional democracy, the researcher dealt extensively on this issue. In the 1999 constitution, an intricate mechanism of checks and balances is built into it. The executive and legislature enjoy their respective control over the judiciary. This can be seen in the appointment process of Justices of the Supreme Court and the heads of all the other superior courts, where the executive appoints and the legislature confirms. Equally, both arms participate in the process of removing the heads of superior courts. This permits both arms to have a say on who becomes a judge or who does not become one. In such a situation, appointment of judges/justices will be less a matter of learning and character than of political sympathies and patronage. On the issue of finance, the judiciary still depends on the executive for the release of fund from the consolidated revenue fund to the National Judicial Council. Due to the above stated control over the judiciary by the executive and legislature, the said two arms of government at times try to encroach and interfere with the powers/functions of the judiciary.

The researcher equally dealt with efforts which have been made to address the problems/ challenges facing the judiciary. The constitution sought to address these issues by the introduction of the National Judicial Council. They make recommendations to the President and Governors for the appointment of justice/judges and their removal. They control the finances of the judiciary but the fund will still be released by the executive. Some of these problems still subsist.

The researcher in chapter nine proffered some recommendations in a bid to address these problems or challenges faced by the judiciary.

9.2 Recommendations

The Nigerian judiciary is trying to live up to expectation. From records, never had the courts given activist and courageous judgments as they have done in these last days especially in the election and pre-election matters. In this way, the judiciary while trying to redeem its image, is giving the people hope in a new democracy. The researcher avers that the restoration of confidence in our nascent democracy is the work which must be done by the judiciary. The researcher at this stage proffers the following recommendations:

9.2.1 Independence of Judiciary

The researcher recommends that the government of Nigeria should guarantee the independence of the judiciary (particularly) now that Nigeria has been democratized. It is a truism that lack of independence (on the part) of the judiciary was one of the reasons the Nigeria judiciary was accused of inconsistency, timidity and inefficiency in handling of cases especially election petition. To cap it all the stability and infact the measure of the democratic nature of any Constitution can easily be determined by the judiciary. There should be broad policy interventions made towards strengthening judicial independence against encroachment by the other arms of government. Stakeholders in judiciary should push for a constitutional amendment so that the executive arm of government would not interfere with their function. This would help insulate judicial officers from arbitrary interference and removal.

9.2.2 Access to Court

Access to court should be guaranteed to the common man by mitigating some of the technicalities and paraphernalia of our court system.

9.2.3 Appointment of Competent Judicial Officers

The Nigerian state has to embark on a re-thinking of the judiciary and judicial system. The starting point should be the appointment of capable and competent hands to the bench. The quota system should be avoided. Training of judicial officers to keep up to date with the developments in the law should be done often. The appointment and removal of judges

should not be at the pleasure of the executive but under the due process of law which guarantees the independence of the judiciary.

9.2.4 Improvement of Working Conditions of the Judges

Any expectation of better performance from our judges without an effort to improve the lot and working conditions of the judges can only amount to wishful thinking. It is suggested that the judiciary be allowed to prepare its budgets, present and defend it at the National Assembly, have the approved budget paid into a judicial account and accountable to the Auditor General for the disbursement and management of such account.

9.2.5 Computerization and the use of Modern Information Technology

This is in line with global trends. Computerization is not merely the provision of computers for offices for word processing functions. It is the actual deployment of the capacities of information technology to solve problems and the general performance of their duties. This requires computers, internet, functional telephones etc.

9.2.6 Rules and Procedures of Courts

Outdated and cumbrous rules of procedures of courts should be reviewed to redress the perennial problem of long delay in trial process. The practice of judges in unnecessary adjournment of cases should be discouraged and erring counsel disciplined.

9.2.7 Obedience of Court Orders

Court orders should be obeyed by all citizens of the country. The spate of disobedience of court orders by the executive arm of the government should be prevented.

9.2.8 Need for Amendment of Section 285 (6) of the 1999 constitution (as Amended)

To avoid stifling the constitutional right of appeal in section 246 (1) b&c, S. 233 (1) (e) and 285 (7) and prevent a miscarriage of justice, there is need to further amend section 285 by the National Assembly possibly along the suggested lines below:

1. That a proviso be included in the said section that excludes interlocutory appeal and that all grounds of appeal whether on interlocutory or final decision should be formulated and filed at the end of final judgment of a tribunal.

2. That a similar provision as in section 294 (5) should be introduced to section 285 so as not to nullify a judgment of the tribunal or court delivered in contravention of section 285 (6) & (7) where the complaining party can prove that he has suffered a miscarriage of justice as a result of such nullification particularly where the delay was not the fault of the petitioner or his counsel, but possibly that of the court or tribunal.

3. That there should be a practice direction limiting the tribunals proceedings to not more than 60days (two months) on any Election petition and a strict adherence to the provision of paragraph 12 (5) of the 1st schedule to the Electoral Act which stipulates that all objections be embedded in the reply and be heard along with the petition. There is no doubt that if the Tribunal avoids taking interlocutory matters or objections much time would be saved and progress made.

4. That the period of public holidays, court vacations and weekends should be expressly excluded from the calculation of the days or alternatively, there should be an express provision that Election Tribunals must sit at all times irrespective of holidays and vacation and that same be applicable to appellate courts considering appeals arising there from.

5. That where an appeal succeeds at the final appellate court and there is need for a retrial or de novo trial, a fresh period of 90days be allocated to the trial tribunal.

9.2.9 Section 87 (9) Electoral Act, 2010 (as amended)

A careful observation of the decided authorities, however tends to show that there is a conscious effort to retain and preserve the principles of *Onuoha v Okafor*[1] as the courts are still restrictive in getting involved with issues of nomination and continually draw a distinction on issues of nomination and sponsorship, despite the provisions of section 87 (9) [2]which tends to have seriously liberalized and widened the jurisdiction of the court in pre-election matters. The court should comply strictly with provisions of that section by exercising its jurisdiction to question every aspect of what transpired on the day of primaries, including the question of which of two or more candidates emerged the winner in a dispute involving the candidates at the primaries, notwithstanding how many primaries were held. The court is urged to investigate why an initial primary was cancelled, which could be as a result of the fact that a particular unfavoured candidate emerged, to the detriment of an anointed candidate and therefore not acceptable to the party chieftains. If the court does not do so the mischief intended to be cured by section 87 (9) of the Act to wit: acceptance of any candidate produced by the party as being nominated without any questioning, irrespective of how he emerged, on grounds that it is a political question or domestic affair, even when it was clearly done with impunity, will be defeated if the courts continue to shy away from determination of issue of nomination and sponsorship in all its ramifications.

9.2.10 Enforcement of the code of conduct for Judicial Officers the Code of Conduct for Public Officers and other relevant laws and regulation.

For example the Code of Conduct for judicial officers which expressly forbid judges from giving extrajudicial advice to other branches of government. A judge should not engage in any other public or private undertakings that could generate public suspicion or impropriety. In the case of the other branches of government, this stance is consistent with the separation of powers.

9.2.11 A judicial system that is simple, fast, efficient and responsive to the needs and yearnings of the citizenry. This can be achieved through full computerization of its operations.

[1] *Supra*
[2] *Electoral Act, 2010 (as amended)*

9.2.12 Revision of some rules of court, in view of, the computerization of the judicial operations.

9.2.13 Need to build the capacity of judges and that of their support staff in ICT in order to leverage the infinite possibilities of the InfoTech Age.

9.2.14 The need for the political branches of government to address the parlous state of our infrastructure especially the power sector, to enable the judiciary, fully realize the goal of computerization initiative.

9.2.15 Appointment of only paragons of integrity, the best and the brightest as judges.

9.2.16 Given the history of our political odyssey, the success or failure of democracy or a democratization agenda depends, in large measure, on the judiciary. Judges and the judiciary system must remain politically neutral and rise up to safeguard our democracy.

9.2.17 Amendment of Relevant Provisions

The National Assembly must continuously effect amendments to relevant provisions and noted areas of mischief that need further amendments, as they come up, with the ultimate objective of reaching perfection or near perfect, acceptable democratic practices.

9.2.11 Issue of Recall

The right of recall in Nigeria is a creation of the 1999 Constitution. The exercise of this right has so far eluded constituents in Nigeria due to a number of reasons already discussed to ensure the efficacy of this right there is need for the following:

a. Sensitization of the populace on the need to view the mechanism as a device to assure regular and close oversight of elected public officials and to make elected officials more continuously, rather than periodically, responsible and responsive. To rid the constituency of an incompetent, corrupt and unresponsive representative.
b. Review of the procedure to make it less cumbersone but transpasent. There is need for meaningful disclosure laws so that voters will know who is bankrolling a recall process. This is to eliminate ulterior motives by special interest groups that might use the process to harass a legislator just to settle scores.

9.2.12 Seats of Legislators who died before the completion of their tenure

There should be a provision in our laws in respect of the seats of legislators who died before the completion of their tenure on how their seats will be filled up to ensure adequate representation from their constituency.

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