THE ROLE OF THE COURTS IN THE ENFORCEMENT OF ELECTORAL RIGHTS THROUGH ELECTION COMPLAINTS: A COMPARATIVE STUDY OF NIGERIA AND THE UNITED KINGDOM

by

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ABSTRACT

Given the role of the judiciary in the application and interpretation of the laws of a State while determining the rights and duties of both citizens and the State, it is important for the courts to be well positioned to handle this responsibility especially when the rights and duties involved bother on the electoral process, the determination or mediation of which, to a greater or lesser extent, has a bearing on the entire polity.

This paper examines the attitudes of the courts in Nigeria and the U.K towards election-related litigation and the Constitutional and legal basis for electoral rights and the jurisdiction of the courts in Nigeria and the U.K in this regard. Using the methodology of analyzing the relevant provisions of the Electoral laws the case law of both countries, this paper points out areas needing emulation and areas that need to be improved upon. The paper generally draws from the experience of the two countries in concluding that independence and impartiality are two inter related and indispensible attributes of a judiciary that would be able to perform its role properly, more so if it must effectively and efficiently mediate the electoral process and ultimately contribute its quota towards a stable and balanced democratic polity.

INTRODUCTION

The Judiciary, through the Courts, has always played the traditional role of interpreting laws and by so doing applies the laws to real life cases in the determination of the rights and obligations of persons coming before the court.

Now that democracy is being embraced globally, the courts in several countries are redoubling their efforts in playing this role, especially as it relates to the settlement of election related grievances or the protection of electoral rights. In some countries courts are specially constituted for this purpose, while in some other countries, special commissions or committees are set up to handle election-related complaints with the courts having the final say by way of judicial review of the decisions of the special election commissions or committees.

Without the protection and indeed the advancement of electoral rights, democracy itself, which is the foundation of modern society, will be adversely affected. Democracy is very important because it is one of the cornerstones of the rule of law which itself is based on constitutionalism. Therefore, in some way, the idea of the electoral rights of the citizens is related to the existence of a democratic environment, the rule of law and constitutionalism which ultimately guarantees the protection of basic or fundamental human rights.

The Courts in performing their traditional role of interpreting and applying the laws as noted above will usually need no special prompting to also apply electoral laws in the determination of questions bordering on the topic. However, because of the important and strategic role of elections in the affairs of nations and taking into consideration the fact that this vexed issue has led to serious crises in many countries, particularly the upcoming democracies of the world, it

has become necessary to give special attention to electoral laws and their applications and that is the reason why special arrangements are made for that.

The conduct of many elections has led to serious crises in some countries (especially Africa) before, during or after the elections or polls: Violence and serious human catastrophe resulted from the conduct or announcement of election results in Kenya in recently. Zimbabwe is still going through the process of getting its stability from the last presidential election, which was believed to be widely rigged by the incumbent and which also excluded the opposition. The deliberate intimidation, harassment, persecution and exclusion from participation of opposition, which is common in most developing countries and other countries of the world, also makes it imperative for the judiciary, through the courts, to play a special role by ensuring that all parties adhere strictly to the rules of the game: This the courts must do without fear or favor.

The literature on this topic is scanty and most writers have concentrated so much on the role or contribution of the law and the courts to politics in general without really doing a thorough discourse or evaluation of the constitutive process of elections as a way of exercising electoral rights and the input of the judiciary or the courts in this direction. Jacob, et al see the general activity of the courts in the dispensation of criminal and civil justice as involving policy making process which itself contributes to the entire political process.[1] However, they agreed that "politics is often perceived to denote a narrower set of phenomena; it is often understood in the sense of *partisan* or *electoral* activities or the advocacy of particular solutions to public problems."[2] They are of the view that there is an intersection of law, courts and politics in varying degrees in most countries of the world and that this intersection produces three sets of

[1] Herbert Jacob, Erhard Blankenburg, Herbert M. Kritzer, Doris M. Provine and Joseph Sanders, *Courts Law & Politics 1996* (Yale University Press, 1996)
[2] Ibid., at page 8

activities that are central to every modern state, namely policy-making, social control, and regime legitimation.[3] It is their further view that the courts play a vital role in the three activities mentioned above through their essence which is to be "found in the triad consisting of two disputants and an authoritative third party decision maker, often incorporating efforts to negotiate or mediate in order to avoid all-or-nothing solutions to disputes."[4]

Morrison, on his part, also opined that courts are a part of the political process and that they fulfill their role by contributing their inputs which may be "in the form of general demands, supports and sanctions, directed toward the system generally, or in the form of specific demands, supports or sanctions, directed toward the resolution of a particularly controversy."[5] His view could be interpreted to mean that the courts contribute towards the political process through decision-making by way of their traditional dispute resolution and law interpretation for general applicability roles. Both Herbert Jacob and Morrison focus on the wider concept of politics and the important and indispensable role of the courts in the entire political process without doing any empirical analysis of the protection of electoral rights by the court. However, their literature is not totally irrelevant to this topic because it was able to point out in a wider perspective that the courts play a very vital role and indeed are part of the political policy formulation in any given modern society. Herbert Jacob, for example, mentions that the courts are involved in giving legitimation to regimes by the way they interpret and apply the law.[6] Naturally, the laws to be applied by the courts include the laws on electoral matters and this has a way of affecting the legitimacy of a regime.

[3] Ibid., at page 3
[4] Ibid., at page 6: Herbert Jacob et al., actually quoted Martin Shapiro on this point.
[5] Fred L. Morrison, *Courts and the political process in England 1973* (Sage Publications, Inc, California 1973) Pp. 18 - 19
[6] Supra footnote 1 at page 13

Watt, on his part, in analyzing the U.K Election law, was able to discuss specifically the issue of electoral rights particularly as they relate to the right to vote and be voted for which is directly related to the topic of this research work.[7] He also dwells extensively on the role of the courts (election courts) in handling post election complaints ('election petitions'). Watt was also able to do an empirical analysis of the situation in England by examining some of the election petitions that were handled by the courts in the past. Watt did not, however, discuss specifically how the courts handle pre-election complaints bordering on denial of electoral rights, for example, the right to contest a particular elective office which is being denied a potential candidate.

Generally, the literature on this research topic is scanty and the little that is available does not really demonstrate how the courts have in specific cases handled pre-election complaints coming before the court apart from Yusuf whose paper is a critical analysis of 2 pre-election judgments of the Supreme Court in Nigeria.[8] However, Yusuf's views in his analysis of one of the judgments are not totally agreeable to this writer.[9] This research intends to cover the role of the court in deciding the electoral rights of citizens both before and after elections by showing what and how the role of the court should be in the protection of electoral rights to vote and be voted for and the right not to be cheated in the results of an election. This writer will achieve this by doing an empirical analysis of both the pre and post election activities of the courts in Nigeria and the post election activities of the courts in England However, the concentration shall be on the right not to be excluded from participation in the electoral process and since this kind of situation is more common in new and/or transitional democracies, a few of the cases decided by

[7] Bob Watt, *UK Election Law: a critical examination 2006* (Glasshouse Press, 2006)
[8] Hakeem O. Yusuf *"Democratic transition, judicial accountability and judicialisation of politics in Africa"* (International Journal of Law and Management, Vol. 50 No. 5, 2008) Pp. 236 - 261
[9] Yusuf joins a few other Nigerians to castigate the Supreme Court for not ordering fresh Gubernatorial election in Rivers State of Nigeria in the case of *Rt. Hon. Rotimi Amaechi V. INEC & 2 ORS (2008) 1 S.C Pt. I, 36.* The details are found in chapter 3 of this paper.

the courts in Nigeria from the last general elections in 2007 are discussed. The essence is to x-ray how the courts handled these cases and what lesson, there might be, to be learned both within and outside these countries. Constitutional provisions and the Electoral Laws of Nigeria and the U.K, as they relate to the electoral rights of the citizens and the judicial procedure for enforcing these rights, will also be examined. In doing this, it is the aim of this research to critically compare and analyze the situations in Nigeria and the U.K pointing out the strong and the weak sides so that the practical experiences in Nigeria and England can be used by them and other countries as useful tool in making future decisions.

This paper consists of four chapters. Chapter One examines generally, but briefly, the functions of the judiciary and *a fortiori*, the courts which shall include how the courts have carried out these functions and any criticisms as regards judicial activism. Chapter Two looks at the definition, scope and sources of electoral rights and how the courts have and should play their role during electioneering processes. Under this chapter, portions of the various electoral laws of the 2 countries under study which give powers to the courts to decide disputes bordering on elections and electoral rights are examined. Chapter Three compares and analyzes particular election decisions of the courts in Nigeria between 2007 and 2009and the United Kingdom between 1999 and 2001. Chapter Four does an analysis of how the activities (including decisions) of the courts in Nigeria and the U.K have contributed to the electoral process and in safeguarding the electoral rights of the citizens in those countries: Areas where the countries could benefit from each other as well as any identified weaknesses are highlighted. This chapter also discusses in a general but brief manner, the need for every democratic country to have in place a vibrant, independent and impartial judiciary as a guarantee of the protection of electoral rights in addition to other rights. The paper ends with a conclusion.

CHAPTER ONE

THE JUDICIARY AND ITS FUNCTION

The Court is an inseparable part of the judiciary and courts cannot be discussed without discussing the judiciary. As a matter of fact, the word judiciary is often times used interchangeably with courts. The word judiciary, also called the judicature, refers to that arm of government in every organized state that deals with the dispensation of justice and this usually includes the courts in their hierarchy and the judges manning these courts.

In simple and elementary language, the judiciary is one of the three major arms of government in every organized state, saddled with the responsibility of dispensing justice according to the law of the land; the other two arms are the legislature and the executive. Morrison refers to the judicial system in the most general sense as "a system composed of judges and courts, which makes determinations primarily with reference to perceived norms".[10] The judiciary is usually saddled with the responsibility of interpreting and applying the laws made by the legislature and executed by the executive. In interpreting and applying these laws, the judiciary, through the courts established by law, dispenses justice by settling disputes between parties or litigants coming before the courts. The extent of the jurisdiction of the courts, regarding subject matter and standing, varies from country to country but one thing is common and certain, the judiciary does dispense justice through the courts.[11]

The courts have carried out this traditional role of interpreting and applying the laws made by the legislature by deciding disputes coming before them either between private persons on matters

[10] Supra, footnote 5 at Page 18

[11] See Article III (Constitution of the United States), Articles 64 – 68 of the French Constitution 1958 and Section 6 of the Constitution of the Federal Republic of Nigeria 1999 all of which provide that judicial powers shall be vested in the courts established by law to decide controversies and thereby dispense justice

bordering on private law or between the state and individuals on matters of public law like criminal justice administration. The courts also decide complaints from individuals against public authorities and in some countries, there are special courts set up to handle this specie of complaints especially if such complaints border on Constitutional interpretation or application.[12]

However, while the judiciaries in some countries have confined themselves to their traditional role as stated above thereby maintaining a conservatism that is usually associated with the courts, some others have introduced activism into their traditional role. They still perform their normal function but they have introduced a kind of dynamism in the way they do this in order to achieve the ultimate goal of dispensing justice. To this kind of courts, the Latin legal maxim, *fiat justitia, ruat coelum* (let justice be done though the heaven falls) seems to be their watchword. The United States Supreme Court has taken a step in this direction by embarking upon judicial review of the actions of the other departments and organs of government: This it does to ensure that Constitutional provisions are complied with by every arm of government. Since the bold step taken by Chief Justice Marshall in the famous case of ***Marbury v. Madison***[13]**,** courts in some other countries of the world have taken the initiative to state the law and give it an interpretation that is in accordance with the Constitution and thereby do justice. This kind of step has led to the development of judicial activism which in turn has been the tonic for the courts to interpret and apply the law in such a manner that the spirit of the law which inures for promotion and protection of social, political and economic rights is ensured as against the letter of the law that might not strictly speaking deliver these goodies to the citizens. It is the view of this writer that, in the application of electoral laws and in deciding election-related disputes, the courts need

[12] In France, Germany and some of the other European countries, the Constitutional Court decides constitutional complaints but unlike its counterpart in Germany, the French Constitutional Court does not hear individual complaints.
[13] U.S. (1 Cranch) 137 (1803)

to adopt the U.S Supreme Court's kind of boldness in order to ensure the doing of substantive justice and some of the subsequent chapters in this paper show how some courts have handled electoral matters coming before them in accordance with the enabling and applicable laws.

However criticisms from certain quarters have continued to trail the idea of judicial activism by the judges. To some, it is not the duty nor is it the business of the courts to give interpretation to the provisions of a law and to them, the judiciary is usurping the function of the lawmaker by taking such steps. One of the antagonists of judicial review is Jeremy Waldron who argues that judicial review is inconsistent with political participation and equality and therefore, unjustifiable[14]. Waldron, however, identified two types of judicial review viz., strong judicial review in which the court refuses to apply the provisions of a statute even if the words are very clear or the effect of provisions are modified in order to give effect to an individual right in ways not contemplated by the statute. The second type is the weak judicial review in which the courts review the provisions of legislation in order to examine its conformity with the Constitution but the court will not refuse to apply such legislation even if rights will be violated. Waldron identifies the United States and Canada with strong judicial review while the United Kingdom and New Zealand are given as examples of countries that carry out weak judicial review. Perhaps the reason why courts in certain jurisdictions carry out strong judicial review could be related to the view of Cass[15] as regards the relation between rules and justice and between analogies and justice; according to Cass "it cannot be said that a system complying with the rule of law must be just or that analogical thinking produces just outcomes. Many genuine rules are unjust e.g. apartheid in South Africa"

[14] J. Waldron, *"The Core of the case Against Judicial Review"* (2006) 115 Yale Law Journal 1346
[15] Cass, Sunstein, *Legal reasoning and political conflict* (Oxford University Press, 1996) P.193

This writer will not go into a detailed discussion of judicial review or judicial activism since it is not the main topic of this discourse but suffice it to say that whether strong or weak, judicial activism is an important, if not indispensable, aspect of the exercise of the function of the courts; to hold otherwise (as Waldron and others do) will create a difficult or cumbersome situation where the court will have to wait for the legislative arm to speak their mind whenever there is an ambiguity in the law that is coming before the court when the court can simply use one of the canons of interpretation at its disposal depending on the whether the wordings of the law to be interpreted is ambiguous or very clear. The judges themselves can not completely isolate themselves from the society in which they live and should therefore, be able to balance the various rights within the ambit of the law in such a manner that the underlying aim of the law they are interpreting or applying is not displaced. The views of Waldron in being totally against judicial review is therefore not agreeable to this writer and I would rather agree with a system that allows for judicial activism which is in tune with the underlining spirit of Constitutional provisions: In other words, judicial activism should always have some legal basis so that the courts would not be seen to be constituting themselves into the lawmakers.

Little wonder, in the United Kingdom, the courts are given the lee-way, in respect of the human rights administration, **to read and give effect to legislation in such a way that is compatible** with the rights contained in the European Convention on Human Rights and Fundamental Freedoms.[16]

The issue of the way and manner in which the court plays its role is important here because without having a good judicial system in place, we cannot discuss the issue of protection of electoral rights and if the citizens of a particular state are dissatisfied with process that produced

[16] See Section 3 (1) of the Human Rights Act 1998 of the United Kingdom

their leaders or if some of them feel that they are excluded from the process and that the avenue for redress is inadequate, then there may be a regime legitimacy problem which can inevitably lead to instability in the polity; instability in the polity can in turn lead to a situation where other rights will suffer. It can, therefore, be conveniently concluded that there is public interest in the fair conduct of elections and the role that the courts play in addressing any complaints arising there from. Watt has stated that "….there is a public interest in the fair conduct of elections. It is submitted that this means that the conduct of the parties to an election should itself be capable of withstanding the direct scrutiny of a court."[17]Harlow referred to cases where the wider public interest is involved as 'public law cases' and according to him, "courts in public law cases were seen as fulfilling a wider role than the traditional dispute resolution function assigned to them in classic positivist theories of law."[18] This perhaps is part of the reason why special courts (Election Courts/Tribunals) are set up in Nigeria and the U.K with special rules of procedure aimed at ensuring speedy determination of election petitions. In Nigeria, election-related matters coming before the normal courts in the form of pre or post election cases are treated as *sui generis* and therefore given special treatment to the end that they are dispensed with at the shortest time possible to avoid leaving a vacuum in any public office or allowing an alleged wrong occupier of the office to stay too long in that seat when the complaint against his nomination or return has not been determined.[19]

[17] Bob Watt, *U.K Election Law: a critical examination* (Glasshouse Press, 2006) P.161

[18] Carol Harlow, *"Towards a Theory of Access for the European Court of Justice"*, (1992) 12 Yearbook of European Law 213 – 248 at page 213

[19] *Section 148* of the Electoral Act 2006 of Nigeria provides that an election petition and appeal arising therefrom shall be given accelerated hearing and shall have precedence over all other cases or matters before the Tribunal or Court while by virtue of *Section 151* of the same Act, the rules of procedure to be adopted for election petitions and appeals are contained in the First Schedule to the Act.
In the U.K by virtue of Section146 of the Representation of the people Act, 1983, the High Court may direct a petition to be stated as a special case and by virtue of Section 139 of the same Act, an election court may continue a trial from day to day on every lawful day until its conclusion.

CHAPTER TWO

MEANING, SCOPE AND SOURCES OF ELECTORAL RIGHTS

Meaning of Electoral Rights.

Generally, electoral rights refer to those rights that are related to the election process in any given society. They are those set of rights that entitle citizens to full participation in the entire process. The Dictionary defines electoral as "relating to elections or electors".[20] It follows therefore that electoral rights refer to those rights which the citizens are entitled to, and can insist on, in any election process for the selection of persons into various offices be it at the local or national level.

For the purpose of this work, electoral rights are the rights to vote and be voted for in any election in accordance with the applicable laws. In other words they are the franchise right and the right to stand for or contest a particular office that a citizen or prospective candidate is qualified for under the law. These rights inevitably include the right against a stolen mandate resulting from the manipulation of election results. If for example, it is clear and provable that a particular candidate received the required votes for election to a particular office ahead of other candidates that contested with her/him, then that candidate is entitled to the right to be declared the winner and the elected candidate to that office and she/he should be able to seek redress if due to manipulation from any quarters (by way of altering the votes or by clearly breaching the law), the mandate she/he has clearly been given by the voters is given or about to be unlawfully given to another candidate that did not win the election.

[20] Oxford Dictionary and Thesaurus, Edited by Maurice Waite (Second Edition, Oxford University Press, 2007)

The importance of electoral rights and the need for the courts to properly protect them whenever the courts have the opportunity to do so cannot be overemphasized. According to Azinge[21] "The right to vote is generally perceived as inextricably intertwined with the concept of democracy."

Scope of Electoral Rights.

The scope of electoral rights varies from one country or jurisdiction to another. In the days and eras that are already past, the electoral right to vote (franchise) was not universal as it was limited to people with certain qualifications ranging from sex, race, social, financial or material status but the tide seems to have changed in the vast majority of the countries of the world. The discussion of the scope of electoral rights shall be divided into two: The scope of the right to vote and the scope of the right to contest an office and be voted for.

The right to vote (Franchise right)

As already stated above, the scope of this right varies from country to country but one thing is certain i.e. this right is becoming universal in most countries of the world today, by the removal of restriction on account of gender, race or material possession. The scope of this right also depends on how it is treated in a particular country; that is to say whether it is treated as a mere civil right, a fundamental political right or just a franchise-privilege[22] However, the right to vote is mostly seen as a fundamental political right[23]. The recognition of the fundamental nature of

[21] Epiphany Azinge, *"The Right to vote in Nigeria: A critical commentary on the open Ballot system"* (Journal of African Law [1994] Vol. 38, No. 2, Pp 173 – 180 at P. 173 where he also quoted Venkatarangaiya as saying that "if popular control of government through the mechanism of elections is the essence of democracy, it follows that the control should be by all people and not by any few among them. Unless it can be proved that those who are excluded are either unfit or incompetent to exercise the vote…"

[22] Ibid, at P. 173

[23] See *Westberry v. Sanders* 376 US 17 where the Court held that "No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live. Other rights even the most basic are illusory if the right to vote is undermined." Providing for this right in most Constitutions of the world is also a testimony to the fact that this right is treated as fundamental political right and not just a mere franchise or privilege.

this right is further underscored by its incorporation into international documents like the European Convention on Human Rights and Fundamental Freedoms as a fundamental right which must be strongly promoted and guarded.[24]In spite of the fact that the right to vote in most countries of the world has now become universal, there could still be some restrictions on the right to vote in some countries, depending on the level of election in issue. For example, under the German system, the President is elected by a Federal Convention made up of the members of the House of Representatives and an equal number of members elected by the parliaments of the states[25]; a citizen who is not a member of parliament cannot therefore complain that she/he has been disenfranchised by not being allowed to participate in electing the president because the Constitution has expressly spelt out the procedure and the category of persons to elect the president, besides, the persons involved in the election are the representatives of the people who were elected by the people, so the people are indirectly involved in electing the president through their representatives. Also in the United States where the President is elected through an Electoral College[26], a citizen cannot complain of being disenfranchised if she/he is not an elector and therefore not a member of the Electoral College. The electors are chosen by the voters and the voters participate indirectly in electing the president through their representatives (the electors). Lastly, if a citizen has not attained the requisite minimum age provided by the law for voting, then she/he cannot be heard to complain of unlawful exclusion, if she/he is not allowed to vote.

24 See Article 3 of the first Protocol to the Convention which provides: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." See also the case of *Matthews v. the U.K*

25 See Article 54 of the German Basic Law

26 See Article II *S* 1 [1]-[4] of the U. S Constitution

The right to run for an office and be voted for:

The scope of this right also varies from country to country depending on the particular office but generally, conditions are usually attached to the eligibility to run for a political office, it is the level of the conditions that varies. For example, conditions as to age, residence and educational qualification attach eligibility to contest most offices. These conditions are higher for some offices and lower for others depending on the legal instruments creating or spelling them out.

On the whole, the scope of electoral rights vary from country to country but it can be safely assumed here, that generally the right to vote in particular has become universal in most countries the only qualifications being the attainment of the age of majority or becoming an adult (which ranges between the ages of 16 and 20 in most countries) and citizenship. Even though some necessary formalities like voter-registration and not belonging to the category of legally excluded person still attach the full enjoyment of the right to vote, restrictions on account of sex and social or material status have become a thing of the past. However, as has been stated before, the discussion of the scope of electoral rights in this paper is restricted to the rights to vote and be voted for and the consequential right to seek redress if any of these rights are violated: Other dimensions of electoral rights that might exist will therefore, not be discussed in this paper.

Sources of electoral rights:

Electoral rights, in modern times, are usually derived from the Constitutions and electoral laws of any given country. This, further buttresses the point made earlier that these rights are now mostly treated as fundamental political rights needing Constitutional protection. Given the scope of this paper, I will not go into the history or development of the sources of electoral rights in the

countries under analysis (Nigeria and the United Kingdom) nor any other country for that matter but will only state the laws as they are today.

For most countries of the world today, electoral rights, particularly the rights to vote and to run or contest a political office are provided for in the Constitution and further expatiated in separate electoral laws.[27]

In this work, I will only examine in details, the provisions of the various laws in Nigeria and the U.K as they relate to the electoral rights being discussed and also those provisions of the laws giving the courts the jurisdiction to enforce these rights through the determination of any complaints brought before them.

In Nigeria, the Constitution of the Federal Republic of Nigeria 1999 provides in *Sections 65, 77, 106, 117, 131 and 132 (1) (4) & (5)* for the rights to vote and also be voted for in the elections to the National Assembly (comprising the Senate and the House of Representatives), the Legislative House of a State and the Presidency of the country. Procedure and conduct of Elections into other offices at the local government level are handled by the States Independent Electoral Commissions provided for under Section *197* of the Nigerian Constitution and also in accordance with Laws made by the States' Legislative Houses.

Section 65 of the Nigerian Constitution provides:

> *"65.-(1) Subject to the provisions of section 66 of this Constitution, a person shall be qualified for election as a member of- (a) the Senate, if he is a citizen of Nigeria and has attained the age of thirty-five years; and (b) the House of Representatives, if he is a citizen of Nigeria and has attained the age of thirty years;*

[27] See the XV, XIX, XXIV & XXVI Amendments to the U.S Constitution, Article 3 of the French Constitution, 1958, Articles 38(2) & 54(1) of the German Basic Law 1949, Article 32 of the Russian Constitution 1993, Sections 46(1) & 47(1) of the South African Constitution 1996 as well as the South African Electoral Act 73 of 1998 particularly sections 6 – 8 thereof.

> *(2) A person shall be qualified for election under subsection (1) of this section if- (a) he has been educated up to at least school Certificate level or its equivalent; and (b) he is a member of a political party and is sponsored by that party"*

Section 77 provides:

> *"77.-(1) Subject to the provisions of this Constitution, every Senatorial district or Federal constituency established in accordance with the provisions of this part of this chapter shall return one member who shall be directly elected to the Senate or the House of Representatives in such manner as may be prescribed by an Act of the National Assembly.*
>
> *(2) Every citizen of Nigeria, who has attained the age of eighteen years residing in Nigeria at the time of the registration of voters for purposes of election to a legislative house, shall be entitled to be registered as a voter for that election."*

Section 106 of the Nigerian Constitution provides for the qualification for election to a State Legislative House and the qualifications are citizenship of Nigeria, minimum age of 30 years, education up to school certificate level and membership of a political party. Under *section 117 (2)* every citizen of Nigeria who has attained the age of 18 years can vote in this election provided he has registered as a voter.

The conditions for qualifications for election as the President of Nigeria are citizenship by birth, minimum age of forty years, membership and sponsorship by a political party and education up to school certificate level or its equivalent.[28] The whole Federation of Nigeria is one constituency for the purposes of the presidential election any person registered to vote at an election of a legislative house (under *Sections 77 & 117*) is qualified to vote in the Presidential election.[29]

The Constitution of Nigeria provides further in *Section 79* as follows:

> *"79. The National Assembly shall make provisions as respects-*

[28] See *Section 131* of the Nigerian Constitution, 1999.
[29] See *Section 132 (4) & (5)* of the Nigerian Constitution, 1999

> *(a) Persons who may apply to an election tribunal for the determination of any question as to whether-*
>
> *(i) any person has been validly elected as a member of the Senate or of the House of Representatives,*
>
> *(ii) the term of office of office of any person has ceased, or*
>
> *(iii) the seat in the Senate or in the House of Representatives of a member of that House has become vacant;*
>
> *(b) circumstances and manner in which, and the conditions upon which, such application, may be made; and*
>
> *(c) powers, practice and procedure of the election tribunal in relation to any such application."*

Sections *119* and *139* contain similar provisions as those in *Section 79* reproduced above in respect of elections to the Legislative Assembly of a state and the presidential election. The National Assembly is given similar powers to make provisions for powers, practice and procedure of election tribunals in respect of such elections as well.

Acting on the above Constitutional provisions, the National Assembly (The Senate and House of Representatives) in Nigeria enacted the Electoral Act of 2002 which was repealed and replaced by the Electoral Act 2006. The 2006 Act is the current Electoral law.[30] *Section 13* of the said Act provides thus:

> *"13. (1) A person shall be qualified for registration as a voter if such a person:*
>
> *(a) is a citizen of Nigeria;*
>
> *(b) has attained the age of eighteen years;*
>
> *(c) is ordinarily resident, works in, originates from the Local Government or Area Council or ward covered by the registration centre;*

[30] The Act which can be cited as 'The Electoral Act, 2006' can be found at http://www.dawodu.com/electoralact2006.htm (accessed 7th March, 2009)

(d) present himself to the registration officers of the Commission for registration as a voter; and

(e) is not subject to any legal incapacity to vote under any law, rule or regulations in force in Nigeria.

(2) No person shall register in more than one registration centre or register more than once in the same registration centre."

A combined reading of the above provisions of the Electoral Act and the Constitution which have also been discussed will reveal that, indeed, every citizen of Nigeria is entitled to the rights to vote and be voted for into any elective or political office, the only requirements being the carrying out of the civic duty of registering as a voter, attaining the minimum ages for voting and for contesting and not being subject to any legal incapacity. There is also the general requirement of a minimum educational qualification for contesting certain offices.

Section 140 of the Electoral Act 2006 provides:

"140. (1). No election and return at an election under this Act shall be questioned in any manner other than by a petition complaining of an undue election or undue return (in this Act referred to as an "election petition") presented to the competent tribunal or court in accordance with the provisions of the constitution or of this Act, and in which the person elected or returned is joined as a party.

(2). In this section "tribunal or court" means:

(a) in the case of Presidential election, the court of appeal; and

(b) in the case of any other elections under this Act, the Election Tribunal established under the Constitution or by this Act.

(3). The Election Tribunals provided for under the Constitution and this Act shall be constituted not later than 14 days before the election."

In Nigeria therefore, complaints arising out of a Presidential election are first heard by the normal Court of Appeal (but with a specially constituted panel made up of some of the Court of

appeal justices selected by the President of the Court of Appeal) and appeal there from shall lie to the Supreme Court whose decision shall be final.[31] For elections to the National Assembly, the Governorship of States, Houses of Assembly of States and Local Government Councils, the Chief Judge of each State of the Federation constitutes tribunals made up of Judges of the High Courts of the States as tribunals of first instance. Appeals lie from these tribunals to the Court of Appeal which is the final Court in terms of these kinds of elections. Even though these tribunals are manned by the usual High Court and the Court of Appeal judges who still maintain their career, they are called "Elections Petitions Tribunals" for the purposes of determining election complaints.

The persons having standing before the Election Tribunals are a candidate in an election and a political party which participated in the election jointly or severally[32]. And by Section 145 (1), the following grounds exist upon which a complaint against an election can be brought:

1. Non qualification on the part of the person whose election is being challenged;
2. corruption practices or non-compliance with the provisions of the Electoral Act, 2006;
3. the respondent was not duly elected by majority of lawful votes cast at the election; or
4. the petitioner or its candidate (if the petitioner is a political party) was validly nominated but was unlawfully excluded from the election.

In the U.K, the right to vote is in the following areas:

1. Parliamentary elections;

[31] See *Section 239(1)* of the Nigerian Constitution and *section 140 (2) (a)* of the Electoral Act 2006
[32] See *Section 144 (1)* of the Electoral Act, 2006

2. European Parliamentary elections;

3. Local Government elections;

4. National Assembly for Wales and Scottish Parliament elections;

5. Northern Ireland Assembly; and

6. Greater London Authority.[33]

This right (to vote) can be exercised basically in two elections: The Parliamentary election and the Local Government election.

The source of the right to vote in the U.K is the Representation of the People Act, 1983 (as amended in 2000). *Sections 1 and 2* of the said Act provide as follows:

> *"1 Parliamentary electors*
> *(1) A person is entitled to vote as an elector at a parliamentary election in any constituency if on the date of the poll he—*
>
> *(a) is registered in the register of parliamentary electors for that constituency;*
>
> *(b) is not subject to any legal incapacity to vote (age apart);*
>
> *(c) is either a Commonwealth citizen or a citizen of the Republic of Ireland; and*
>
> *(d) is of voting age (that is, 18 years or over).*
>
> *(2) ……..*
>
> *2 Local government electors*
> *(1) A person is entitled to vote as an elector at a local government election in any electoral area if on the date of the poll he—*
>
> *(a) is registered in the register of local government electors for that area;*
>
> *(b) is not subject to any legal incapacity to vote (age apart);*
>
> *(c) is a Commonwealth citizen, a citizen of the Republic of Ireland or a relevant citizen of the Union; and*

[33] http://www.parliament.uk/commons/lib/research/notes/snpc-02208 (accessed 20th March, 2009)

(d) is of voting age (that is, 18 years or over).

(2)……."

Basically, apart from the usual requirement of registration and residence and absence of any legal incapacity, any British citizen who has attained the age of 18 is entitled to register and vote, which makes the situation similar to that of Nigeria.

Every British Citizen can also run for or contest an elective or political office and would not be excluded on any other ground apart from the general requirements attaching each office on account of age, constituency, political party affiliation or any such similar requirement.

The source of the Courts jurisdiction to handle election complaints in the U.K is also to be found in the Representation of the People Act 1983 hereinafter referred to as "ROPA 1983".[34] In *section 120* of the said Act, it is provided thus:

> *"120 (1) No parliamentary election and no return to Parliament shall be questioned except by a petition complaining of an undue election or undue return ("a parliamentary election petition") presented in accordance with this Part of this Act.*
> *(2) A petition complaining of no return shall be deemed to be a parliamentary election petition and the High Court—*
> *(a) may make such order on the petition as they think expedient for compelling a return to be made; or*
> *(b) may allow the petition to be heard by an election court as provided with respect to ordinary election petitions."*

An election Court tries election petitions from local Government elections and the Election Courts are constituted in the manner provided under *section 130* of the ROPA 1983 as follows:

> *"130 (1) A petition questioning an election in England and Wales under the local government Act shall be tried by an election court consisting of a person qualified and appointed as provided by this section.*
> *(2) A person shall not be qualified to constitute an election court—*

[34] The Representation of the People Act 1983 was amended in 2000 but still retains a large part of the older provisions including Part III on the rules pertaining to election petitions.

> *(a) unless he has a 10 year High Court qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990; or*
> *(b) if the court is for the trial of an election petition relating to any local government area in which he resides."*

As regards standing before the High Court or an Election Court in the U.K, the following persons have the *locus standi:* In terms of a Parliamentary Election.[35]

(a) a person who voted as an elector at the election or who had a right so to vote; or

(b) a person claiming to have had a right to be elected or returned at the election; or

(c) a person alleging himself to have been a candidate at the election.

And in terms of a Local Government Election, by:

(a) A person who was a candidate at the election; or

(b) Four or more electors or persons who had the right of electors at the election.[36]

In concluding this chapter, it is instructive to reiterate that the rights to vote and be voted for in Nigeria and the U.K are treated as fundamental political rights and they have Constitutional provisions backing them. It is also clear from the provisions of the relevant Laws in Nigeria and the U.K as discussed above that it is the courts (called Elections Tribunals and Election Courts respectively but which are manned by regular High Court and Court of Appeal judges) that have the jurisdiction to try or hear complaints from the conduct of elections both as first instance Courts and as Appeal Courts. This make both Nigeria and the U.K a bit different from some countries in Europe like Hungary and Russia where an election complaint is first heard by the Electoral Commission or Electoral Committee at the end of which a dissatisfied party can now apply to the Court for judicial review.[37]

[35] See section 121 of Representation of the People Act 1983 (as amended)
[36] See section 128 of the Representation of the People Act 1983 (as amended)
[37] See Articles 77 & 82 of the Electoral Act No. XXXIV of Hungary 1989 and Article 63.9 of the Law on Basic Guarantees of Electoral Rights and the Rights of citizens of the Russian Federation to participate in a Referendum 1997 (as amended in 1999)

Both Nigeria and the U.K have electoral bodies called the Independent National Electoral Commission (INEC) and the Electoral Commission respectively but these bodies are by their enabling laws saddled only with the conduct of elections, announcement of results and other ancillary functions and do not in any way hear complaints from conduct of elections because these bodies are usually joined as defendants in the election petitions and it would, it seems, go against the principle of natural justice for a party who conducted an election that is being faulted to also be a judge in a case in which he is a party.

Complaints from the Parliamentary, Presidential and Local Government elections in both Nigeria and the U.K are called "Election Petitions".

While the High Court or the Election Court hears a Parliamentary Election petition and an Election Court hears a local Government Election petition in the U.K, the Local government Elections petitions tribunal, the Gubernatorial and House of Assembly Elections petitions tribunal, the National Assembly Elections petitions tribunal and the Presidential Election petition Tribunal hear petitions from conduct of local Government, Gubernatorial and House of Assembly, the National Assembly and the Presidential elections respectively in Nigeria.[38]

All pre-election matters bordering on voter registration and clearance for participation as a candidate by the Electoral Commission can also be heard by the normal Courts in the exercise of their normal jurisdiction to decide disputes coming before them because the election courts or tribunals are set up purposely for post election complaints (petitions) and their work begins after the announcement of results for conducted elections.

[38] See Sections *7 (4), 197 (1) (b), 239 & 285* of the Constitution of Nigeria 1999 and *Section 140 (2)* of the Electoral Act 2006 of Nigeria.

CHAPTER THREE

HOW THE COURTS IN NIGERIA AND THE U.K HAVE FARED IN THE MEDIATION OF THE ELECTORAL PROCESS

An analysis of some of the cases decided by the courts:

In Chapter two, I discussed extensively, the laws forming the basis of the jurisdiction of the courts and which mandate them to mediate in disputes bordering on the electoral process in Nigeria and the U.K, I also pointed out that the election courts or election petitions tribunals set up by the various instruments discussed in both countries are meant to hear post election complaints called 'election petitions'. However, in Nigeria, there is interestingly as much pre election matters for the courts as post election petitions more than in the U.K. Pre election complaints or cases are handled by the normal courts in the form of usual civil matters bordering on rights litigation. These rights are provided for in the Constitutions and the Electoral Acts and they range from complaints about not being registered as a voter to not being allowed to contest as a candidate for a particular political office.

In this chapter, I will examine a few cases (both pre and post election) that have been decided by the courts in Nigeria and the U.K in the past to expose how the courts have carried out their mandates and why they decided they way they did. The pre election matters that have been heard by the courts in Nigeria are more interesting because of the various dimensions they assumed, some of them outlasting the announcement of election results. The following cases will be briefly discussed in this chapter:

1. *Action Congress and others v. The Independent National Electoral Commission (INEC) & others*[39]
2. *Rt. Hon. Rotimi Amaechi v. INEC*[40]
3. *Alh. Atiku Abubakar & 2 others v. Alh. Umaru Yar adua & others AND Gen Buhari v. INEC & others*[41]
4. *R v. Jones (Fiona)*[42]
5. *Cooper v. Gildernew*[43]

In ***Action Congress & others v. INEC & Others***, the second Appellant, one Alhaji Atiku Abubakar who was then the Vice President of the Federal Republic of Nigeria was also the Presidential Candidate of the first Appellant (Action Congress), a political party. The Electoral Body in Nigeria, the Independent National Electoral Commission (INEC) sought to exclude the second Appellant from the presidential election which was billed for April, 2007 on the ground that he was indicted along with several other Nigerians by the Economic and Financial Crimes Commission (EFCC) of corrupt charges and that the Federal Government had issued a white paper endorsing the report of an Administrative panel set up to look into the EFCC indictment. The second Appellant and his party therefore went to Court to challenge the decision of the INEC to exclude the second Appellant from contesting the Presidential election on the major ground that by virtue of *Section 32* of the Electoral Act 2006 of Nigeria, it is only the Court that can disqualify a candidate after having given the candidate a fair hearing and having found him

[39] (2007) 6 S.C Pt. II 212 - 314
[40] (2008) 1 S.C Pt. I 36 (-302)
[41] (2009) Vol. 5 WRN 1-241. This was a consolidated petition comprising of 2 petitions brought by Alhaji Atiku Abubakar of the Action Congress (AC) Party and Gen. Muhammadu Buhari (Rtd.) of the All Nigeria Peoples Party (ANPP) against the election of Alhaji Umaru Musa Yar'adua of the Peoples Democratic Party (PDP)
[42] (1999) 2 Cr. App R 253
[43] (2001) NIQB 36

guilty of any wrong doing which warrants her/him to be disqualified. *Section 32* of the Electoral Act, 2006 provides as follows:

> *"32 (1) Every political party shall not later than 120 days before the date appointed for a general election under the provisions of this Act, submit to the Commission in the prescribed forms the list of the candidates the party proposes to sponsor at the elections.*
>
> *(2) The list shall be accompanied by an Affidavit sworn to by each candidate at the High Court of a State, indicating that he has fulfilled all the Constitutional requirements for election into that office.*
>
> *(3)……*
>
> *(4) Any person who has reasonable grounds to believe that any information given by a candidate in the Affidavit is false may file a suit at the High Court of a State or Federal High Court against such person seeking a declaration that the information contained in the Affidavit is false.*
>
> *(5) If the Court determines that any of the information contained in the Affidavit is false* ***the Court shall issue an Order disqualifying the candidate from contesting the election"*** (emphasis mine)

The trial Court[44] held that it was within the powers of the judiciary and not the executive arm to make an order disqualifying a candidate from an election naturally because it is before the court that the candidate would have an opportunity to defend himself. In summary, the court held that

[44] The matter was instituted before the Federal High Court, Abuja as the court of first instance. It later went on appeal to the Court of Appeal in Abuja and on further and final appeal to the apex court, the Supreme Court of Nigeria.

INEC can only exclude a candidate from contesting an election if, and only if, there is a court order disqualifying the said candidate by virtue of *section 32* of the Electoral Act 2006. This judgment was appealed by INEC and the Court of Appeal overturned the judgment. The Appellants appealed to the Supreme Court which is the final Court in Nigeria. The Supreme Court reversed and restored the judgment of the trial court therefore paving the way for the second Appellant to contest the 2007 Presidential election under the platform of the first Appellant.

It is instructive to narrate a little bit, the background of this case because it also forms the background to other cases that will be discussed in this chapter shortly. During the period in the run up to the 2007 general elections, the then sitting president, Olusegun Obasanjo had nursed the ambition of amending the Constitution so that he could run in the election for a third term having served the maximum two terms allowed by the Constitution.[45] His bid to get the lawmakers to amend the Constitution to pave the way for him to run for a third term failed because some pro-democracy elements within and outside the Parliament frustrated this move. He (Olusegun Obasanjo) then supposedly figured out those behind the frustration of his third term agenda and sought to frustrate them politically; his vice, Alhaji Atiku Abubakar happened to be one of these persons he figured out. The relationship between the two (the President and his vice) turned awry to the extent that the Vice President was frustrated out of the ruling party that brought both he and the president to power, he (the vice president) had to join another party, the Action Congress, to be able to realize his ambition to contest in the forthcoming Presidential election.

[45] See Sections 135(2) & 137 (1) (b) of the Nigerian Constitution, 1999 which allows a maximum of 2 terms of 4 years each for anyone occupying the position of the Presidency of Nigeria.

Not satisfied, the President got the EFCC[46] to compile a list of a number of politicians including the Vice President whom they claimed had been investigated and found to have various cases of corrupt practices to answer to. This list was sent to the Presidency which set up an administrative panel to look into the EFCC report. The Administrative panel submitted its report to the Federal Executive Council within a few weeks and the Federal Executive Council accepted it and sent same to the Independent National Electoral Commission(INEC) which sought to use that list to disqualify persons whose names appeared on it including the Vice President who was vying for the Presidency on the ground that he fell into one the categories of persons disqualified from running for the office of the President as provided under the Constitution.[47]

In ***Rt. Hon. Rotimi Amaechi v. INEC***, the applicant was nominated by his party, the Peoples Democratic Party (PDP) to represent the party in the gubernatorial elections in Rivers State of Nigeria. The applicant had defeated 7 other candidates in a party primary to pick the party's ticket and his name was duly sent by his party (the PDP) to INEC as their candidate in the election which was billed for April, 2007. By December, 2006, due to the background information given above and the fact that the applicant herein no longer enjoyed good relationship with the presidency and the powers that be in his party, the party (PDP) wrote a letter to the INEC in which they sent another name (Celestine Omehia) to replace the applicant as their candidate.

The applicant went to the court to challenge this move by his party on the grounds *inter alia* that the substitution of his name with another person's name was in breach of the provisions of their

[46] EFCC (The Economic and Financial Crimes Commission) is an agency set up under an Act of Parliament to fight corrupt practices bordering on finances in the public and private sectors. The Chairman of the Commission is appointed by the President.
[47] See Section 137 (1) (i) of the Constitution of Nigeria, 1999

party's constitution which lays down an internal democratic procedure for the selection of candidates in accordance with the Constitution[48] and also that by virtue of *section 32(5)* of the Electoral Act, 2006 (already reproduced above), it is only a court order that can make INEC remove his name or disqualify him from contesting the election.

The Federal High Court sitting as a court of first instance agreed with the applicant and granted his relief for his name not to be substituted with another name without any cogent reason or a court order. There was an appeal by his party and INEC to the Court of Appeal in Abuja which upturned the judgment of the Federal High Court. The applicant as appellant appealed to the final Court, the Supreme Court and while the matter was pending at the Supreme Court, the election in respect of which there was this dispute took place and the INEC yielded to the demands of the applicant's party by substituting his name with that of Celestine Omehia. The applicant's party (the PDP) won the gubernatorial elections in Rivers state and the new person whose name was substituted for the applicant's name was sworn in as the governor of Rivers state. The Supreme Court delivered its judgment after the election and the swearing-in and in its judgment, the Supreme Court affirmed the judgment of the trial court by finding in favor of the applicant/appellant but because it appeared the Supreme Court was confronted with a fait accompli (i.e. election having been concluded and another person sworn in already), it granted an additional prayer by the Appellant to be declared the winner of the Gubernatorial elections in Rivers State which was to later generate a lot of controversy. The Supreme Court ordered that since the applicant/appellant herein was the duly elected candidate of the PDP and since PDP was the political party that won the election in Rivers state, the applicant/appellant should be sworn in as the governor of Rivers state. The Supreme Court therefore did not deem it necessary

[48] See section 223 of the Nigerian Constitution 1999

or appropriate to order fresh polls. Comments on the controversy generated by this judgment are found later in this chapter and in the next chapter.

The case of ***Alh. Atiku Abubakar & 2 others v. Alh. Umaru Yar adua & others AND Gen Buhari v. INEC & others***, was a consolidated presidential petition which is made up of 2 petitions filed by the 2 major petitioners, Alhaji Atiku Abubakar of the Action Congress Party (AC) and General Muhammadu Buhari (Rtd) of the All Nigeria Peoples Party (ANPP). Both petitions which are similar were filed at the Court of appeal (which is the first instance election petitions tribunal for presidential elections) and were consolidated for ease of trial. The petitions were against the election of Alhaji Umar Musa Yar'adua of the People Democratic Party (PDP) as the President of Nigeria in the April 2007 presidential polls. The main grounds of the petitions were that Alhaji Umar Musa Yar'adua was not qualified to contest the presidential election by virtue of the indictment of the president in a white paper released by the Abia State government before the election for corrupt practices while he was governor of a state between 1999-2007 and also that the election was marred by wide irregularities (one of which was the non-serialization of ballot papers). There was an additional ground by Alhaji Atiku Abubakar that he was excluded from the election because INEC in obeying an earlier court order to allow him contest did not properly put his picture on all the ballot papers.

The Court held that Alhaji Atiku Abubakar was not excluded from the election since his name and party logo were on all ballot papers and also that Alhaji Umar Musa Yar' adua cannot be disqualified from contesting on the strength of a government wide paper without a court order (*Section 32 (5)* Electoral Act, 2006). Finally the Court found that the irregularities in the conduct of the polls including the non serialization of ballot papers were not substantial enough to

warrant the annulment of the election. The Supreme Court on December, 12th 2008 affirmed this decision by a split decision of 4-3 justices.

In ***R. v. Jones (Fiona),*** Fiona Jones was elected under the platform of the Labour Party in the U.K as a Member of Parliament representing Newark in the 1997 general election. However, she could not take her seat in the House of Commons because she faced criminal charges of fraudulently failing to declare the full amount of her election costs. She was convicted in March, 1999.

Fiona Jones appealed against her conviction to the Court of Appeal and within weeks her conviction was overturned paving the way for her to take her seat in the House of Commons. The court's order for her to take her seat and not to order fresh election was informed by the fact that there was really no issue with the votes cast and it appeared it would have amounted to a an irrational decision to order fresh election.

In ***Cooper v. Gildernew,*** the Petitioner filed a petition complaining about the action of the party members of the Respondent (Gildernew) and the Electoral officials. Gildernew had been declared the winner of the Fermanagh and South Tyrone seat in the Parliamentary election held in 2001 having polled 53 votes. The crux of the Petitioner's complaint was that the Respondent won the votes because her party workers' threat and action led to the extension of voting beyond the time allowed which inexorably led to the Respondent getting more votes during the unlawfully extended period of time.

The Northern Irish High Court sitting as an Election Court, after having analyzed the law as contained in the Representation of the People Act, 1983 held that "We do not consider that the

number of voting papers issued in that time could be materially more than 30, and that number falls well short of the successful candidate's majority of 53 votes. We therefore hold that the breaches of the regulations did not affect the result of the election."

How and why the courts decided the way they did:

The 5 cases discussed above are all related to election and the rights of the citizens to vote and contest various elective offices both in Nigeria and the UK. The first 2 cases (Alhaji Atiku Abubakar(AC) and Rt. Hon. Rotimi Amaechi) were pre-election matters bordering on disputes as to the right to participate in elections as candidates for political offices. There appears not to be much litigation in the U.K as regards pre-election matters such as the kinds found in Nigeria and the reason is not far fetched; the U.K has in place, to a great extent, stable democratic institutions which have been able to take care of pre-election matters to the satisfaction of the citizens. The second reason, as it appears to me, is that the political arena and indeed the political players in the U.K are more developed and matured than what obtains in Nigeria at the moment. In Nigeria, pre-election cases bordering on unlawful exclusion or short-changing both within and outside political parties are as rampant as the post-election petitions themselves because the political elite have turn the political arena on its head with a continuous bitter and dangerous moves to outwit each other by whatever means possible. Politics is therefore played with acrimony and rancor. The role and importance of an independent and impartial judiciary, in a situation such as has just been painted of Nigeria, cannot be over emphasized

The last three cases discussed were on post-election complaints on the conduct of the election and two out of the three cases were taken from the U.K.

In the case of *Alh. Atiku Abubakar & 2 others v. Alh. Umaru Yar adua & others AND Gen Buhari v. INEC & others*, the Supreme Court of Nigeria allowed the election of the president

because according to the Court, the irregularities complained of were not substantial enough to vitiate the election. Similarly in *Cooper v. Gildernew(suupra),* the Election Court in U.K held that the irregularity in the conduct of the polls which have to do with extension of voting beyond prescribed time due to threats issued by the Respondent's (winner) party workers, was not enough to vitiate the election. Obviously, both Courts in Nigeria and the U.K were acting in accordance with the provisions of the *Article 48* of the Representation of the People Act 1983 (U.K) *Section 146* of the Electoral Act, 2006 (Nigeria) respectively which are to the effect that an election would not be annulled if there is substantial compliance with the provisions of the electoral laws. What amounts to 'substantial compliance' is for the Courts to decide and this they do based on the facts of each case, however, it appears that if an irregularity does not affect the votes in an election, then the courts are usually very reluctant to set aside the election. However, one wonders whether the courts can, at all times, really come up with decisions in election matters that can be a true reflection of the mind of the electorate. In determining these election matters, the electoral rights involved are not only those of the contestants but the right of the electorate is also involved and indeed, elections are about the only tool in the hands of the electorate or the people to check and/or control their representatives, it will therefore be an unfortunate development, if the courts in performing their electoral process mediation role, take decisions that do not reflect the mind of the electorate as demonstrated in the polls. This is the point where some have argued against allowing the courts to be the final arbiter as regards issues such as this.

In *Cooper v. Gildernew* (supra) for example, the presiding judge of the election Court, **Carswell LCJ**, decried and condemned the action of the Respondent's party workers in that they threatened the electoral officials into extending voting time and during the extended period,

between 15 to 20 votes were cast for the Respondent. The Respondent eventually won the election with 53 votes. However, the judge still went ahead to confirm the result of the election thereby refusing the prayer of the applicant for a cancellation of the election. Watt condemns this attitude of the court[49], the same way that Yusuf joins other people (including lawyers, academics and politicians) to condemn the Nigerian Supreme Court decision in *Rt. Hon. Rotimi Amaechi* case.[50] I am however, of the view that the two courts in these two cases arrived at the right decisions and I am looking at it from the perspective of the role of the court to keep its eyes wide open while deciding the electoral rights of the citizens because, apart from the individual politicians coming before the court to assert their right or seek remedy for a breach of their right, there is also the right of the electorate and therefore a public interest in the whole issue. The court in *Cooper v. Gildernew* took into account the fact that even if the estimated 15-20 votes scored by the Respondent during the period that the voting was extended were to be deducted from the Respondent's votes, the Respondent would still have had more votes than the applicant which would still have been enough to get him elected. The court was also considering the fact that if you allow an illegal action (threat) like that of the party workers of the Respondent to be the basis for annulling an election even if the votes were not affected, then you set a bad precedent whereby in future, the supporters of a losing candidate can decide to create a similar scene in order to have the entire election set aside or annulled.

On the *Rt. Hon. Rotimi Amaechi's* case in Nigeria, I also agree with the decision of the Supreme Court in ordering that Rotimi Amaechi be sworn in as Governor of Rivers State in place of Celestine Omehia without calling for fresh election. The reason advanced by the Supreme Court which to me, is quite convincing, was that by virtue of *section 221* of the Nigerian Constitution,

[49] Bob Watt, *supra* note 8 at P.175 paragraph 1
[50] Hakeem O. Yusuf *"Democratic transition, judicial accountability and judicialisation of politics in africa"* (International Journal of Law and Management, Vol. 50 No. 5, 2008) Pp. 236 - 261

there is no place for independent candidacy in Nigeria and a candidate must be sponsored by a political party; it follows therefore, that even though, the political parties field candidates, they are more pronounced in the contest than the individual candidates. Having found therefore, that Rt. Hon. Rotimi Amaechi was the right candidate to have been fielded by his party, he steps into the shoes of the candidate that was unlawfully fielded and it makes no difference whether the party won or lost in the election. There was widespread jubilation by the people of Rivers state over this decision by the Supreme Court, yet a few lawyers along with some academics and politicians have faulted this ruling on the ground that the Supreme Court has made somebody a governor who never contested an election and therefore has trumped the free and democratic choice of the people who voted during the election. The question which these critics have failed to consider is that if Rt. Hon. Rotimi Amaechi's party (the PDP) had lost the election and now that he has been declared to be the rightful candidate, the Supreme Court goes ahead to cancel the election and order fresh election, what would the party that won that election have done? The simple answer to that question is that the party that won the election would have cried foul and it would have been more a case of trumping the free and democratic choice of the people due to the internal problem or fault of one of the contesting parties. The Supreme Court of Nigeria further gave the reason that it decided that case not as an election Court but as an appeal court listening to the normal rights litigation which originated in a Federal High Court went through the Court of Appeal before coming before it and as such would not be in a position to cancel an election and order a new one. Even this reason does not assuage Yusuf, Eze[51] and the rest. Yusuf mentioned particularly that "admittedly, the Court found itself in an unprecedented legal conundrum in the country's history. To resolve the difficulty, it however adopted a legal

[51] Chukwuka Eze, *"Intrigues: The Nigeria Supreme Court and the Rotimi Amaechi's judgment"* found at http://www.onlinenigeria.com/articles/ad.asp?blurb=652 (posted on 6/5/2008 and accessed 21/3/2009)

formalism that led it to an adjudication steeped in an artificial construct distant from situational reality. The reality being the incidence of an election in which close to 200,000 voters made a choice of a candidate presented on a usurped ticket."[52] I disagree with the submission of Yusuf because even though Yusuf tends to agree with my earlier view in this paper that Courts should not close their eyes to the environment within which they operate in carrying out their role, he went from the truth by saying that the Supreme Court adopted a formalism leading to an adjudication embedded in artificial construction distant from reality. The truth is that the people of Rivers state were happy with the Supreme Court decision and they jubilated because, it removed a candidate that was forced on them by the then President Olusegun Obasanjo. Besides, the democratic basis or legitimacy for the person (Celestine Omehia) who unlawfully replaced Rt. Hon. Rotimi Amaechi as the PDP candidate was non-existent as he did not even contest the Party primaries where Rotimi Amaechi was elected to represent the party. Yusuf, with all due respect, appears not to be in tune with the actual reality on ground during the Amaechi, Atiku ans similar other saga in Nigeria. In Amaechi's case particularly, while the case was at the Court of Appeal, ruling was reserved by the Court of Appeal in Abuja for 12th of April, 2007 which was a Thursday meanwhile the gubernatorial elections for which Amaechi wanted to contest were billed for Saturday 14th April, 2007. What the Federal Government headed by Olusegun Obasanjo did was to declare 12th and 13th April 2007 as public holidays in Nigeria without any justifiable reason apart from the fact that people should prepare for the elections. This kind of holidays was unprecedented in Nigeria and it was too glaring to the public that the government was using the apparatus of the state to fight an individual. This action is also an affront on the judiciary by the executive who was using every means within its power to frustrate the move of

[52] Supra, footnote 50 at page 244

the court to give justice to the people. By the next working day (Monday 16th, April, 2007) when the Court of Appeal delivered its ruling, the elections had already taken place.

The people who criticized the Supreme Court of Nigeria's Judgment in Amaechi v. Omehia, including Yusuf, seem to hinge their overall argument on the fact that the Supreme Court was too formalistic or legalist as the Supreme Court also relied on section 22 of the Supreme Court Act which permits the Court to grant such relief that will completely determine all the issues arising from enforcement of the judgment won by the appellant. This time, they are not arguing that the Court deviated from the law to embark on a frolic of its own but that it adhered to the law blindly; my question is, assuming (arguendo) that the Supreme Court was too legalistic, was substantive justice done or not? Were the people who allegedly voted in Rivers state happy over the judgment or not? The people of Rivers state who voted in the election were happy over the judgment of the Supreme Court but that is not in any way suggesting that the Supreme Court rules in accordance with public opinion. The Supreme Court itself clarified this issue in a latter case[53] where it held that,

> *"Courts of law do not give judgment according to public opinion or to reflect public opinion unless such opinion represents or presents the state of the law. This is because the Judges clientele is the law and the law only. Public opinion is, in most instances, built on sentiments and emotions. Both have no company with the law. They are kilometers away from the law."*

In these days that substantial justice seems to be the watch word every court, the courts should be allowed some flexibility in the application of the law (particularly in Nigeria where the applicable laws and rules of court are so complex and in some cases out of tune with reality), my only proviso being that they should not extend this flexibility to the extent of ignoring the law and arriving at a decision which is totally baseless in terms of legal norms and it is a good thing

[53] Abubakar v. Yar'Adua (2009) 5 W.R.N 1 at 164 lines 25-30 per Niki Tobi, JSC

that the Supreme Court in Amaechi's case found a legal basis for its decision including the consequential orders it made.

The Supreme Court itself pointed out this fact when they stated as follows:[54]

> *"In the eyes of the law, he (Amaechi) remains the candidate and this court must treat him as such. The appellant and not the respondent must be seen as having won the election. The argument that the appellant must be held to his claim overlooks the fact that this court has the wide jurisdiction to give circumstantial orders and grant reliefs, which the circumstances and situations dictate"*

The Court further stated:

> *"This court shall rise up to do substantial justice without regard to technicalities.* ***We would not make an order which does not address the grievances of the party before this court. The only way to accord recognition to his right not to be trampled upon is to declare him and not the 2nd respondent to have won the April 14 gubernatorial election****"*. (Emphasis mine)

On the need to shy away from technical justice and do substantial justice, the Court held:[55]

> *"A court must shy away from submitting itself to the constraining bind of technicalities. I must do justice even if the heavens fall. The truth of course is that when justice has been done, the heavens stay in place. It is futile to merely declare that it was Amaechi and not Omehia that was the candidate of the PDP. What benefit will such a declaration confer on Amaechi? Now in Packer v. Packer 1954 page 15 at 22, Denning MR in emphasizing that there ought not to be hindrances or constraints in the way of dispensing justice had this to say: 'What is the argument on the other side? Only this, that no case has been found in which it had been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before we shall never get anywhere. The law will stand still whilst the rest of the world goes on and that will be bad for both'……The sum total of the recent decisions of this court is that the court must move away from the era when adjudicatory power of the court was hindered by a constraining adherence to technicalities. This often results in the loser in a civil case taking home all the laurels while the supposed*

[54] See the lead judgment of Justice Katsina-Alu

[55] See the concurring judgment of Justice Oguntade, JSC on Pp. 114-115 lines 40-40 as reported in (2008) 10 W.R.N 13

winner goes home in a worse situation than he approached the court."

In concluding this chapter, it will be re iterated that the systems in place for the protection of the electoral rights to vote and be voted for both in Nigeria and the U.K are similar particularly in terms of the procedure for post-election petitions before the election courts/tribunals. However, the two countries differ from each other in terms of the practical situation on the ground: While, there appears to be more activity in terms of the volumes of both pre and post election cases in Nigeria due to the "high-powered intrigues that challenge the fundamental existential basis of the polity", the U.K seems to have a more stable and well established democracy where "various refined institutional buffers serve to blunt possible sharp edges off electoral disputations."[56] The few cases discussed above have shown that the attitudes of the Courts in these two jurisdictions are similar when they handle post-election matters in the sense that apart from the individual electoral rights of the parties coming before them, the courts also take public interest into consideration in the light of the provisions of the Electoral Laws providing that elections will not be set aside if there is substantial compliance with the Electoral Law, particularly when the courts are convinced that any irregularities did not materially affect the votes proper as was done in the cases of Fiona Jones and Gildernew decided by the UK courts and the Amaechi and Yar'adua cases in Nigeria.

[56] Supra, footnote 50 at page 243

CHAPTER FOUR

WHAT SCORE FOR THE JUDICIARY IN NIGERIA AND THE U.K ?

I submit that, one of the main yardsticks to use in answering the question on how to score the judiciary in Nigeria and the U.K as regards the role they have played in the electoral process in these countries (and *a fortiori* the safeguard of electoral rights) is the pulse or feeling of the general public. The important issue in this regard is 'how will the ordinary man on the street score the judiciary?' This writer is not aware of any opinion polls conducted in any of these two countries on the issue in recent times but comments and actions from members of the public on specific verdicts of the court from time to time could be used to measure the pulse of the public to a large extent. The readiness of the people to submit to the jurisdiction of the courts and to patiently wait for the verdicts of the courts is also another indicator of the level of faith that the people have in the judiciary. There is no perfect system any where in the world and perfection, as far as human society and inter-relations are concerned, can only be utopian; that is why some people are able to fault some aspects of some of the decisions of the courts in this regard. From the empirical point of view, it appears that the courts in the U.K have fared very well as their electoral jurisprudence shows that they have not really been handing down decisions that totally lack any legal or Constitutional basis capable of generating wide-spread controversies which can in turn erode public confidence in the judiciary; it must however be quickly added that the situation in the U.K is such that so much litigation is not necessary in the sense that the electoral system is organized in such a manner that leaves very little room for manipulations. The level of the rule of law is also very high that the people in power will not ordinarily want to bend or break the law to the extent of excluding their opponents from lawful political contest. Compared

to the U.K, Nigeria is a country where democracy and the rule of law is still going through experimentation because the country has had more of military dictatorship than Constitutional rule since independence in 1960, the last stint of military dictatorship being the 16 years from 1983 to 1999. The current democratic experience in Nigeria began in May, 1999 when the last military junta midwifed an election and handed over to the elected civilian administration. The story of Nigeria has, therefore, been such that even some of the elected civilian leaders continue to act as if they are acting a script from the former military lords and that is why those in power will not adhere to the law to provide a level playing field for all political actors. People belonging to political parties different from the ruling party are harassed, victimized and at other times, the law is manipulated to scheme them out of even contesting elections. The Supreme Court of Nigeria had this to say about politics in Nigeria:[57]

> *"Politics as it is played in Nigeria leaves much to be desired. There is so much acrimony, bitterness and violence. Nigerians play politics as if they are in a battle field. It is not so. I do not agree that politics is a dirty game. It is a decent game; only some Nigerians make it dirty. The problem in Nigeria is the politics of winner takes it all. Another problem is the gain from it. I will suggest that politics should be made less attractive. If that is done, there will be less fight, acrimony and bitterness."*

This is one of the major reasons why the courts in Nigeria are inundated with volumes of pre and post election complaints; the other reason is that the vast majority of the people of Nigeria now have respect for and confidence in the judiciary because of the way and manner the courts handled the several complaints arising from the 2003 and the 2007 general elections in Nigeria (a few of the cases decided by the courts are discussed in chapter 3). The judiciary seems to be the only sane department, as the other political branches appear to have thrown caution to the wind in their bid to hang onto power at all cost. This is not to say that the judiciary has attained a state of perfection in Nigeria not needing adjustment or reform, however, like its counterpart in the

[57] See the case of *Abubakar v. Yar'Adua* (2009) 5 W.R.N 1 at 168 lines 5-15 Per Niki Tobi, JSC

U.K the judiciary in Nigeria has done a good job deserving a pass mark in the electoral and indeed the political process in the last 10 years since the return of the country to democratic rule in 1999. The fact that politicians and their followers do not resort to self help to cause destabilization of the polity and would rather take their complaints to court is a testimony to this fact. The decisions handed down by the courts in both countries, especially Nigeria (some of which are discussed in chapter 3) and the attitude of the court in the way they have handled electoral complaints has also sent a message to the bodies responsible for organizing elections and the message is that they should play by the rules, failing which the courts will not fail to enforce the law in a manner that substantial justice, as seems in tune with public expectation and legal norms, will be done.

Even though it is not the main issue for discussion in this paper, the role of the electoral bodies is as important, if not more important than the roles of the courts, because if the electoral body responsible for organizing and executing the conduct of elections abide by the rules to the satisfaction of the players, there will be less disputation for the courts to handle. In this regard, Nigeria has a lot to learn from U.K and my suggestion is that the Nigerian government can appoint credible persons to the Electoral Commission some of whom should be well trained in the practical aspects of management of the electoral process. One of the ways to achieve this is by sending the commissioners and other key staff of the Electoral Commission to study or observe how it is being done in places like the U.K. The Supreme Court in Nigeria commented on the major factor responsible for problem with the electoral system in the case of Abubakar v. Yar'Adua[58] as follows:

> *"It cannot be said that all is well with our electoral system. It is however clear that whatever is wrong with the system had nothing*

[58] (2009) 5 W.R.N 1 at 207 lines 35-40

> *to do with the law or legal provisions but the human beings operating the system."*

The Electoral Commission itself should be independent and the appointment and dismissal of the key officers of the Electoral Commission should not be at the discretion of those holding executive offices. Presently in Nigeria, the power to appoint and remove the Chairman and members of the Independent National Electoral Commission lies with the President and even though, the Senate has an input by having to confirm the exercise of that power, this check has proved to be ineffective and the presidency is always having its way.[59] The system in the U.K where the chairman and members of the Electoral Commission are appointed and removed by the House of Commons exercising Her Majesty's power is preferable.[60]

The amendment of the Electoral Act of Nigeria in 2006 by the Legislature particularly section 32 thereof is however, commendable. Section 32 in the old Act of 2002 reserved the right to determine who should be disqualified from contesting election to the Independent National Election Commission but the National Assembly was sensitive enough to realize that that provision of the Act was used by the executive who seems to have a hold on INEC to select the candidates who should contest elections and screen out those that may pose a threat. The new *section 32* particularly sub section 5 in the Electoral Act of 2006 now gives the court the power to determine whether any candidate has met the required conditions to qualify her/him to contest any political post. The position now is that if INEC, or anyone for that matter, feels that a particularly candidate is not qualified to contest an election, an application should be filed in court for an order disqualifying such person. This is a good innovation by the National Assembly in Nigeria which is recommended to the Parliament in the U.K even though cases of unlawful disqualification or exclusion do not seem to be rampant in the U.K but it does appear that the

[59] See Sections 153, 154(1) & 157 of the Nigerian Constitution 1999
[60] See Sections 1 (4) & (5) and 3 (1) of the Political Parties, Elections and Referendums Act, 2000 (U.K)

Electoral Law in the U.K generally needs to be updated to bring it in tune with development in the electoral process. Watt, for example, has observed that the rules in respect of electoral matters (as found in the Representation of the People Act 1983) are complex and should be re drafted "in order both to modernize the rules and to clarify some issues".[61] My recommendation ca not, therefore, come at a better time than now that the U.K is experimenting with new electoral processes like the voting by post or postal voting which was used in the Birmingham council elections of 2004 and which led to widespread condemnation as a result of ballot rigging due to the flaw in the safeguards against postal vote fraud.[62]

This development has led to comments by well meaning U.K citizens to the effect that Britain's next Government could be decided in court. David Monks, a returning officer for Huntingdon and an elections expert was reported to have said "There is little doubt that we will see more electoral petitions in marginal seats". He said further "I am afraid that the country's future could be decided in the courts and not at the ballot box"[63]

The case of *Alh. Atiku Abubakar & 2 others v. Alh. Umaru Yar adua & others AND Gen Buhari v. INEC & others*, decided by the Supreme Court in Nigeria in which the election of President Umar Musa Yar'Adua was upheld in a split decision of 4-3 shows another identified problem with the way the Supreme Court arrived at its judgment and the problem has to do with the usage of Section 146 of the Electoral Act 2006 which is *in pari materia* with Article 48 of the Representation of the People Act 1983 of the UK. These provisions are to the effect that an election will not be set aside for non-compliance with the Electoral law if the court determines that there was substantial compliance with the Electoral law. The Supreme Court in Nigeria

[61] Bob Watt, *supra* note 8 at P.155
[62] Francis Elliot, Sophie Goodchild and Sam Care *"Election could be decided in courts"* (published in The Independent of Sunday, 10 April 2005) found at http://www.independent.co.uk/news/uk/politics,/election-could-be-decided-in-courts (accessed 21st March, 2009)
[63] Supra, footnote 32

relied heavily on this provision to uphold the election of Umaru Musa Yar'Adua who is currently the President of Nigeria in spite of the argument from the 2 petitioners that there was non-compliance with the Electoral Act as regards numbering or serialization of ballot papers which was capitalized upon for the perpetration of electoral fraud to the disadvantage of the petitioners. Four out of the seven Justices who heard the petition were not convinced with this argument and they held (relying on the old section 37(1) of the Representation of the Peoples Act, 1949[64]) that there was substantial compliance in spite of the non-numbering of the ballot papers complained of. They further held that it was for the petitioners to call witnesses to testify that the illegality or unlawfulness substantially affected the result of the election. The problem here appears to be with the provision of the Electoral Act 2006 and Section 146 thereof which seems to give too wide a discretion to court to determine what substantial compliance is or what it is not. The U.K Court in *Cooper v. Gildernew* had also relied on a similar provision to allow the election of a party who got more votes during unofficial voting time. Even though I am not faulting the ultimate verdict of the Court in Cooper v. Gildernew, I find it difficult to agree with the reasoning of the Supreme Court in up holding the election of the Respondent (Yar'Adua) because I cant find what else could affect the result of an election more than ballot papers that are not serially numbered and therefore, easy tool for electoral fraud or rigging as they are very difficult to account for. It is my suggestion that Section 146 of the Electoral Act 2006 of Nigeria and the similar provision in the Representation of the People Act, 1983 of the UK should undergo a review in order for specific cases to be mentioned when the conduct of an election can be said not to have complied substantially with the provisions of the Electoral law in order to reduce the kind of discretion at the disposal of the courts presently.

[64] See page 40 of the judgment reported in (2009) 5 W.R.N 1

What kind of judiciary for the role of electoral rights protection?

Having stated that the judiciary is the department of government that traditionally interpret and apply the laws and therefore the last hope of the citizens in the protection of the rights of the citizens including electoral rights, the next question is 'how should the judiciary be organized to be able to effectively and efficiently carry out this all-important role?' The short answer (but needing elaboration) is that the judiciary must be independent and impartial. As a matter of fact, the independence and impartiality of the judiciary are inter-related and inter-dependent and there cannot be impartiality if there is no independence.

The issue of the independence and impartiality of the judiciary is so important because Firstly, it determines whether or not decisions coming from the courts will be taken seriously; secondly in modern times, the courts have come to assume a somewhat strategic and sensitive role in the electoral process and the decisions they make is able to make or mar a polity particularly in up coming democracies like Nigeria. There is now what Yusuf refers to as "judicialisation of politics in Nigeria's transition to democratic governance" brought about by a predisposing environment created by the political branch.[65]

It is argued that the adjudication of electoral rights, as simple as it seems, may have far reaching implications for the foundation of the polity.[66] That is why the courts need to be adequately prepared or equipped for this daunting task which must be performed with the greatest caution in order not to contribute in spurning the free and fair choice of the electorate. The court is expected to overturn "a constrained and/or biased choice, which is no choice at all"[67] and not to come up with a decision that will further constrain a free and fair democratic choice.

[65] supra footnote 50 at page 239
[66] Ibid at page 243
[67] Watt, supra footnote 8 at page 155

The failure to put in place an independent and impartial judiciary that commands the respect and confidence of the people is, to a large extent, responsible for why politicians and their supporters who lost out in the polls and who felt they were cheated in the conduct of the elections have resorted to self help without considering the option of seeking legal redress in the courts because the judiciary might be under the firm control of the incumbent. Example is Kenya where more than 1,000 people were killed and a lot more displaced due to the post-election violence that erupted after the 2007 presidential election when the opposition rejected the results of the election and accused the incumbent of rigging the polls. This leads to the next point, which is about the appointment and accountability of members of the judiciary, the presence of which further bolsters the confidence of the people in the judiciary. The Judiciary as the third branch of government is apolitical in the sense that it does not engage in politicking like the other two branches: It does not canvass for votes neither are its members elected directly by the people in an election. There are, however, certain structures that can be put in place to ensure the independence and accountability of the judiciary. The appointment of judges should be done in a way that the judges appointed will not hold their offices at the mercy and subject to the whims of the person or authority appointing them. There should be a properly laid down transparent procedure for the appointment of judges and this procedure should involve more than one department of government. In Nigeria, for example, the judges of the federal Courts are appointed by the President on the advice of the National Judicial Council (NJC)[68] and their appointments are subject to confirmation by the Senate. In the U.K, judges are appointed by the Queen on the recommendation of the Prime Minister and the Lord Chancellor. While the procedure in Nigeria makes it possible for the upper Legislative House to be involved in the

[68] See Sections 238(2), 250(2), 256(2), 261(2) & 266(2) of the Constitution of Nigeria, 1999. The composition and functions of the NJC is further elaborated in this chapter

process of appointing judges by the chief Executive, the system in the U.K is a bit different as the Parliament (excepting the Prime Minister who seats in the Commons) is not involved in the appointment process; the absence of a clear-cut separation of powers in the U.K is responsible for this. However, a lot of reforms are already going on in the U.K at the end of which, there shall be a judicial appointment and conduct Ombudsman to handle recommendation for appointments and complaints from appointments. Discipline of erring Judges is to be handled jointly by the Constitutional affairs Secretary and the President of the courts.[69] In, the Constitution in *Section 153* provides for the setting up of the National Judicial Council (hereinafter referred to as the NJC) which is responsible for the recommendation of persons to be appointed to the Supreme Court and the other superior courts of record. This council also handles issues bordering on the discipline of judges and recommends their removal from office for misconduct. The membership of the Council is made up of senior judges, 5 lawyers who are in private practice and 2 persons of unquestionable character who are not lawyers. While this innovation in the Nigerian Constitution, which is aimed at ensuring accountability of the judiciary, is commendable and recommendable, it is important to stress that the independence, transparency and discipline of the members of such a body should also be guaranteed; Yusuf has criticized the NJC in Nigeria based on the issues of transparency and discipline.[70] It is my humble suggestion, that one of the ways of dealing with the issue of transparency (raised by Yusuf) of such bodies as the NJC is to have their membership drawn across various groups including laymen and possibly representation of the organized labour in order not to make it a wholly judicial affair since the essence of the body is to check any excesses of the judiciary.

[69] http://www.discourse.net/archives/2004/01/uk_to_adopt_greater_partial_separation_of_powers.html (posted Jan. 26, 2004 and accessed 22/3/2009)
[70] Supra footnote 50 at page 247

If bodies such as the NJC in Nigeria and the Judicial appointments and conduct ombudsman in the U.K are properly set up put in place by any government, then the issues of the appointment and accountability of Judges will be settled and this will go a long way to secure the independence and impartiality of the Judiciary which will ultimately culminate into an effective and efficient performance of duty by the courts and stronger confidence of the people in the Judiciary

Conclusion

The preceding chapters herein have shown that the judiciary is an indispensible and an important branch whose role in the interpretation and application of the laws has a deep implication for the protection of the rights of the citizens generally. These rights include electoral rights which for the purpose of this paper have been restricted to the rights to vote and be voted for and the consequential right to seek redress. The way and manner that the judiciary performs this role is as equally important as the duty to perform this function. This writer has opined that the judiciary must not adopt a straight –jacket approach or be zombie-like in performing their role because the judges are a part of the society in which they live and work; however, the judges should not put the law aside and do what the think the law should be if there is in existence a clear and unambiguous law on a particular issue. Other people like Waldron are of the contrary opinion and some of them are of the extreme view that the judiciary should not have the final say on issues bordering on the rights of citizens and legislators as the citizens and legislators are capable of reasoned decisions as judges. The question is, what will be the fate of the citizens if their representatives decide to connive to act contrary to the will of the people and the judiciary is just there as a robot to act out the script of the peoples' representatives? The simple answer is that a despotic government that will perpetuate itself in power not giving the people a fair opportunity to alter the status quo through the polls will be birthed.

The attitude of the judiciary should not be different when they mediate the electoral process because when they do so, they are deciding on the electoral rights of the citizens which have public interest flavor. This role has been shown to be very crucial, especially in transitional societies like Nigeria as the action of the judiciary in this respect has a way of touching on the

existence of the polity itself. Politics in these kinds of societies has not only been judicialized but the judiciary has the potential to be politicized as well.[71]

The courts in Nigeria and the U.K have kept faith with what is expected of them as has been shown from the few cases discussed, having realized that it is better to do substantial justice and be criticized than adhere strictly to the technicalities inherent in the letter of the law and arriving at an unjust ruling against the spirit of the law. The Court of Appeal in Nigeria, while deciding the Atiku/Buhari v. Yaradua presidential election petition alluded to this position when it quoted Chief Justice Rehnquist from the U.S Supreme court's decision in ***Bush v. Gore***[72] as follows:

> *"We deal here not with an ordinary election for the President of the United States. In Burroughs v. United States, 290 US 534, 535, 78 L Ed. 484, 54 S. ct 287 (1934), while presidential electors are not officers or agents of the Federal government (in re Green, 134 US 377, 379, 33 L Ed. 951, 10 S ct 586(1890) they exercise federal functions under, and discharge duties in virtue of authority conferred by the Constitution of the United States, the President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated."*

The Court of Appeal therefore relying on the provision of the Electoral Act on 'substantial compliance' and drawing inspiration from the U. S Supreme Court held as follows:

> *"I have carefully perused the two results as contained in Exhibits EP3/12(2) and EP3/12(3). The disparity is not such that would affect the totality of the result. And beside, the result in the manual collation has not been rebutted. The result in the manual collation is before the Court and I cannot close my eyes to it. The result of the election of the 1st respondent cannot be nullified based on this complaint which has in no way affected the real substance of the election. The 1st respondent is deemed as returned via the manual result. I take note of the importance of the election and the vital character of its relationship to and the effect upon the welfare and safety of the entire nation, which cannot be too strongly stated. In sum I come to the conclusion that all the issues raised in the*

[71] Ibid at page 251
[72] (2000) 531 U.S 98

petition have not been established. Accordingly, it is hereby dismissed"

To be able to properly carry out its ever increasing crucial role, the judiciary needs to be independent and impartial. Measures to ensure the accountability of the judiciary need to be put in place also because the decisions of the courts in exercising their role have far reaching effect for the polity and the society at large particularly when electoral rights are involved. The decisions of the Courts in this regard, whether it is believed or not, have a way of ultimately contributing to the shape of democracy in the long run. Generally speaking, there is a link between the way the courts perform their role and the socio-economic well being of the people.[73]

[73] Eze Onyekpere *"The Socio-economic imperatives of electoral reform in Nigeria"* (Electoral probity and conflict management: 2003 general elections in retrospect published by Concerned Professionals, 2003) Pp. 81 – 87 at P.86 where it was stated, "There is an inextricable link between the state of the electoral process and its laws and the character of the leadership that it will produce. The character of the leadership will invariably impact on the provision of the basic needs and rights of the people, poverty reduction, creation of jobs and adding value etc. Where the process is easily manipulated and abused, then the leadership it will throw up will not be people orientated."

BIBLIOGRAPHY

Books

Herbert Jacob, Erhard Blankenburg, Herbert M. Kritzer, Doris M. Provine and Joseph Sanders, *Courts Law & Politics 1996* (Yale University Press, 1996)

Fred L. Morrison, *Courts and the political process in England 1973* (Sage Publications, Inc, California 1973)

Bob Watt, *UK Election Law: a critical examination 2006* (Glasshouse Press, 2006)

Cass, Sunstein, *Legal reasoning and political conflict* (Oxford University Press, 1996)

Articles

Hakeem O. Yusuf *"Democratic transition, judicial accountability and judicialisation of politics in Africa"* (International Journal of Law and Management, Vol. 50 No. 5, 2008) Pp. 236 - 261

J. Waldron, *"The Core of the case Against Judicial Review"* (2006) 115 Yale Law Journal 1346

Carol Harlow, *"Towards a Theory of Access for the European Court of Justice"*, (1992) 12 Yearbook of European Law 213 – 248

Epiphany Azinge, *"The Right to vote in Nigeria: A critical commentary on the open Ballot system"* (Journal of African Law [1994] Vol. 38, No. 2, Pp 173 – 180

Eze Onyekpere *"The Socio-economic imperatives of electoral reform in Nigeria"* (Electoral probity and conflict management: 2003 general elections in retrospect published by Concerned Professionals, 2003) Pp. 81 – 87

Chukwuka Eze, *"Intrigues: The Nigeria Supreme Court and the Rotimi Amaechi's judgment"* found at http://www.onlinenigeria.com/articles/ad.asp?blurb=652 (posted on 6/5/2008 and accessed 21/3/2009)

Francis Elliot, Sophie Goodchild and Sam Care *"Election could be decided in courts"* (published in The Independent of Sunday, 10 April 2005) found at http://www.independent.co.uk/news/uk/politics,/election-could-be-decided-in-courts (accessed 21st March, 2009)

Constitutions

The Constitution of the Federal Republic of Nigeria, 1999

The French Constitution of 1958

The German Basic Law

The Constitution of the United States of America

Statutes

The Representation of the People Act 1983 (as amended) (U.K)

The Electoral Act, 2006 of Nigeria

The Electoral Act No. XXXIV of Hungary 1989

The Law on Basic Guarantees of Electoral Rights and the Rights of citizens of the Russian Federation to participate in a Referendum 1997 (as amended in 1999)

Political Parties, Elections and Referendums Act, 2000 (U.K)

Websites

http://www.discourse.net/archives/2004/01/uk_to_adopt_greater_partial_separation_of_powers.html (posted Jan. 26, 2004 and accessed 22/3/2009)

http://www.parliament.uk/commons/lib/research/notes/snpc-02208 (accessed 20th March, 2009)