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**JUDICIALISM AND ELECTORAL PROCESSES IN  
NIGERIA: WHAT THE SUPREME COURT DID;  
WHAT THE SUPREME COURT MAY DO**



**JUDICIALISM AND ELECTORAL PROCESSES IN  
NIGERIA WHAT THE SUPREME COURT DID;  
WHAT THE SUPREME COURT MAY DO**

*By*

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*FICArb***

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## Foreword

It is indeed on record that all major elections in Nigeria were litigated upon up to the highest court of the land – the 1979 Presidential Elections, the June 12 1993 Presidential Elections, the 1999, 2003, 2007 and recently, the 2011 Presidential Elections and the consequent litigations are pointer in this regard.

Justice Ibrahim Muhammad brings to the fore some of the interventions of the Supreme Court of Nigeria in the electoral processes in this country which have gone a long way to deepen our democratic system and lend credence to the capacity of the apex court to serve as a stabilizing factor to checkmate the activities of politicians and bring them within the realm of due process.

No doubt the jurisprudence of this country has been immensely enriched by the Supreme Court of this country in particular and the Judiciary in general and the level of the confidence of the public in the Judiciary as an impartial arm of government has also deepened.

Thus, the choice of Hon. Justice Ibrahim Tanko Muhammad to deliver the lecture on **Judicialism and Electoral Processes in Nigeria: What the Supreme Court Did; What the Supreme Court may Do** is appropriate. This discourse has become an enduring monument because of its graceful style, majestic language, poetic rhythm, unusual insight and uncommon advocacy.

The author examines the role of the Supreme Court of Nigeria in the electoral processes in time past vis-à-vis the electoral laws in existence and use that as a basis to postulate what the apex court may do in the future.

To achieve this goal, His Lordship employs a sevenfold segmentation: the concept of judicialism; Supreme Court of Nigeria in the judicial hierarchy, its establishment, powers and jurisdiction; major provisions of the 2010 Electoral Act; significant judicial interventions made by the apex court in electoral matters; state of the Nigerian law on judicialism; electoral processes; and postulates as to what the apex court

may do in the near future especially in similar or related circumstances.

In the elaboration of judicialism, Justice Tanko submits that the most important considerations in the due discharge of the judicial office are impartiality, integrity and equality of treatment. Although the Supreme Court holds itself bound by its previous decision, he points out however that the Court may and has indeed departed from following its previous decisions in appropriate cases. The court has the power to overrule itself (and has done so in the past) for it gladly accepts it is far better to admit an error than to persevere in error. For the Supreme Court the most important consideration is the interest of justice, the development of the law and issues of public policy.

The lecture reveals that since the inception of the current democratic experience in Nigeria in 1999 there have been a number of occasions when the intervention of the Supreme Court was sought especially in electoral matters. The essence of the Supreme Court's intervention has always been to promote democratic culture among the Nigerian populace, strengthen the confidence of the people in the democratic process and promote constitutionalism and due process in the political system. Therefore, the Electoral Act and Party Constitutions must be seen to be complementing the Constitution in formulating broader rules, regulations and operation mechanisms for both INEC and the political parties for administrative convenience. Where any of such is in conflict with any section of the constitution, that enactment, rule or policy must surrender to the Constitution. Politics is not anarchy; it is not disorderliness. It must be punctuated by justice, fairness and orderliness.

The author concludes that Government should institute deep and elaborate reforms that will lead to the restoration of the integrity of the electoral system in this country and ensure that future elections meet minimum acceptable international standards. Both the leaders and the led must appreciate the role of the Court in general and the Supreme Court in particular in the development of the democratic values and practices. It is if

and only when this is done and we all learn to accord respect to the orders of court that we will join the rest of the democratic comity of nations as having arrived.

**Professor Epiphany Azinge, SAN, Ph.D, LLD**  
*Director-General*  
*September, 2012*







## **JUDICIALISM AND ELECTORAL PROCESSES IN NIGERIA: WHAT THE SUPREME COURT DID; WHAT THE SUPREME COURT MAY DO<sup>1</sup>**

*The* opinions of the Supreme Court whatever they may be, *will* have the force of law, because there is no power provided in the Constitution that can correct their errors, or control their adjudications. From this court, there is no appeal ... there is no power above them to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.  
Brutus.<sup>2</sup>

### ***I*n**roduction

The history of electoral processes in Nigeria is akin to the history of Nigeria herself as a nation. Both are chequered. Nigeria as a country, a contraption of the British colonialists emerged from the diverse intrigues and manipulations by the different European colonial powers which were in search of territorial occupation. She was to experience the three years fratricidal and perhaps senseless war from 1967 to 1970 that almost destroyed the very foundation upon which the country was built. Do I need to stress that the fact that she, Nigeria, is

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1. Being the text of a paper presented at the *2012 Felix Okoye Memorial Lecture* organised by *Nigerian Institute of Advanced Legal Studies, University of Lagos* and held at *Ayo Ajomo Auditorium, Nigerian Institute of Advanced Legal Studies, University of Lagos, Akoka, Lagos, on 18th September, 2012.*
  2. Quoted by Andrew E. Busch; *Judicialism's Cost to the Republic on Principle v.1 In 2 Sept. 2003.*

existing today as one nation, is a testimony to the power of the Almighty God.

Again elections were held and the outcome of most of them hotly contested. It is indeed on record that all major elections in Nigeria were litigated upon up to the highest court of the land – the 1979 Presidential Elections, the June 12 1993 Presidential Elections, the 1999, 2003, 2007 and recently the 2011 Presidential Elections and the consequent litigations are pointer in this regard. In all these, the apex court in the land, the Supreme Court of Nigeria was requested to and indeed, did intervene one way or the other.

In this lecture, we examine the role of the Supreme Court of Nigeria in the electoral processes in this country in the time past vis-à-vis the electoral laws in existence and use that as a basis to postulate as to what the apex court may do in the future. To achieve this goal, we have divided this presentation into seven major parts of which this part forms the first. In the second part herein, we focus on the concept of Judicialism. Part three of this lecture examined the Supreme Court of Nigeria as the apex court in the judicial hierarchy, its establishment, powers and jurisdiction. We bring the Electoral Act 2010 as amended into perspectives in part four with an examination of some of its major provisions. Some of the significant judicial interventions made by the apex court in electoral matters form the crucible of our discussion in Part five. While the position reiterated in Part 5 is the state of the Nigerian law on the subject presently, our discourse in Part 6 raises issues as to whether, if and when the apex court decides otherwise in the future. Our conclusions and suggestions are contained in Part 7.

### **The Principle of Judicialism**

It is a fact that, in recent times, with a world globalised by technology, the era of good governance has arrived. Its essence is management of public affairs by rational institutions; limiting

executive power and de-emphasizing the individual's remit in decision-making; decentralizing national resources and providing for national autonomies; establishing a framework for rationality in the exercise of executive competence; empowering adjudicative organs, guided by principle and law; subjecting disputes to a judicial process; reforming public institutions. The overall principle describing this new mode of governance is constitutionalism. The new epoch distinctly empowers one institution that was always in place albeit in enfeebled form - the Judiciary. The reason is that it is this institution that always had a detailed scheme of guiding-steps for its actions: jurisdictional rules; procedural rules; natural justice; substantive limits defined by statute law; limits imposed by the constitutional law. The moment the epoch of constitutionalism came, the rational path of governance became that which is defined by the judicial mandate. Indeed, constitutionalism has spawned the secondary ideology of judicialism. There is a clear support of the aforementioned in the Constitution of Kenya, 2010 under which the Judges have taken their oath of office, and which must, today, be taken as the crucial element in the grundnorm whereupon rests the entire legal order.

The demands of Judicialism, over time, have crystallized approaches to the discharge of duty, which have been considered in substance, adopted and formalized, as virtually a routine guide to those holding judicial office. In the elaboration of the relevant principles, the most important considerations in the due discharge of the judicial office have been set out as follows:

- 1) the Judge is to conduct the judicial function "independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference";

- 2) The Judge is to be free from inappropriate connections with, and influence by, the executive and legislative branches of government;
- 3) The Judge is to exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary.
- 4) The value of impartiality constrains the Judge to perform his or her judicial duties without fear or favour, bias or prejudice; to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases; to abstain from making any comment that might reasonably be expected to affect the outcome of any proceedings he or she is conducting.

On the value of integrity, the Judge is to ensure that his or her conduct is above reproach in the view of a reasonable observer and to reaffirm the people's faith in the integrity of the judiciary. On the value of propriety, the Judge is to avoid impropriety and the appearance of impropriety in all the judge's activities; to accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

On the value of equality, the Judge is to ensure equality of treatment before the Courts; and in this regard ought not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds. The Judge is required to have an awareness of diversity, and differences arising from various sources in society, such as race, colour, sex, religion, national origin, caste, disability, age, and marital status, and sexual orientation, social and economic status.

As already remarked in this paper, the governance obligation of constitutionalism and Judicialism presupposes the

existence of a stable and fair Court system operating with impartiality and integrity and enjoying the confidence of the public; as it is in international norm and practice<sup>3</sup>.

Judicialism as a concept can simply be explained as the philosophy that the political and governmental edifice in a country is optimally designed only when its central pillar is the judicial process. The judicial process is, in this case, regarded as a friendly, and people-focused mechanism, because it does not arbitrarily exclude anyone, so long as there is due compliance with rules of *locus standi*. It does not discriminate between the weak and the strong; it has expedient and objectively-designed procedures for the conduct of proceedings; it is a listening and hearing mechanism; it is sensitive to questions of merit; it resolves all justiciable disputes, including those entailing conflicts within the political establishment; it has a definite claim to legitimacy; it hands down its decisions with finality; it has an appellate structure for self-rectification, or affirmation; it has good cause to demand obedience, of all and sundry. The Judiciary, thus, is the classical instrument of institutionalized governance founded on merit and principle. This is the justification for the doctrine of Judicialism.

The doctrine of Judicialism is to the effect that the Supreme Court is the primary and possibly the sole interpreter of the Constitution. Therefore all other state and federal institutions should submit to its judgment. Cases handed down are looked at as sacrilegious and the elected branches don't have the right or duty to look into any constitutional question.

The increasingly popular view is that the Constitution is whatever the Supreme Court says it is. This view is widely held in the Court, Law School and Media over a long period of time. This doctrine of Judicialism disallows the political system no means to deal with courts when they err. Closely connected to this doctrine of Judicialism is the doctrine of judicial

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3. *Judicialism and Ethics: An Introduction* at <http://www.kenyalaw.org/klr/index.php?id=905>

precedence<sup>4</sup>. Judicialism has become the handmaiden of constitutionalism; and it follows that of the three conventional arms of government, the one which has distinctly benefited from the changing political philosophy is the judiciary. The inference to be drawn is that the plane of governance has shifted, from a raw power-orientation to an institutional check orientation; and that is today, the expression of good governance. Judicialism is the philosophy that the political and governmental edifice in a country is optimally designed only when its central pillar is the judicial process<sup>5</sup>.

The Judiciary's functioning, within the principle of judicialism, is required to be independent: the exercise of judicial authority ought not to be subjected to the control or direction of any person or authority. Judicialism founded on the dictates of the grundnorm, provides that the Constitution is to be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, and the human rights and fundamental freedoms contributes to good governance.<sup>6</sup>

Since judges are considered as important arbiters between conflicting legal arguments, they will mostly restrict their reasoning and decisions to the legal views expressed before them by lawyers representing opposite sides. Therefore judicialism means ignoring any extrinsic considerations including policy issues not argued or introduced by counsel. Many of the judges, especially in the common law countries, will have been elevated to the bench from practice at the bar and, as one distinguished lawyer has remarked, the fact that a person has been appointed a judge does not remove him from the principles and notions of law which he has previously held.<sup>7</sup>

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4. See Andrew E. Busch; "Judicialism's Cost to The Republic"; *On Principle*, VI In2 September 2003.

5. I. G. W. Kanyeihamba; "The Rule of Law, Judicialism, and Development", Vol. 3, Issue 1, *Third World Legal Studies*. (1984).

6. Kanyeihamba, *Supra*, at page 1.

7. Kanyeihamba, *supra*, p.3.



There is no pretence that the judiciary simply uncovers the intention of the legislature. It acknowledges that judges have a role to play. This is different from the presumption of legislative intent which posits that the legislature intends to promote international law. The point here is that the legislature intends to promote certain values, in developing laws; hence, the matrix of considerations does not pretend that reliance on International norms does not add anything new to the legal landscape. As related proposition, the matrix of considerations approach recognizes that judicial choice permeates virtually every level of the analysis. For example, judges determine which rationales are present; they assign weight to the various rationales. And they balance the national and international norms.<sup>8</sup>

Though all developing nations have written Constitutions and many do have specific provisions granting judicial power as extensive as that of the Supreme Court of the U.S.A., relatively few courts have been prepared to exercise it in the same manner and even fewer governments have been ready to concede that the judiciary can invalidate executive decisions or acts of the legislature. Of the countries which follow the experiences of U.S.A, only India can show some evidence of courts with the courage and foresight to found their decisions in constitutionalism. Nevertheless, within the first decade of its existence, the Indian Supreme Court had become the target of criticism from ministries and parliamentarians. The court was seen as a stumbling block to the building of a new society based on economic and agrarian reforms. The factors which fostered the growth of judicial supremacy in the U.S.A are either absent or are not much prominent in our constitutional system.

Another commentator has remarked that it is doubly certain that for a nascent republic dedicated to a social welfare objective, an over-zealous indulgence in Judicial activism

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8. Globalization of Judgment: Transjudicialism, *International Human Rights Law and Commonwealth Courts* at <https://tspace.library.utoronto.ca/handle/1807/15286>.

would have been not merely harmful, but positively self-defeating, too.<sup>9</sup>

The fact remains that for a constitutional government to emerge and democracy to become institutionalised in any nation for that matter, the role of the Judiciary is crucial. In other words, judicialism is a prerequisite to constitutionalism. This in effect means that the responsibility for ensuring that the standards and procedures laid down in a constitution are observed rests with the courts. This view originated in eighteenth century Europe and was given practical expression in the United States, and now forms a part of the constitutional systems of nearly all the advanced capitalist States. It was at independence, translated in slightly different forms and to varying degrees, into the Constitutions of the Commonwealth African States.<sup>10</sup>

### **The Supreme Court of Nigeria**

The Supreme Court of Nigeria is the apex court in the hierarchy of courts in Nigeria.<sup>11</sup> It replaced the Judicial Committee of the Privy Council as the highest court in Nigeria. It should therefore treat the decisions of the Privy Council given before the abolition of the appeals to the Council as it would treat its own decisions. That was indeed the attitude adopted by the Supreme Court in the case of *Johnson v. Lawanson*.<sup>12</sup> The decisions of

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9. *Supra*, at p. 3.

10. B.O Nwabueze: "Judicialism in Commonwealth Africa: The Role of the Courts in Government", Vol 17, Issue 01, *The Journal of Modern African Studies*, 1979; London and Enugu.

11. Created in 1963 on the attainment of Republican status by Nigeria. The Court succeeded the Judicial Committee of the Privy Council as the Court of final appeal in the country and the decisions of the Privy Council rank at par with the decision of the Supreme Court.

12. (1971) 1 All N.L.R. 56 Maurice. See also *Goualin Ltd v. Aminu Privy Council* Appeal No. 17 of 1957 (unreported), *Odeneyi v. Savage* (1964) N.M.L.R. 115. *Williams v. Akinwumi* (1966) 1 All N.L.R 115.

the Supreme Court becomes binding on all other courts to which the common law doctrine of binding precedent applies.<sup>13</sup>

### **Establishment of the Supreme Court of Nigeria**

There shall be a Supreme Court of Nigeria which *shall* consist of the Chief Justice of Nigeria and such number of justices of the Supreme Court not exceeding twenty one as may be prescribed by an Act of National Assembly.<sup>14</sup> The phrase not exceeding twenty one in section 230 is a tactic amendment of section 210 of the 1979 Constitution and section 228 of the 1989 Constitution, both of which provide for maximum of fifteen Justices of the Supreme Court. This deliberate legislative effort is aimed at reducing the workload of Justices of the Supreme Court whose task is becoming more and more burdensome by increase in number of appeals filed before them.<sup>15</sup>

### **Appointment of Chief Justice of Nigeria and Justices of the Supreme Court**

Under section 231 (1) and (2), of the Constitution of the Federal Republic of Nigeria, 1999 (as amended and shall be hereinafter referred to as the Constitution) the Chief Justice of Nigeria and other Justices of the Supreme Court shall be appointed by the President on the recommendation of the National Judicial Council, subject to confirmation by the Senate. Under subsections (4) and (5) an acting Chief Justice can, where necessary, be appointed by the President who shall be the most senior Justice of the Supreme Court, to act for not more than three months, except as otherwise recommended by the National Judicial Council. But the President shall not re-appoint as acting Chief Justice a person whose appointment as such has elapsed. Also a person shall not be qualified to hold the office of Chief

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13. Obilade G.B: *The Nigerian Legal System*, Spectrum Book Limited. Ibadan 2003 p110 at p.23.

14. Constitution, *op.cit.*

15. *Ibid.*

Justice of the Supreme Court of Nigeria unless he is qualified to practice as a Legal Practitioner in Nigeria and has been so qualified for a period of not less than fifteen years.<sup>16</sup> It should however be noted that the word recommendation in section 231 means *advice* as opposed to directive or an act of compulsion.<sup>17</sup>

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16. Subsection (3) of 231 Op cit 1999 Constitution.

17. See *Musa v. Hamza* (1982) 3 N. C. L. R. 229 at 250.

### **Jurisdiction of the Supreme Court**

The Supreme Court is an essentially appellate court and its jurisdiction therefore, must be ascertained only in the statute establishing it or any other enabling legislation.<sup>18</sup> In the main however, the Supreme Court has both appellate and original jurisdictions. The appellate jurisdiction conferred on the Court makes it the only court in the land to hear and determine appeals from the Court of Appeal.

### **Original Jurisdiction of the Supreme Court**

The Supreme Court has original jurisdiction in any dispute between the Federation and a State or between States *inter se* if and in so far as that dispute involves any question (whether of law or fact) in which the existence or extent of legal right depends.<sup>19</sup> In addition to this, the Supreme Court shall have such original jurisdiction as may be conferred upon it by any act of National Assembly.<sup>20</sup> Within the context of jurisdiction conferred by an Act of the National Assembly, the Supreme Court Act<sup>21</sup> in section 17 provides as follows:

With respect to exercise of the original jurisdiction conferred upon the Supreme Court by subsection (1) of section 232 of the Constitution or which may be conferred upon it pursuant to section 232 (2) of the Constitution, the following provisions shall apply:

- (a) Subject to the express provisions of any enactment, law and equity shall be administered concurrently;
- (b) In every cause or matter pending before the Supreme Court, the Court shall grant, either absolutely or on such

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18. *A.G. Anambara State v. A.G. Federation*, Suite No. S. C 140/1993; (1993) 6 N.W.L.R. (Pt 302) 692 at 722.

19. *Ifeawu v. F.R.N (2001)* 13 N.W.L.R. (pt 729) 103 @ 126.

20. Subsection (2) of 232 *Op cit* 1999 Constitution.

21. *Cap. S15 Laws of the Federation of Nigeria, 2004.*

terms and conditions as the court thinks just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter, so that as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters be avoided;

- (c) Subject to the express provision of any enactment, in all matters in which there was formally or in any conflict or variance between the rules of equity and common law with reference to the same matter, the rules of equity shall prevail;
- (d) In addition to any other powers conferred upon the Supreme Court by any enactment, the Supreme Court shall have and may exercise all powers and authorities which are vested in or capable of being exercised by it under the Constitution;
- (e) The Supreme Court shall observe and enforce the observance of customary law to the same extent as such law is observed and enforced in the Nigerian courts.

It is worth pointing out, *albeit*, in the passing that the original jurisdiction of the Supreme Court is not subject to the invocation of a party or a litigant at random. Certain conditions must be present before the court can be successfully moved to exercise its original jurisdiction. Thus, in *Attorney General of Bendel State v. Attorney General of the Federation*, the Supreme Court pointed out as follows:

- 1) For the original jurisdiction of the Supreme Court to be invoked:

- a) there must be an existing dispute,
  - b) the dispute must be between the Federal Government and a State or between States;
  - c) the dispute, to be justiciable, must involve a question of law or facts; and
  - d) the dispute must be one of which the existence or extent of a legal right depends.<sup>22</sup>
- 2) For there to be a dispute or controversy, such must be one that is appropriate for judicial determination. A justiciable controversy should, thus, be distinguished from a different or dispute of a hypothetical or abstract character; from one that is academic or moot, the controversy must be concrete and definite, touching on the legal relationship of parties having adverse legal interests.
  - 3) The word “dispute” means the act of arguing against controversy, debate, contention as to right, claim and the like or on a matter of opinion as in the instance case.

### **Appellate Jurisdiction of the Supreme Court**

Section 233 of the 1999 Constitution makes provision for appeals from the Court of Appeal to the Supreme Court and related matters. The provision of section 233 (2) of the Constitution listed a number of appeals that will go to the Supreme Court from decisions of the Court of Appeal without leave or as of right. The section provides as follows:

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22. *Ibid.*

An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following cases:

- (a) Where the ground of appeal involves question of law alone, decision in any civil or criminal proceedings before the Court of Appeal;
- (b) Decisions in any civil or criminal proceedings on questions as to the interpretation or application of this Constitution;
- (c) Decisions in any civil or criminal proceedings on question as to whether any of the provisions of Chapter IV of this Constitution has been, is being or likely to be contravened in relation to any person;
- (d) Decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or which the Court of Appeal affirmed a sentence of death imposed by any other court;
- (e) Decisions on any question
  - (I) Whether any person has been validly elected to the office of the President and Vice President, Governor and Deputy Governor under this Constitution.
  - (II) Whether the term of office of President and Vice President, Governor and Deputy Governor has ceased.



- (III) Whether the office of the President and Vice President, Governor and Deputy Governor has become vacant; and
- (IV) Whether any person has been validly elected to the office of Governor or Deputy Governor under this Constitution
- (V) Whether the term of office of a Governor or Deputy Governor has ceased
- (VI) Whether the office of Governor or Deputy Governor has become vacant and
- (f) Such other cases as may be prescribed by an Act of the National Assembly.  
Similarly, section 16 of the Supreme Court Act<sup>23</sup> deals with jurisdiction of the court to hear appeals in certain matters and it is to the effect that:

Where right of appeal, with or without leave, from decisions of the Court of Appeal given in the exercise of its appellate jurisdiction in respect of state matters are prescribed by the law of a state, the Supreme Court shall, except in so far as other provision is made by any law enacted by, or having effect as if enacted by the National Assembly, have like jurisdiction to hear and determine appeals from the decisions of the Court of Appeal given in the exercise of its jurisdiction”.

In *C.B.N. v. Ahmed*<sup>24</sup> it was held that section 233 (3) of the Constitution grants a right of appeal hence the mere fact that a

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23. *Op cit.*

party has already complied with the terms of a judgment will not stop him from appealing it. However in the case of *C.B.N. v. Okoje*<sup>25</sup> the Supreme Court held that by virtue of the section, a ground of appeal, which is of mixed law and fact, is incompetent if filed without prior leave being sought and granted.

However in practice, when an appellant has been granted leave to appeal on his original grounds of mixed law and facts, that leave related to the entire appeal and will cover not only the grounds filed, but also any other amended grounds. Thus, where an appellant intends to amend his original grounds, he needs only leave to amend the original grounds and not leave to appeal on the additional grounds. It suffices to say that grounds of facts or mixed law and facts need leave to be filed.<sup>26</sup> Subsection (6) of section 233 of the 1999 Constitution is to the effect that right of appeal to the Supreme Court shall be exercised subject to any Act of National Assembly and rules of Court for the time being in force regulating the power, practice and procedure of the Supreme Court.

Thus in *Oyeyipo v. Oyinyole*,<sup>27</sup> the Supreme Court while interpreting a similar provision under the 1979 Constitution,<sup>28</sup> it was held that an appellant must comply with the provisions of the Supreme Court Act, 1960 and the Supreme Court Rules, 1985, before he can invoke the appellate jurisdiction of the Supreme Court. The Supreme Court however cannot in the exercise of its appellate jurisdiction sit on appeal over its judgment.<sup>29</sup>

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24. (2001) 11 N.W.L.R. (pt 724) or (2001) 5 S.C. (pt 11) 146.

25. (1992) 2 S.C.N.J. (Pt II) 266.

26. *Odeneye v. Efunuga* (1990) 7.N.W.L.R (Pt 164) 618 S.C. *Okereke v. N.D.I.C* (2003) 2 N.W.L.R. (Pt 804) 218.

27. *Attorney General of Bendel State v Agbofodoh* (1999) 2 S.C.N.J. 111 at 131.

28. *Texaco Panama Incorporation v. S.P.D.C. Ltd* (2002) 2 S.C.N.J. 102 and *P.D.P v. I.N.E.C.* (2001) F.W.L.R. (Pt 31) 2735 S.C.

29. *Akulaku & Ors v. Yongo* Suit No. S.C. 70/1997 (2002) 5 N.W.L.R (Pt 759) 135 at 169.

### **Constitution of the Supreme Court**

The Supreme Court, for the purpose of exercising jurisdiction conferred upon it by the 1999 Constitution or any law, shall be duly constituted if it consists of not less than five Justices of the Supreme Court, provided that where it is sitting to consider an appeal on a decision bordering on the interpretation or application of the Constitution or fundamental human rights, or to exercise its original jurisdiction, the Supreme Court shall be constituted by seven Justices.<sup>30</sup> The decision of the Supreme Court can only be final if the Supreme Court is validly constituted as to the number of justices and jurisdiction over the subject matter.<sup>31</sup>

### **Finality of decision of the Supreme Court**

Once the Supreme Court in a decision has effectively decided on the matter before it and there is no ambiguity or slip to be corrected, it becomes *functus officio*.<sup>32</sup> Therefore once the decision of the Court is clear, it is final. Inherent power of the Court can only be invoked if there is a missing link in the main body of the judgment and some steps must be taken to fill the gaps or ambiguity so that the justice of the issues will be clear.<sup>33</sup>

Without prejudice to the power of the President or Governor of a State with respect to prerogative of mercy, no appeal shall lie to any other body or person from any determination of the Supreme Court. But these powers of the President and the Governor of a State referred to in the Constitution are limited to criminal proceedings only. But finality of decision of the Supreme Court with respect to civil proceedings is absolute

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30. See *Adewumi v. A.G Ekiti* (2002) F.W.L.R. (pt 92) 1835 S.C.

31. Even if the statute is ill – couched or unwise, the judge should not bring his personal view to overwhelm the legislative intent. See *Adewumi v. A. G. Ekiti* (2002) 1 S. C. N. J. 27.

32. *Kogi v. Yakubu* (2001) 16 W.R.N 98 at 106.

33. *Adigun v. The Sec. Iwo Local Govt. & Anor* Suit No. S.C 227/1992 (1998) 8 N.W.L.R. (pt 613) 30 at 37-38.

unless specifically set aside by a later legislation.<sup>34</sup> As the final appellate court also, the Supreme Court has the responsibility to promote judicial policy of Nigeria, based on local conditions in the country.<sup>35</sup>

In *Ibero v. Obioha*,<sup>36</sup> after the Supreme Court had finally decided an appeal before it, the respondent in the appeal filed a motion seeking among other things a review of the said judgment. One of the grounds in support of the application challenged the jurisdiction of the Supreme Court to pronounce on the correctness *vel non* of the decision of the Divisional Officers Court, Exhibit K. In dismissing the application, a unanimous Supreme Court held, per Belgore, J.S.C., thus:

The purpose of this application is clear, it is an appeal cloaked in the guise of a motion. From the wording of the motions and the ground for bringing it, it is manifestly clear that the validity of the judgment of this court as given is being challenged... once the Supreme Court has entered judgment in a case that decision is final and will remain so for ever. The law may in future be amended to affect future issue on the same subject, but for the case decided that is the end of the matter.<sup>37</sup>

This has been the reasoning of the Supreme Court in a number of decisions. The Supreme Court in its earlier decisions always insisted it will only re-visit its judgment if there were clerical errors, or if there was any need to vary it to convey the real intention of the court, though the court appeared to have

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35. See *Kutner v. Phillips* (1891) 2 Q.B 267.

36. (2001) 8 N.W.L.R. (Pt 745) 466 S.C

37. *A. G Anambra v. A. G, Federation* (1993) 6 N.W.L.R. (pt 302) 692 S.C.

shifted its position now to accommodate more fundamental queries, e.g. a challenge on its jurisdiction.<sup>38</sup>

In *Adegoke Motors Ltd v. Adesanya & Anor*<sup>39</sup> the Supreme Court, per Oputa, JSC commenting on the power of the Court to overrule itself stated that:

We are final not because we are infallible, rather we are infallible because we are final, justices of this court are human beings, capable of erring, and it will certainly be short-sighted arrogance not to accept this obvious truth. It is also true that this court can do inestimable good through the wise decision...

But will the Supreme Court dogmatically stick to its previous decisions especially in election matters or will it be magnanimous enough to depart from same? This issue and related ones will be dealt with *anon*. But in the word of His Lordship, Hon. Justice Umaru Eri (Rtd) *OFR*<sup>40</sup>:

... a review of the past will undoubtedly provide a platform to redress the present, and a necessary compass to plan the future

### **An Overview of the Electoral Act, 2010**

The 1999 democratic experiment was ushered in by legislative instrument put in place for the purpose of regulating the conduct

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38. *Igwe v. Kalu and Osadabey v. A. G (Bendel)* (1991) 1 N.W.L.R. (Pt 169) 525 at 574.

39. (1989) *L.P.E.L.R- S.C.* 186/1988 or (1989) N.W.L.R (Pt 109).

40. See Eri: U; *Legal Education in Nigeria from 1960 to Date*. Being a paper presented at a Public Lecture at Re - Union (Home – Coming) of the Alumni members of the Faculty of Law, Ahmadu Bello University, Zaria on Friday 26th June 2009.

of elections and the affairs of political parties. Between 1999 and now, there have been series of amendments and repeals of the various Electoral Acts that had been used at one point or the other in the country.

The Electoral Act, 2010 repealed the Electoral Act 2006. The Long Title of the 2010 Act described the legislation as ...an Act to repeal the Electoral Act No. 2, 2006 and Independent National Electoral Commission Act, Cap. 15, Laws of the Federation of Nigeria, 2004 and enact the Electoral Act, 2010 to regulate the conduct of Federal, State and Area Council elections; and for related matters.

The nine-part legislation has 158 sections with each Part addressing specific issues of concern for the success of elections. Parts 1 & 11 deal with the establishment and functions etc of the Independent National Electoral Commission (INEC) and staff of the Commission respectively. Part 111 makes provisions for National Register of Voters and Voters' Registration. Among other things, this part provides regarding continuous registration<sup>41</sup> in preparation for the conduct of any general election. The Commission under section 9 [3] is empowered to maintain a part of the Register of Voters for each State of the Federation and the Federal Capital Territory. Section 12 of the Act relates to the qualification for registration as a voter. It so requires that, a person shall be a citizen of Nigeria; must attain the age of 18 years and above, is ordinarily resident, works in, originates from, the Local Government Area Council or Ward covered by the registration centre; is not subject to any incapacity to vote under any Law, rule or regulation in force in Nigeria.<sup>42</sup> The Commission also possesses the powers to design, print and control the issuance of voter's card as well the powers to keep custody of the voter's register.<sup>43</sup>

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41 . Section 10, *Electoral Act, 2010*.

42. Section 12, *ibid*.

43. Section 15, *ibid*.

The Act under section 24 [1] provides for such offences relating to registration of voters for any person that makes a false statement in any application for registration as a voter knowing it to be false and such other related offences. On conviction such person or persons shall be liable to a fine not exceeding N100,000.00 or imprisonment not exceeding one year or both.<sup>44</sup>

Part IV of the Act comprising of sections 25 - 77 regulates the conduct and procedure for the general elections. It provides for such matters as to the powers of the Commission to directly supervise elections and other electoral matters therein. It begins from the days of election<sup>45</sup> to its final conclusion. One important section is section 33 of the Act. The section has attracted a lot of comments and intervention from the Bench and even up to the Supreme Court. It relates to the power of political parties to change their candidates. The section provides:

A political party shall not be allowed to change or substitute its candidate whose name has been submitted pursuant to section 32 of this Act, except in the case of death or withdrawal by the candidate.

Suffice for me to state at this point that I shall revert to this section fully anon. Other provisions of Part IV include withdrawal of candidates – section 35; Display of ballot papers – section 48; conduct of poll by open secret ballot – section 52; post-election procedure and collection of election results – section 65; rejection of ballot without official mark – section 66; decision of Returning Officer on ballot paper – section 67; declaration of result – section 69; and Certificate of Return – section 75.

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44. Section 24, *ibid*

45. Section 25, *ibid*

Provisions relating to political parties are contained in Part V. These include power of the Commission to register political parties-section 78; merger of political parties –section 81; nomination of candidates by parties –section 86.

However, while the Commission is empowered to register associations into political parties, it also has the power to de-register political parties on the grounds of breach of any of the requirements for registration; and for failure to win a seat in the National or State Assembly election.<sup>46</sup>

Similarly, section 87 of the Act was a singular provision with which if not for the timely intervention of the judiciary by addressing the very controversial issue, Nigerians would have experienced a similar thing to anarchy. This particular section provides for the nomination of candidates by political parties. In the recent past, there were serious controversies between the INEC and political parties on whether or not the INEC has the power to screen or disqualify candidates validly nominated by political parties. Whereas under section 21 [8] and [9] of the Electoral Act, 2002, the INEC had the power to disqualify candidates, but the legal position has changed with the enactment of the Electoral Act, 2006. The power was vested in the courts by virtue of section 32 [4], [5] and [6] of the Electoral Act 2006, with a similar provision in section 31 [5] and [6] of the Electoral Act 2010.

Yet another significant section of the Act is section 96 which prohibits the use of force or violence during political campaign. Electoral violence has been a common phenomenon in Nigeria. The use of violence has posed serious threat to the Nigerian democracy and the rule of law. Considering this perpetual problem in Nigeria, the judiciary has done wonderfully well in its landmark judgments towards preventing future violence in elections. Just in a bid to winning elections by all means, political parties explore all sort of violence against

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46. Section 78 [7], *Electoral Act*, 2010.



opponents in order to gain power or consolidate in power. The Supreme Court on the true nature of democracy has this to say:

Democracy world is rich and multifaceted. Democracy should not be viewed from a one dimensional vantage point. Democracy is multidimensional. It is based both on the centrality of laws and democratic values, and, at their centre, human rights. Democracy is based on every individual's enjoyment of rights which even the majority cannot deny simply because the power of the majority is in its hands.<sup>47</sup>

The Court further maintained on the need to strengthen confidence in the Nigerian Democratic process. The strict duty of the operators is to realize that:

Laws are meant to be obeyed for the benefit of the society since that is the only way to ensure certainty, peace and progress, equity, fair play and the rule of law.<sup>48</sup>

That is to say, politicians must desist from the use of corruptive influence in getting themselves in power. At least, this might guarantee us a responsive government in Nigeria.

Part VI comprises of sections 103 – 116. These sections cover the procedure for election into Area Council and the mandate given to the Commission for having the authority to direct and supervise the conduct of elections into the Area Councils,<sup>49</sup> divisions of Area Council into Registration Areas<sup>50</sup>. Sections 107 and 108 provide for the qualification and

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47. *Amaechi v. INEC* [2008] 1. MJSC.

48. *Olotu v. Itodo* [2010] 18 NWLR Pt.1225.

49. Section 104, Electoral Act 2010.

50. Section 105, *Ibid*.

disqualification into Area Council elections including dates and procedure for nomination, and so on.

The Act envisaged the likelihood of offences being committed before, during or after the conduct of elections. It thus created electoral offences in Part VII. Such offences include offences in relation to registration of voters.<sup>51</sup> It starts with offences in respect of nomination<sup>52</sup>, disorderly behavior at political meetings,<sup>53</sup> improper use of voter's card<sup>54</sup>, bribery and corruption, wrongful voting and false statements and disorderly conduct at elections. Beside, there are also provisions for offences of voting by unregistered persons and threatening.

Sections 133 to 145 of the Act are contained in Part VIII. Generally speaking, this part deals with the determination of election petitions arising from elections. In addition, these sections established the Area Council Election Tribunal and the Area Council Election Appeal Tribunal. It also provides for the grounds for filing petitions.

Sections 146 to 158 are miscellaneous provisions. Very importantly, section 150 provides for trial of offences relating to elections and section 157 effectively repealed the Electoral Act 2006 and the Independent National Electoral Commission Act Cap. 15 Laws of the Federation of Nigeria, 2004.

### **What the Supreme Court Did**

Since the inception of the current democratic experience in Nigeria in 1999 there have been a number of occasions when the intervention of the Supreme Court was sought especially in electoral matters. In all these cases, the apex court had never shied away from playing its constitutionally assigned role in the polity. The essence of the Supreme Court's intervention has always been to promote democratic culture among the Nigerian populace, strengthen the confidence of the people in the

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51. Section 117, *Ibid.*

52. Section 118, *Ibid.*

53. Section 119, *Ibid.*

54. Section 120, *Ibid.*

democratic process and promote constitutionalism and due process in the political system. For the purpose of this discourse, I will simply examine two or three of such interventions made by the Supreme Court and the reaction of the political class in particular to these decisions.

In *Action Congress of Nigeria & Anor. v. INEC*<sup>55</sup>, the plaintiffs instituted an action against INEC being the defendant to the Federal High Court for determination of whether the defendant has the power to disqualify any candidate properly sponsored by a political party without recourse to a court of law. At the conclusion of hearing, the trial court granted the plaintiffs'/appellants' claim in part. It held that although the defendant/respondent had the power to screen candidates for election, it did not have the power to disqualify a candidate. It also held that the power to disqualify any candidate sponsored by any political party including the 2<sup>nd</sup> plaintiff/appellant from contesting an election is vested in the courts as provided in section 32 [5] of the Electoral Act, 2006.

On appeal and cross-appeal to the Court of Appeal by the respondents and appellants respectively, the Court of Appeal allowed the respondents' appeal and dismissed the appellants' cross-appeal. Dissatisfied with the decision of the Court of Appeal, the appellants appealed to the Supreme Court. In dealing with the issues raised in the appeal, the Supreme Court considered the provision of section 137 [1] of the Constitution of the Federal Republic of Nigeria, 1999, paragraph 15 of its Third Schedule; and section 32 [4], [5] and [6] of the Electoral Act, 2006.

The Supreme Court, in a unanimous decision, held that to disqualify a person from contesting election for the office of the President solely on the basis of an indictment for embezzlement or fraud made against him by an administrative Panel of Inquiry with the presumption of guilt for those offences thereby implied, runs completely against the purpose and significance of

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55. *Action Congress v. INEC* [2007] NWLR (Pt 1048).

vesting of judicial power in the courts by section 6 [1] of the 1999 Constitution. The Supreme Court pointed out that there was nothing within the provision of section 137 [1] of the Constitution of the Federal Republic of Nigeria 1999 that empowers INEC to disqualify any candidate especially the 2<sup>nd</sup> appellant from contesting the election as a presidential candidate. According to their Lordships, there is nowhere in the Constitution where any such power is conferred on INEC to disqualify any candidate. By virtue of section 6 [1] and [6] of the Constitution of the Federal Republic of Nigeria 1999, it is only a court of law that can exercise a function which is exclusively adjudicative in nature. The Court pronounced with finality that within the meaning of section 32 [4] of the Electoral Act which provides that:

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.

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.<sup>56</sup>

Mere allegation of crime or dishonest conduct, without evidence of trial and conviction, is not enough to ground the disqualification of a person from contesting a primary election of a political party or any other election.<sup>57</sup>

Distinguished audience, it is difficult, if not totally impossible, to ignore or make secondary the decision of the

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56. Sections 32 [4], [5] *Electoral Act* 2006.

57. *Uzodinma v. Izunaso* [2011] 17 NWLR Pt.1275.

Supreme Court in the case of *Rt. Hon. Rotimi Chibuike Amaechi v. INEC & 2 Ors*<sup>58</sup> herein called *Amaechi's case*. This was one case where the issue of unlawful substitution of candidates by political parties came up for determination by the Supreme Court. The *Amaechi's case* has become rather very popular. The facts are simple and are virtually known to all of us here present today. Suffice it to say that I shall try to restate same as clearly as possible.

On the 26-01-2007, the Appellant Rt. Hon. Rotimi Chibuike Amaechi, as the Plaintiff commenced his suit at the Federal High Court, Abuja against the Independent National Electoral Commission (INEC) as Defendant. The Plaintiff/appellant sought and was later granted leave to join as second and third Defendants respectively, Celestine Omehia and Peoples Democratic Party (3<sup>rd</sup> and 4<sup>th</sup> respondents herein).

Amaechi as a member of the Peoples Democratic Party, in his quest to be the Governorship candidate of the Party, in the April 2007 elections in Rivers State, contested the Party Primaries against seven other members of the PDP. They competed for a total of 6,575 votes. Amaechi had 6,527 to emerge the winner. Omehia (Second Defendant) was not one of the candidates at the PDP Primaries.

The PDP submitted Amaechi's name to *INEC* as its Governorship candidate. No Court of law subsequently made an Order disqualifying Amaechi from contesting the Governorship Elections. PDP however substituted Omehia's name for Amaechi's without giving cogent and verifiable reason for the substitution as required by the Electoral Act, 2006. Amaechi therefore brought his suit claiming among other things:

- i) A declaration that the option of changing or substituting a candidate whose name is already submitted to INEC by a political party is only available to a political party and/or the

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58. (2008)1 S.C (Pt. 1) 36.

Independent National Electoral Commission (INEC) under the Electoral Act, 2006 only if the candidate is disqualified by a Court Order.

- ii) A declaration that under Section 32(5) of the Electoral Act, 2006 it is only a Court of law, by an order that can disqualify a duly nominated candidate of a political party whose name and particulars have been published in accordance with section 32(3) of the Electoral Act, 2006.
- iii) A declaration that under the Electoral Act, 2006, Independent National Electoral Commission (INEC) has no power to screen, verify or disqualify a candidate once the candidate's political party has done its own screening and submitted the name of the Plaintiff or any candidate to the Independent National Electoral Commission (INEC).
- iv) A declaration that the only way Independent National Electoral Commission (INEC) can disqualify, change or substitute a duly nominated candidate of a political party is by Court Order.
- v) A declaration that under Section 32(5) Electoral Act, 2006 it is only a Court of law, after a law suit, that a candidate can be disqualify (sic) and it is only after a candidate is disqualify (sic) by a Court order, that the Independent National Electoral Commission (INEC) can change or substitute a duly nominated candidate.
- vi) A declaration that there are no cogent and verifiable reasons for the defendant to change the name of the plaintiff with that of the 2<sup>nd</sup> defendant

candidate of People's Democratic Party (PDP) for the April, 13<sup>th</sup> 2007 Governorship Election in Rivers State.

- vii) A declaration that it is unconstitutional, illegal and unlawful for the 1<sup>st</sup> and 3<sup>rd</sup> defendants to change the name of the plaintiff with that of the 2<sup>nd</sup> defendant as the Governorship candidate of Peoples Democratic Party (PDP) for Rivers State in the forthcoming Governorship Election in Rivers State, after the plaintiff has been duly nominated and sponsored by the Peoples Democratic Party as its candidate and after the 1<sup>st</sup> defendant has accepted the nomination and sponsorship of the plaintiff and published the name and particulars of the plaintiff in accordance with section 32(3) of the Electoral Act, 2006 the 3<sup>rd</sup> defendant having failed to give any cogent and verifiable reasons and there being no High Court Order disqualifying the plaintiff.
- viii) An order of perpetual injunction restraining the defendants, jointly and severally by themselves, their agents, privies or assigns from changing or substituting the name of the plaintiff as the Rivers State Peoples Democratic Party Governorship candidate for the April, 2007 Rivers State Governorship election unless or until cogent and verifiable reasons are given as required under section 34(2) of the Electoral Act, 2006.

Let it be noted from the outset that at the conclusion of pleadings, there was no dispute whatsoever as to the following facts:

- 1) that Ameachi contested and won the PDP's Primaries for the Governorship Elections in Rivers State.
- 2) that Omehia NEVER took part in such Party Primaries,
- 3) that Ameachi's name was first forwarded by PDP to INEC,
- 4) that Omehia's name was later substituted for Ameachi's vide letter sent to INEC by PDP on 02/02/2007.
- 5) That the reason given by PDP for the substitution was simply tagged "error".

At the conclusion of trial, the learned trial judge found as a fact, that the 3<sup>rd</sup> respondent could by cogent and verifiable reasons substitute the 2<sup>nd</sup> respondent for the appellant and the substitution was made within the 60 days stipulated in Section 34(1) Electoral Act, 2006. Although the trial court found as a fact that the substitution was done within time and was in fact accepted by INEC, it however set aside the substitution on the ground that it was done during pendency of the appellant's suit.

The appellant appealed to the Court of Appeal against the decision while the respondents cross-appealed. Meanwhile, some occurrences of which I consider important and germane to the discussion of Ameachi's case took place during the pendency of the appeal and the cross-appeal before the Court of Appeal as mentioned earlier.

In Imo State, the PDP conducted its Primaries for its Governorship candidate for that state. One Senator Araraume won the primaries. He was later substituted with one Engineer Ugwu who contested the primaries but had been placed as No.16. The reason given by PDP for the substitution was



“error”, as in Ameachi’s case. Araraume brought a suit challenging his substitution. The Federal High Court dismissed his case. He brought an appeal before the Court of Appeal. Both the Araraume and Ameachi’s appeals happened to be before the Court at the same time. The Court of Appeal, in its judgment in Araraume’s case, on 5/4/2007, held that the reason “error” did not satisfy the requirements of section 34 of the Electoral Act, 2006. The respondents before the Court of Appeal in the Araraume’s case brought an appeal to Supreme Court. It is noteworthy that the parties and the court of Appeal were AD IDEM on the view that the decision by the Supreme Court in the Araraume’s case would be accepted by them in the Amaechi’s case. The exact words used by the Court of Appeal read as follows:

Court: It is the decision of this court and going by the doctrine of stare decises – judicial precedent that wet waist (sic – we wait?) for the judgment of the Supreme Court on section 34 of the Electoral Act – since that decision shall be law and applicability shall be binding on the parties particularly political parties (and) INEC. This court shall also base other decision(s) on any appeal involving section 34 on the decision of the Supreme Court. This appeal shall be adjourned to the 11<sup>th</sup> of April, 2007.

On the 5<sup>th</sup> day of April, 2007, the Supreme Court affirmed the judgment of the Court of Appeal in the Araraume’s case. The court came to the conclusion that the reason “error” did not satisfy the requirements of section 34(2) of the Electorate Act, and that Araraume remained the candidate of the PDP for the April, 14 Imo State Governorship Elections.

In reaction to the Supreme Court judgment the PDP, on 10/4/07, expelled both Araraume and Amaechi from the party.

When later, Amaechi's appeal came before the Court of Appeal (same Abuja Division) for hearing on 11/4/07, PDP and INEC asked that the appeal be struck out on the ground that the Court of Appeal no longer had jurisdiction to hear the appeal, as a result of the expulsion of Amaechi from PDP. The Court of Appeal granted the prayers of INEC and PDP. It struck out the appeal filed by Amaechi. Amaechi was dissatisfied with the ruling of that court. The full panel of the Supreme Court on 11/5/07 heard the appeal. In a short ruling, the Supreme Court, per Katsina Alu, JSC (as he then was), who presided, held:

Having heard all the arguments of learned counsel on all sides, I hold that the Court of Appeal was in error in declining jurisdiction to hear the appeal and cross-appeal on the merit. It is now ordered that the matter be remitted to the Court of Appeal, Abuja to hear the two appeals expeditiously.

On 21/05/07, Omehia filed an application before the Court of Appeal asking the court to stay proceedings in the appeal just remitted to it by the Supreme Court, pending the delivery of the full judgment which will provide the basis of the determination of the appeal by way of reasons for the judgment (as was announced by the Supreme Court). There was an alternative prayer in which Omehia asked the Court of Appeal for stay of proceedings in the same appeal pending when any of the parties approached the Supreme Court to apply the provisions of Order 8 Rule 16 to correct the clerical error in her judgment to the effect that the pronouncement of Katsina-Alu, JSC (as he then was) made in open court that reasons for the judgment will be provided at a later date which pronouncement was not reflected in the certified copy of the proceedings of 11<sup>th</sup> May, 2007 be reflected in the said judgment. Omehia's application was heard by the Court of Appeal. Both INEC and PDP at the hearing supported the application.

It is to be noted that on 21/5/07 when Omehia's said application was filed, the Governorship elections for Rivers State had been concluded and Omehia declared Governor-elect. However, his swearing-in as Governor was not to come until 29/05/07.

The Court of Appeal on 25/05/07 in a ruling stayed proceedings in the said appeal remitted by the Supreme Court for expeditious hearing pending the application of the provision of Order 8 Rule 16 to correct clerical error (if any). The respondent was ordered by that court to file his application at the Supreme Court within seven days from the date of that ruling. It is to be noted, here again, that the 7 days allowed to Omehia on 25/05/07 by the Court of Appeal would in effect ensure that he (Omehia) would have been sworn in as Governor of Rivers State on 29/05/07 before the said application to Supreme Court was brought.

Once again, Amaechi was driven into filing yet another appeal before the Supreme Court against the Order of the Court of Appeal which on 25/05/07 stayed proceedings in the appeal pending before it. In yet another ruling, the Supreme Court needed to make a repeat order on 10/07/07 that the Court of Appeal should hear the appeal expeditiously. The Court of Appeal finally heard the pending appeal on 16/07/07. This was after Omehia had been sworn in as Rivers State Governor on 29/05/07. The Court of Appeal relying on decision of the Supreme Court in *Ugwu v. Araraume*<sup>59</sup> affirming the decision of the Court of Appeal in view of the provision of Section 34(1&2), of the Electoral Act, 2006 held that any party wishing to substitute a candidate must give cogent and verifiable reasons. Instead of allowing the appeal of the Appellant to be determined on the outcome of the decision of Supreme Court in *Ugwu v. Araraume*<sup>60</sup>, the 2<sup>nd</sup> Respondent brought a motion for an Order striking out the appeal on the ground that

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59. (2007) 6 S.C (Pt. I) 88.

60. *Supra*.

the appeal had been overtaken by events. In the same vein, the PDP brought an application urging the Court to strike out the Appeal on the ground that an Election having taken place, the Appeal had become mere academic. The Court of Appeal ruled that in view of the reliefs being claimed by the Appellant it has no jurisdiction to adjudicate on the Appeal.

The Appellant Appealed against the decision of the Court of Appeal to the Supreme Court. The Supreme Court allowed the Appeal and ordered for expeditious hearing of the Appeal.

It can thus, be clearly seen, Mr. Chairman, Ladies and Gentlemen that the events which stalled the hearing of the appeal filed by Amaechi before the 14<sup>th</sup> of April Governorship Elections in Rivers State and ultimately before Omehia was sworn in as Governor on 29/05/07, were so many but can be summarised as follows:

- 1) that Court of Appeal had on 4-4-07 stated that in the consideration of Amaechi's appeal, it would be bound by the judgment of the Supreme Court in the Araraume's appeal.
- 2) the Supreme Court on 5-4-07 affirmed the judgment of the Court of Appeal to the effect that the reason 'error' did not satisfy the requirements of section 34[2] of the Electoral Act, 2006 for the substitution of one candidate with another.
- 3) On 5/4/07 when the Supreme Court delivered its judgment in the Araraume's case, the elections were still [9] nine days away.
- 4) The PDP on 10-4-07 published a notice expelling both Araraume and Amaechi from the party in reaction to the judgment given by the Supreme Court on 11/05/07.

- 5) Omehia and PDP on 11/04/07, three [3] days to the election filed an application that Amaechi's appeal be struck out following his expulsion from the party.
- 6) On 16-04-07, two days [2] after the Governorship Election, the Court of Appeal struck out Amaechi's appeal.
- 7) On 11/04/07, the Supreme Court in its judgment on Amaechi's appeal against the order of the Court of Appeal which struck out his appeal ordered that the said appeal be heard expeditiously.
- 8) On 21/05/07, Omehia brought to the Court of Appeal an application that the hearing of Amaechi's appeal be stayed until the Supreme Court made further clarification of its decision given on 11/05/07.
- 9) On 25/5/07, four [4] days to the swearing-in of Omehia as Governor of Rivers State, the Court of Appeal made an order staying proceedings in the appeal of Amaechi before it and granted Omehia seven [7] days to file before the Supreme Court an application for the clarification of the decision given by the Supreme Court on 11/05/07.
- 10) On 10/07/07, the Supreme Court re-affirmed the order it had previously made on 11/05/07, that the appeal by Amaechi and the cross-appeal by PDP and Omehia be heard expeditiously and on the merit.

11) On 16/07/07, the Court of Appeal finally heard Amaechi's appeal and judgment was delivered by the Court of Appeal on 20/07/07 where it held *inter alia*, that Amaechi's name was properly substituted with that of Omehia. It is from that decision Amaechi filed a final appeal before the Supreme Court. Omehia and PDP also filed cross-appeal. The main issue before the Supreme Court to be determined is whether or not the two Courts below were correct in their conclusion that the reason given by the Peoples Democratic Party (PDP) for substituting Appellant with 2<sup>nd</sup> Respondent satisfied the requirements of section 34 of the Electoral Act, 2006. Now, section 34 of the *Electoral Act, 2006* provides as follows:

- (1) A political party intending to change any of its candidates for any election shall inform the Commission of such change in writing not less than 60 days to the election;
- (2) Any application made pursuant to subsection (1) of this section shall give cogent and verifiable reasons. (underlining for emphasis)

After having considered carefully and in details, the two appeals the Supreme Court at the end as I stated earlier allowed Amaechi's appeal and dismissed the cross-appeals. It is pertinent however, at this juncture, to bring to fore some of the vital reasons why the Supreme Court did what it did in Amaechi's case. This is as a result of the wide condemnation levied (unjustifiably) by some persons. I will only limit myself to the lead judgment delivered by no other person than the great jurist who happens to be the Chairman of this occasion, Hon. Justice Oguntade, CON, CFR (a retired Justice of the Supreme

Court). Starting from the reliefs sought by Amaechi, Oguntade stated:

I now consider the relief to be granted to Amaechi in this case even if elections to the office of Governor of Rivers State had been held. As I stated earlier there is no doubt that the intention of Amaechi, to be garnered from the nature of the reliefs he sought from the court of trial, was that he be pronounced the Governorship candidate of the PDP for the April, 2007 election in Rivers State. He could not ask to be declared Governor. But the elections to the office were held before the case was decided by the court below. Am I now to say that although Amaechi has won his case, he should go home empty-handed because elections had been conducted into the office? That is not the way of the court. A court must shy away from submitting itself to the constraining bind of technicalities. I must do justice even if the heavens falls. 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?"

That, according to Oguntade, JSC, with whom I concurred in my judgment, is to enable the court to move away from the era when adjudicatory power of the court was hindered by a constraining adherence to technicalities which often results in the loser in a civil case taking home all the laurels while the supposed winner goes home in a worse situation than he approached the court.

On the attempted substitution of Amaechi with Omehia, Oguntade, JSC, said:

There is no doubt that PDP having previously sent Amaechi's name to INEC by letter on 26/12/2006 could only validly remove the name or withdraw it if it complied with section 34[2] above. The cogency or the verifiability of the reasons for the withdrawal of a candidate's name has to be considered against the background that INEC officials, pursuant to section 85 of the Electoral Act above would have been present at a meeting of congress of a party called for the nomination of a candidate for an elective office. INEC would thus know the results of such party primaries. When a political party later asks to substitute a candidate, it does so against the background of the result of the primary election. If there is a problem with a candidate who comes first then the party will opt for the candidate who never contested a primary election in such setting to emerge a party candidate. This seems to me a praiseworthy attempt to enthrone intra-party democracy in order to ensure that our democracy is truly reflective of the people's choice.

On why new election was not ordered by the Supreme Court? Oguntade, JSC, stated:

The argument that a new election ought to be ordered overlooks the fact that this was not an election petition appeal before this court but rather an appeal on a simple dispute between two members of the same party. If this court falls into the trap of ordering a new election, a dangerous precedent would have been created



that whenever a candidate is improperly substituted by a political party, the court must order a fresh election even if the candidate put up by the party does not win the election. The court must shut its mind to the fact that a party wins or loses the election. The duty of the court is to answer the question which of two contending candidates was the validly nominated candidate for the election. It is purely an irrelevant matter whether the candidate in the election who was improperly allowed to contest wins or loses. The candidate that wins the case on the judgment of the court simply steps into the shoes of his invalidly nominated opponent whether as loser or winner.

It is clear from the facts that PDP won the primaries. It is also a fact that Amaechi contested the primaries and won massively with 6,527 votes out of 6,575 votes competed for. It is notorious as well, that Omehia was neither (properly substituted) nor participated at the primaries. It was the law in this country, then, that no independent candidacy was allowed. So, how could Omehia feature in the Rivers Governorship election? Oguntade, JSC, held as follows:

Now section 221 of the 1999 Constitution provides:

No association other than a political party shall canvass for votes for any candidate at any election or contribute to the funds of any party or to the election expenses of any candidate at an election.

The above provision effectually removes the possibility of independent candidacy in our elections and places emphasis and responsibility in elections on political parties. Without a

political party a candidate cannot contest. The primary method of contest for elective offices is therefore between parties. If as provided in section 221 above, it is only a party that canvasses for votes, it follows that it is a party that wins an election. A good or bad candidate may enhance or diminish the prospect of his party in winning but at the end of the day, it is the party that wins or loses an election. I think that the failure of respondents' counsel to appreciate the overriding importance of the political party rather than the candidate that has made them lose sight of the fact that whereas candidates may change in an election but the parties do not. In mundane or colloquial terms we say that a candidate has won an election in a particular constituency but in reality and in consonance with section 221 of the constitution, it is his party that has won the election.”

It is to be noted again that Amaechi's case was a pre-election matter. As a citizen of this country, Amaechi has every right to have access to a court of law as guaranteed by section 36 of the Constitution. The jurisdiction of the ordinary courts to adjudicate in pre-election matters, I believe, remains intact and unimpaired by sections 178[2] and 285[2] of the 1999 Constitution.

On the stultifying occurrences which I pointed out earlier and which in my view brought the administration of justice to disrepute, my learned brother, Oguntade, JSC, stated unequivocally the mind of the Supreme Court in the following words:

I am greatly alarmed by these developments. The result of this calculated and improper behavior was that the respondents ensured that the elections for the Governorship office in Rivers State were held and Omehia sworn in as Governor before Amaechi's appeal was heard. Before us in this appeal, the respondents who had improperly prevented the expeditious hearing of the appeal, argued

that this court has no jurisdiction on the ground that elections had been held and further that because Omehia has been sworn in as Governor of Rivers State, he now enjoys immunity from civil suits. In other words they relied on their own wrongdoing to oust the jurisdiction of this court.

This court indeed all courts in Nigeria have a duty which flows from a power granted by the constitution of Nigeria to ensure that citizens of Nigeria, high and low get the justice which their case deserves. The powers of the court are derived from the constitution not at the sufferance or generosity of any other arm of the Government of Nigeria. The judiciary like all citizens of the country cannot be a passive on-looker when any person attempts to subvert the administration of justice and will not hesitate to use the powers available to it to do justice in the cases before it.”

On the contemptuous behavior of Amaechi’s party by expelling him from the party when his appeal was pending before the Court of Appeal, the Supreme Court considered that unlawful and amounted to a calculated attempt to undermine judicial authority. The powers of the Supreme Court as donated by the constitution and other statutes are in no doubt and can effectively be invoked when circumstances warrant for the furtherance of administration of justice in our country. In the Araraume’s case (*Supra*) had the advantage of making the following observations:

The Electoral Act and Party Constitutions must be seen to be complementing the Constitution in formulating broader rules, regulations and operation mechanisms for both INEC and the political parties for administrative convenience. Where any of such is in conflict with any section of the

constitution, that enactment, rule or policy must surrender to the Constitution. Except where it is meant to say that a member of a Political Party has no right at all, in election matters, I cannot see why a Political Party should be permitted once it has given its commitment or mandate to a candidate whom it had already nominated whether wrongly or rightly to bulldoze its way to rescind that mandate for no justifiable cause. Politics is not anarchy; it is not disorderliness. It must be punctuated by justice, fairness and orderliness.

See: *Ugwu v. Araraume* (2007) 12 NWLR (Pt.1048) 365 at p.511, C-E.

The Supreme Court considered several provisions of the Electoral Act, 2006 and in particular sections 34 and 85. It insisted that under the law there was no room for a candidate who never contested a primary election to emerge a party candidate and that since Amaechi's name who took part and won at the primary election was validly sent to INEC the latter remained the PDP candidate for the general election. Part of the reasoning of the Supreme Court was that in party politics in Nigeria electorates actually voted for Political Parties rather than individual, since by virtue of section 221 of the Constitution of the Federal Republic of Nigeria, 1999, as amended, the possibility of independent candidacy was ruled out for the purpose of contesting elections in Nigeria. In allowing the appeal therefore, the Supreme Court held that the name of Amaechi was not substituted as provided by law; that Amaechi remained the candidate of the PDP for whom the party campaigned in the April 2007 elections and that since PDP won the said elections, Amaechi must be deemed to be the candidate that won the elections for the PDP. It was therefore not surprising that the Supreme Court ordered that he, Amaechi, be

sworn in as Governor of River State. With this exposure on the Amaechi's case, it is my hope that all lingering doubts and cynicism will give way to truth and justice to prevail.

### **Tenure Elongation**

Another set of cases that drew public attention and enthusiasm is that on tenure elongation. The case of *Buba Marwa & Ors. v. Admiral Murtala Nyako & Ors*<sup>61</sup> is another case worth mentioning in relation to the intervention of the Supreme Court in electoral matters. Simply put, the apex Court was called upon to determine the period that the tenure of an elected Governor of a State commences. These appeals are consolidated from the decision of the Court of Appeal resulting from litigation trailing the general elections conducted in 2007. The elections included Governorship elections into the offices of Governors of the 36 States of the Federation. The victory of some of the State Governors was challenged by other candidates on various grounds. These grounds ranged from unlawful disqualification, electoral malpractices to total absence of elections which however produced winners. The electoral victories were successfully challenged by the rival candidates against the following:

- i. Admiral Murtala Nyako – Adamawa State
- ii. Mr. Timipre Silva – Bayelsa State
- iii. Mr. Liyel Imoke – Cross River State
- iv. Alh. Aliyu Wamako – Sokoto state
- v. Alh. Ibrahim Idris – Kogi State

However, following their alleged electoral victories, each of the above candidates was duly installed as Governor of his respective State on May 29, 2007 after taking the Oaths of Allegiance and of Office.

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61. (2012) LPELR-SC 141. Others call it 'tenure completion,' etc.

The election petitions against their declaration as winners of the election went up to the Court of Appeal where the elections of the five Governors were nullified after they had spent more than a year in the office as Governors. The Independent National Electoral Commission (INEC) was ordered to conduct a re-run in all the affected States within a period of ninety (90) days as required by law. The re-runs were duly conducted. The candidates were again declared winners of the elections. This resulted in their taking another set of Oaths of Allegiance and of office as Governors on different dates in 2008.

The question arising from the stated events revolves around the two sets of Oaths of Allegiance and of Office and installation in offices as Governors. Simply put, the issue was whether the term of office of each of these Governors expired at the end of four (4) years calculated from 29<sup>th</sup> May 2007 or whether they are entitled to a tenure of 4 years calculated from the date of the second taking of Oaths of Allegiance and of Office following the re-run elections of 2008. The lower courts held that the relevant points at which the 4 year tenure of the Governors was to be calculated is the date they took their second Oaths of Allegiance and of Office in 2008.

From the facts, the main issue for determination by the Supreme Court was whether having regards to Sections 180(1) and (2) and 182(1) (b) of the 1999 Constitution, the lower court was right in holding that the tenure of office of the Governors commenced on the date they took their second Oaths of Allegiance and of Office in 2008 as against the 29<sup>th</sup> day of May, 2007 when they took their first Oaths of office and Allegiance. There was however a sub-issue which was whether Section 180 (2<sup>A</sup>) of the 1999 Constitution (as amended) was applicable to the facts.

After the briefs of argument by counsels in the matter, the Supreme Court considered the provisions of Section 180 (1) (2) & (3) which deals with tenure of office of Governors. The section provides as follows:

180 (1) Subject to the provisions of the Constitution a person shall hold the office of Governor of a State until:

- a. When his successor in office takes oath of that office; or
- b. He dies while holding that office; or
- c. The date when his resignation from office takes effect; or
- d. He otherwise ceases to hold office in accordance with the provisions of this Constitution

(2) Subject to the provisions of subsection (1) of this section, the Governor shall vacate his office at the expiration of a period of 4 years commencing from the date when:-

- a. in the case of a person first elected as governor under this Constitution, he took the Oath of Allegiance and Oath of Office, and
- b. the person last elected into that office took the Oath of Allegiance and Oath of Office or would, but for his death, have taken those oaths.

(3). If the Federation is at war in which the territory of Nigeria is physically involved and the President considers it not practicable to hold elections, the National Assembly may by resolution extend the period of four (4) years mentioned in subsection (2) of this section from time to time, but no such extension shall exceed a period of six (6) months at any one time.

The Supreme Court held that the taking of Oaths of Office and of Allegiance by a Governor marked the commencement of his tenure in the office of Governor and that it matters not that there was a re-run election. In the words of Onnoghen, JSC:

It is clear from the provisions that in the case of commencement of tenure of a person first elected, it starts with the taking of the Oath of Allegiance and Oath of office, in this case, the 29<sup>th</sup> day of May, 2007 when the respondents took their first Oaths of Allegiance and of Office.

.....  
The most important thing to note having regards to the provisions dealing with tenure of office of Governors reproduced supra is that looking closely at the provisions of section 180(2)(a), there is no room for the same person elected Governor being elected again following a re-run election. A person elected following a re-run election cannot be said to have been “first elected as Governor under this Constitution” except he was not the winner of the earlier or first election.

According to His Lordship:

It is settled law that the time fixed by the Constitution for the doing of anything cannot be extended. It is immutable, fixed like the rock of Gibraltar. It cannot be extended, elongated, expanded or stretched beyond what it states.

...it is therefore clear and I hereby hold that the second Oaths of Allegiance and of Office



taken in 2008, though necessary to enable them continue to function in that office, were clearly superfluous in the determination of the four years tenure under section 180(2) of the 1999 Constitution.

### **Limitation of Time on Election Petitions and Appeals**

The amended version of the 1999 Constitution came up with a new law which limits the time within which petitions relating to election of the President and Governors of States and their vice/deputies should be determined. Section 285 of the Constitution provides *inter alia*:

- “5. An election petition shall be filed within 21 days after the date of the declaration of result of the elections;
1. An election tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition;
2. An appeal from a decision of an election tribunal or Court of Appeal in an election matter shall be heard and disposed of within 60 days from the date of the delivery of judgment of the tribunal or Court of Appeal.
3. The court, in all final appeals from an election tribunal or court may adopt the practice of first giving its decision and reserving the reasons therefore to a later date.

No sooner than when the gubernatorial elections were over when petitions and appeals started filing into the election tribunals and the appeal courts. There were several appeals to the Supreme Court challenging, in the main, the competence of

the election tribunal or Court of Appeal to deliver its judgment outside the time allotted by the Constitution.<sup>62</sup> What the Supreme Court re-iterated is the well settled principle of interpretation that where provisions of the Constitution or any statute for that matter are clear and unambiguous, the court shall apply them as they exist by giving them their plain and ordinary meanings. Thus, by the provision of section 285, where a tribunal or court fails to comply with the said provisions, its jurisdiction to entertain the petition or appeal is spent and cannot be extended by a second. In one of these appeals, my learned brother Onnoghen, JSC, stated as follows:

The time fixed by the Constitution is like the rock of Gibraltar or Mount Zion which cannot be moved, that the time cannot be extended or expanded or elongated in any way enlarged; that if what is to be done is not done within the time so fixed, it lapses as the court is thereby robbed of the jurisdiction to continue to entertain the matter.

In *Hope Democratic Party v. Jonathan and Ors (supra)* the Supreme Court per Musdapher, CJN, stated as follows:

it is clear from the provisions of section 285[7] of the Constitution that this court ceases to have jurisdiction to entertain this

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62. See for instance: *ANPP v. Goni, Consolidated appeals Nos. SC.1/2012 and SC. 2/2012* (delivered on 17/02/2012); *Action Alliance v. INEC & ORS Appeal Nos. SC. 23/2012* delivered on 14/02/2012; *PDP v. Chief Anayo Rochas Okorochoa & Ors* No. SC.17/2012, delivered on 2/3/2012; *Chief Great Ogboru v. Emmanuel Ewetan Uduaghan, appeals Nos. SC.18/2012 and SC.18A/2012 Consolidated* delivered on 2/3/2012; *CPC v. INEC & Ors*, appeal No. SC 33/2012, delivered on 5/3/2012; *PDP v. CPC & Ors* appeals No.SC. 272/2011 and SC. 276/2011 (Consolidated) delivered on 31/10/2011; *Hope Democratic Party v. Dr. Goodluck E. Jonathan & Ors* appeal No. 263/2010, delivered on 14/11/2011.

matter since 60 days from the decision of the lower court. This court has interpreted the provision of section 285[7] of the Constitution in the unreported case of PDP V CPC and others unreported decisions of this court in the consolidated matters in SC.272 and SC.276/2011 delivered on the 31/10/2011. The learned counsel for the appellant/applicant has failed to convince us why we should depart from that decision. The appeal has lapsed and is accordingly struck out.

Some of the public views on such decisions of the Supreme Court is that the Supreme Court should have been more proactive. They forgot that in dealing with a constitutional provision the Supreme Court and any other court or tribunal has to apply the law as it is and not as it ought to be. The view I hold and which I expressed in one of such decisions is that if section 285 of the Constitution is a bad law, the battle ground has now shifted from the court to the legislature. Courts do not make laws. Courts interpret laws. If the amendment introduced by section 285 of the Constitution does not cure the mischief it was meant to remove, then the citizens have every right to go back to the legislature for a further review. These cases and others like them where the intervention of the Supreme Court was called are a pointer to the capacity of the apex court of the land to serve as a stabilizing factor to checkmate the activities of politicians and bring them within the realm of due process. No doubt the jurisprudence of this country has been enriched immensely by the Supreme Court of this country in particular and the Judiciary in general and the level of the confidence of the public in the Judiciary as an impartial arm of government. Commenting on the role and place of the Judiciary in the emergence of a robust democratic governance, Oyeboode, put it beautifully in the following words:

... a political system can be considered as democratic on the basis of the extent to which the judicial arm is permitted to hold the scale of justice over and above the other arms of government ... for, if good governance has become a modern day desideratum, human ingenuity is yet to devise a better means of preventing arbitrariness and ensuring social well-being than that of separation of powers, due process of law and independence of the Judiciary, which taken together constitute the hall mark of a well functional democratic system.<sup>63</sup>

### **What the Supreme Court May Do**

In most countries of the world, the Supreme Court is usually the apex in the judicial and appellate hierarchy of the administration of justice. It is usually the court of last resort and from its decisions appeals lie to no other court, body or authority. It is trite to say also that it is most unlikely that the decisions of the court like that of any other court for that matter are to be acceptable to all manner of litigants and parties who come before it. This fact remains especially in the Nigerian democratic environment where those who seek elective political offices would not want to accept a defeat at the polls. Thus, decisions of the courts, nay, the Supreme Court, cannot but be viewed with some mischief.

Some of the decisions of the Court reviewed here have been subjected to public discourse and debate. Even some individuals who though are not learned in law have suddenly become “legal commentators” on some of the issues raised and pronounced upon by the Court. Unfortunately, some members of the Bar

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63. A. Oyeboode: “The Judiciary and Constitutionalism in Democratic Society” in *Law and Nation Building in Nigeria: Selected Essays*, (2005) p. 117.

who ought, ordinarily, to protect the Bench appeared to have thrown the culture of courtesy for which the Bar is reputed to the wind. Be that as it may, it is important to point out that every case comes before a Court of law is decided solely upon its own peculiar facts and surrounding circumstances. But the question worthy of consideration is whether the Supreme Court is a dogmatic institution that will always stick to a position no matter what? Given a similar situation in the near future, will the Supreme Court still decide any of these cases the same way?

The Supreme Court on the principle of stare decisis is bound to adhere loyally to the principle of law enunciated in its earlier decision, unless, of course the court is clearly satisfied that the principle is wrong.<sup>64</sup> Although the Supreme Court holds itself bound by its previous decision, however, where it is satisfied that its previous decision is erroneous or was reached *per incurium*, and will amount to injustice to perpetuate the error by following such decision it will overrule such decision, or depart from it.<sup>65</sup> The Supreme Court will not ordinarily depart from its previous decision unless certain very stringent criteria are met.<sup>66</sup>

We must bear in mind distinguished scholars, jurists, ladies and gentlemen, that every case that comes before a court for adjudication is invariably decided on the basis of available facts, the position of the law and the advocacy of counsel. Thus, given the same situation, facts and circumstances, the Supreme Court may not but decide in accordance with its previous decisions. The general rule and the position of the law is that the Supreme Court will follow its previous decisions. This is appreciated against the imperative of the need for certainty in the law. I must hasten to point out however that the Supreme Court may and has indeed departed to follow its previous decisions in

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64. *Oduye v. Nigeria Airways Ltd.* (1987) 2 N.W.L.R. (Pt. 55) 126 at 129.

65. *Johnson (supra)*.

66. *Akinsaya v. U.B.A Ltd* (1986) 4 N.W.L.R. (pt. 35) 273 at 323.

appropriate cases. Thus, *Order 8 Rule 16* of the *Supreme Court Rules* provides that:

the court shall not review any judgment once given and delivered by it, save to correct any clerical mistake or some error arising from any accidental slip or omission, or to vary the judgment or orders, so as to give effect to its meaning or intention. A judgment or order shall not be varied when it correctly represents what the court decided nor shall the operative and substantive part of it be varied and a different form substituted.<sup>67</sup>

Commenting on the power of the Supreme Court to overrule itself and depart from its previous decisions, Oputa, JSC in *Adegoke Motors Ltd v. Adesanya & Anor*<sup>68</sup> said:

we are final not because we are infallible, rather we are infallible because we are final”.<sup>69</sup> Justices of this court are human beings capable of erring; it will certainly be short-sighted, arrogance not to accept this obvious truth. It is also true that this court can do incalculable harm through its mistakes. When, therefore, it appears to the learned counsel that any decision of this court that has been given *per incuriam*, such decision shall be overruled. This court has the power to overrule itself (and has done so in the past) for it gladly accept it is far better to admit an error than to persevere in error.<sup>70</sup>

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67. *Supreme Court Rules 1985* as Amended.

68. (1989) L.P.E.L.R- S.C. 186/1988 or (1989) N.W.L.R (pt 109).

69. *Ibid.*

70. *Op. cit.* 274 to 275.

Again, in *Buknor Maclean v. Inlak Ltd.*<sup>71</sup>, the Supreme Court noted thus:

“It is true that this Court is entitled to depart from or overrule its earlier decision when called upon to do so in an appropriate situation but it will have to be convinced to take that course if it is:

- 1) that the previous decision is clearly wrong and there is a real likelihood of injustice being perpetuated<sup>72</sup>
- 2) that the previous decision was given per in curium<sup>73</sup>
- 3) that a broad issue of public policy was involved”<sup>74</sup>

Yet in *Alhaji Karimu Adisa v. Emmanuel Oyinwola & Ors.*<sup>75</sup> the Supreme Court restated that it will depart from or overrule its previous decisions in the interest of justice where the decisions are shown to be; vehicle of injustice; or given per in curium; or clearly erroneous in law; or impeding the proper development of law; or having results which are unjust, undesirable or contrary to public policy, or inconsistent with the provision of the Constitution; or capable of fettering the exercise of judicial discretion by court.

The bottom line of this submission is that for the Supreme Court the most important consideration is the interest of justice, the development of the law and issues of public policy. Thus, should the society feel strongly about any of the decision of the Supreme Court, my view is that all a party needs to do is to

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71. (1980) 8-11 S.C. 1.

72. *Bucknor- Maclean (supra)*.

73. *Odi v Osale* (1985) 1 N.S.C.C. 14.

74. *Okulate & Ors.*

75. (2001) IV *N.W.L.R* (Pt 302) 116.

await for another opportunity, approach the court properly and show the imperative of the Court overruling its previous decisions on the same or similar issue.

### **Conclusions & Suggestions**

My Lords, distinguished audience, ladies and gentlemen, we have in this paper sought to bring to the fore some of the interventions of the Supreme Court of Nigeria in the electoral processes in this country. No doubt these judicial interventions have gone a long way to deepen our democratic system. We have postulated as to what the apex court may do in the near future especially in similar or related circumstances.

The role of the Judiciary generally is limited to expounding the law as found in the statute books. The Judiciary, unlike the Legislature, does not engage in the business of law-making. Electoral matters are essentially within the ambit of the legislative competence. The Court will however step in only to give meaning to what the Legislature has put in place. This brings us to what ought to be done to make the polity stable and less rancorous.

The late President and Commander-in-Chief, Alhaji Umar Musa Yar'dua, *GCFR*, realised early enough in his administration some of the challenges confronting the electoral processes in Nigeria and he appeared set to address same. Thus, in addressing the challenges of elections in Nigeria he set up a 22 member Electoral Committee in August 2007 to examine the entire electoral process with a view to ensuring that we raise the quality and standard of our general elections and thereby deepen our democracy.

The Committee had the following Terms of Reference:

- a. Undertake a review of Nigeria's history with general elections and identify factors which affect the quality and credibility of the election and their impact on the democratic process;



- b. Examine relevant provisions of the 1999 Constitution, the Electoral Act and other legislation that have bearing on the electoral process and assess their impact on the quality and credibility of general elections;
- c. Examine the roles of institutions, agencies and stakeholders in shaping and impacting on the quality and credibility of the electoral process. These should include Government, Electoral Commission, Security agencies, Political Parties, Non Governmental Organizations (NGOs) Media, General Public and the International Community;
- d. Examine electoral systems relevant to Nigeria's experience and identify best practices that would impact positively on the quality and credibility of the nation's electoral process;
- e. Make general and specific recommendations (including but not limited to Constitutional and Legislative provisions and / or amendments) to ensure:
- f. A truly Independent Electoral Commission imbued with administrative and financial autonomy;
- g. An electoral process that would facilitate the conduct of elections to meet international standards; and
- h. Legal process that would ensure election disputes are concluded before inauguration of newly elected officials;
- i. Mechanism to reduce post – election tensions including possibility of introducing the concept of

proportional representation in the constitution of government;

- j. Make any other recommendations deemed necessary by the Committee.

The Committee received 1,466 Memoranda. It held Public Hearings in 12 States, two in each of the six geo-political zones and Abuja. During the public hearing, 907 presentations were made. Experts were invited from eleven countries. The Electoral Reform Committee submitted its reports on the 11<sup>th</sup> December, 2008.

The Report of the Committee was presented in six volumes. Volume one is the main report containing the Executive Summary and main recommendations. Volumes two and three contain memoranda received by the Committee while volume four is the verbatim report of the public hearings. Volumes five and six contain report of retreats held with foreign experts and the Appendices to the main report.

The Report concluded that the 2007 election was the worst in the 85 year history of Nigeria's elections which also showed a progressive degeneration of outcome. The Report identified some factors that were responsible for the poor electoral outcome in Nigeria. These include the mindset of Nigerians about elections, poverty, corruption, lack of good governance, the electoral system, incumbency, military intervention and so on.

While receiving the report from the *Electoral Reform Committee* (ERC), the then President, His Excellency Umaru Musa Yar Adua GCFR, said he was committed to the implementation of the recommendations. According to His Excellency:

Our focus on the electoral reform is predicated on the belief that elections are the very heart of democracy hence they must not only be

fair, they must also be seen to be so by our people and the rest of the world. We will carefully study and implement, with the support of the National Assembly, those recommendations that would guarantee popular participation, ensure fairness and justice and bring credibility to the electoral processes in Nigeria. It is our abiding belief that failure in instituting an acceptable process by which the representative of the people are chosen will definitely resort in failure in the long run. For us to proceed in our effort, however, we need the buy in of all stakeholders; politicians, the media, civil society and indeed all Nigerians. Nurturing and sustaining a credible electoral regime indeed entail the cooperation and magnanimity of winner who can appreciate the burden of responsibility, and gallant looser who will gracefully accept defeat in the certainty of the process if the process is fair. From inception, this administration has considered it a sacred mandate to institute deep and elaborate reforms that will lead to the restoration of the integrity of the electoral system in this country and to ensure that the future election will meet minimum acceptable international standards.

The Chairman of that Committee was no other than a respected Jurist of all times Hon. Justice Muhammadu Lawal Uwais, *GCON* former Chief Justice of Nigeria. Two main suggestions I would like to make. The first is that the government should be magnanimous enough to implement the enduring and durable recommendations made by the *Uwais Panel on Electoral Reforms*. Secondly and by no means of less

importance, it is for us, as a people and the politicians in particular to learn to accept defeat gallantly. There must be an end to the culture of do or die politics in this country. Besides, both the leaders and the led must appreciate the role of the Court in general and the Supreme Court in particular in the development of the democratic values and practices. It is if and only when this is done and we all learn to accord respect to the orders of court that we will join the rest of the democratic comity of nations as having arrived.

It is my pleasure, Mr. Chairman and distinguished audience, before I am done, to give honour to whoever deserves it. The person in whose honour this lecture is organized, Dr. Felix Chukwuemeka Okoye, was a distinguished lawyer, but unfortunately he died under tragic circumstances on July 17, 1983 long before he was able to reach the peak of his career in law, leaving behind him aged parents, a wife, Ijeoma, and four young sons. Felix Chuks Okoye was born to the illustrious family of Chief F. G. N. Okoye in Bukuru, Plateau State of Nigeria on December 14<sup>th</sup>, 1940. He had his early education at the St. Bartholomew's Primary School, Onitsha. In 1961 he left for the United Kingdom where owing to his love for hard work and his high intellect he was able to gain admission to Fitzwilliam College, Cambridge. There he exhibited such excellence in learning and intellect that he was permitted to proceed to pursue postgraduate studies up to the doctorate level. His doctoral dissertation was such a distinct and excellent contribution to knowledge in the field of Public International Law that it at once made a tremendous impact in Africa in its published form – **International Law and New African States**.

Between 1970 and 1972 Dr. Chuks Okoye expanded his intellectual and academic horizons considerably. In 1970 he was admitted to the Degree of Utter Barrister by the Honourable Society of Gray's Inn. In 1972 he was admitted as a Solicitor and Advocate of the Supreme Court of Nigeria, and in that year attended the Academy of American International Law during

which attendance he earned for himself an award of appreciation by President Richard Nixon of the United States.

Chuks Okoye will continue to be remembered by his activities and contributions to the Nigerian Institute of International Affairs, the International Bar Association, the Nigerian Society of International Law and the International Law Association. A man with almost unlimited energy and great zeal for life, Chuks Okoye at the time of his death age 42 was publicity Secretary of the Nigerian Society of International Law. He was the Group Vice Chairman and General Counsel, Fegno Group of Companies, a Director of Union Bank of Nigeria, a Director of Unipetrol Nigeria Limited, and a number of other companies. That no doubt is a remarkable achievement for a man of only 42.

My Lords, distinguished Professors Emeritus, legal scholars, distinguished academics, members of the Press, ladies and gentlemen, I think this is an appropriate place for me to stop. I hope I have been able to stimulate your interest in the topic of my presentation. Please forgive me of whatever shortcomings you might have noticed in this lecture. I thank the Chairman of the Governing Council of the Nigerian Institute of Advanced Legal Studies, the Director General of the Institute Prof. Epiphany Azinge, SAN, a distinguished Professor of Law and the Management & staff of the Institute for this singular honour done to me by the invitation to serve as Guest Lecturer here today.

Thank you all and God bless.