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JUDICIAL ATTITUDE TO FUNDAMENTAL RIGHTS PROTECTION IN NIGERIA

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Abstract

The judiciary is one of the three arms of government recognised under the 1999 Constitution of Nigeria. As a result, there are constitutional provisions on the roles and powers of the judiciary in governance which is essentially to interpret the law and adjudicate on matters within a legal framework. Fundamental human right is one of the areas in which the Constitution empowers the judiciary to adjudicate over. The aim of this paper is to examine the roles and limitation of the judiciary in the protection of fundamental human rights in Nigeria. In doing this, the paper examines the constitutional powers and jurisdiction of the judiciary in respect of fundamental human rights cases. It also examines the attitude of the judiciary in applying its constitutional powers and this is through an examination of some of the decided cases on fundamental human rights. This paper adopts the doctrinal legal research approach through content analysis of concepts, laws and cases. It finds that the Nigerian judiciary has been proactive in enforcing the constitutional provisions on fundamental human rights and by extension in the protection of fundamental human rights. Nevertheless, unnecessary interference and lack of independence is a challenge affecting the optimal performance of the judiciary in the protection of human rights. This paper therefore recommends that there is the need for both institutional and personal independence of the judiciary in order to live to its name as the last hope of the common man.

Keywords Constitution, Judiciary, Fundamental Human Right

Introduction

Human rights are natural rights of man which has been in our consciousness since the era of renaissance humanism in the early modern era.¹ It is a global phenomenon and a major responsibility of every civil society. Nigeria as a country within the global village is not left out in the recognition of human rights as the inalienable rights of man. Fundamental rights are similar to human rights; however, unlike human rights,

¹ En.wikipedia.org/wiki/History-of-human-rights accessed on 1st June, 2015

fundamental rights have legal sanctions and are thus enforceable in courts. The 1999 Constitution recognises and classifies some rights as the inalienable and fundamental human rights. These rights are provided in Chapter IV of the Constitution as follows: Right to life, Right to dignity of human person, Right to personal liberty, Right to fair hearing, Right to private and family life, Right to freedom of thought, conscience and religion, Right to freedom of expression and the press, Right to peaceful assembly and association, Right to freedom of movement, Right to freedom from discrimination and Right to acquire and own immovable property.

Judiciary carved out of the Latin word *judicialis* from the word *judicium* literally means judgement.² The judiciary is the third arm of government and a constitutional creation, the working machine of which are the courts under the functional attitudes of judges as the managers. The 1999 Constitution creates the judiciary as an arm of government and confers power on it which includes as an institution for the protection of the constitutionally guaranteed human rights. The powers and jurisdiction of courts for the protection of human rights are discussed as follows. The 1999 Constitution vests judicial powers on the courts established by the Constitution and any other courts that are created by the national or state legislature. In the same vein, it confers jurisdiction on courts to guide in the exercise of judicial powers.

Judicial Power and Jurisdiction

Judicial power can be described as the power of court to decide on, pronounce judgement and give effect to same in cases between litigating parties. On the other hand, jurisdiction although often used interchangeable with judicial power, can be defined as the authority of courts to exercise judicial power in a particular case under specific circumstance. Jurisdiction therefore has been considered as a pre-requisite for the exercise of judicial power.³

Section 6 (1) of the 1999 Constitution vests judicial powers on the constitutional established courts listed in section 6 (5)⁴ and other courts as may be established under the National or State Assemblies.⁵ Furtherance to the exercise of judicial power, the Constitution also gives these courts wide jurisdiction to entertain actions and proceedings including questions of fundamental rights contained in Chapter IV, as to civil rights and obligations between persons, or between government, individual and other authorities in Nigeria.⁶ However, there is

² Oxford Advanced Learner's Dictionary (7th edn, Oxford University Press, 2005) 729.
³ J. O. Akande, *The Constitution of the Federal Republic of Nigeria: with Annotations* (MJ Publishers 32.
⁴ These are superior courts of records
⁵ Section 6 (4) (a)
⁶ Section 6 (6) (a & b)

limitations to the judicial powers granted in section 6 and it is to the effect that judicial powers shall not extend to any case in which the law or judicial decision is in conformity with the Fundamental Objective and Directive Principle of State Policy stated in Chapter II of the Constitution.

It must be noted that the Constitution recognises a hierarchy of courts system with the Supreme Court at the apex, followed by the Court of Appeal, the High Courts and State's Inferior Courts of Appeal.³ The Court of Appeal is empowered in section 241 (1) to hear and determine appeal as of right from the Federal High Court or a High Court of a State or the Federal Capital Territory. Thus, whenever any of the provisions of chapter IV has been violated, a dissatisfied party can go on an appeal from the High Court to the Court of Appeal. In the same vein, appeal lies to the Supreme Court in the same manner.⁴

The power of the Nigerian Courts includes specifically to protect human rights guaranteed in the Nigerian constitution under the judicial power confer on it both at the national and state levels by the Constitution.⁵ In addition to the general judicial power stated above, courts are given specific jurisdiction for the enforcement and to uphold of the values of these rights. This is enabled by the provision of the Fundamental Rights (Enforcement Procedure) Rules⁶ where it provides:

Any person who alleges that any of the Fundamental Rights provided for in the Constitution and to which he is entitled, has been, is being, or is likely to be infringed may, apply to the court in the state where the infringement occurs or is likely to occur for redress.⁷ Thus, the Fundamental Rights (Enforcement Procedure) Rule is a positive measure taken by the judiciary for the protection of human rights. The Rule is pursuant to the provisions of section 46(3) of 1999 Constitution which empowers the Chief Justice to make provisions for the practicability of the jurisdiction conferred on the High Court by the Constitution. This is mainly aimed at re-enforcing the practical role of the judiciary in the protection of human rights. It must be stated that the power conferred on the judiciary herein with particular reference to the protection of human rights is not limited to infringement from government and its organs alone, rather it includes infringement of rights by individuals and any other authority.

¹ Section 6(6)(c), see also section 6(6)(d)

² Section 6(5), these are the superior courts of records recognized under the Constitution. However, section 6 (4) allows the National and State Assembly to establish courts subordinate to the superior courts of record.

³ Section 233 (2)

⁴ Section 6, see also section 233 (2) (c)

⁵ The rule is cited as Fundamental Rights (Enforcement Procedure) Rules 1979 which came into force on 1st January, 1980. The rule was made pursuant to section 46 (3) of the 1999 Constitution

⁶ Order 1 rule 2 (1) of the Fundamental Rights (Enforcement Procedure) Rules 1979 a derivative of sub section 2 of section 46 of the Constitution

In addition, fair hearing has been described as one of the indivisible twin pillars of natural justice i.e. *audi alteram partem* and *Nemo iudex in causa sua*, the effect of failure to observe it renders proceedings a nullity³⁴ if bias is proved and it occasioned miscarriage of justice.³⁵ On this *Nnaemeka-Agu J.C.A* as he then was says:

*The rule of audi alteram partem postulates that the court or other tribunals must hear both sides at every material stage of the proceedings before handing down a decision on that stage. It is a rule of fairness. A court cannot be fair unless it considers both sides of the case as may be presented by both sides.*³⁶

Courts in civil cases have also protected this right to the extent of holding wrongful exclusion of evidence as a violation of the right to fair hearing. This was the position of the Supreme Court in the case of *Agbahomovo v. Edueyegbe*.³⁷ In this case, the trial court did not use the statement of defence of the respondents as the basis of his judgement. The learned trial judge also restrained the respondents from asking questions at a crucial stage of the proceedings. In addition, the respondents were also precluded by the trial judge from giving evidence relating to exhibits already admitted before the court and the judge went ahead to expunge their evidence from the record. Thus, the Supreme Court declared all these actions of the trial judge as a denial of the right to fair hearing and therefore a violation of section 36 of the Constitution. In protecting the respondents' rights to fair hearing in the instant case, the court in dismissing this appeal, upheld the decision of the Court of Appeal which allowed the respondents appeal on that ground by setting aside the judgement and orders of the trial court.

It must be noted that the right to fair hearing in criminal cases is more elaborated under the Nigerian Constitution.³⁸ In other words, any person charged with a criminal offence has a wider scope of protection of his right to fair hearing. Therefore, from the provisions of section 35 of the Constitution, the right to fair hearing of an accused person starts from his right to be arraigned in court within a specified period of time by the law.³⁹ For a proper understanding of this position, section 36 is read together with section 35 of the Constitution. In a criminal charge, an accused person has the fundamental right to be presumed innocent, this is one of the grounds for the consideration his entitlement to be admitted to bail pending trial as a constitutional

³⁴ *Adigun v A-G of Oyo State* (1987)1 N.W.L.R (pt 53) 678

³⁵ *Bamgboye v University of Ilorin* (1999) 6 S.C.N.J. 305 at 308

³⁶ *Ekuna v. Silver Eagle Shipping Agencies Ltd* (1987) 4 N.W.L.R. (pt. 65) 472 at 486
³⁷ (1999) 2 S.C.N.J 100

³⁸ Sub-sections 4 to 12 of section 36

³⁹ Section 9 of the Criminal Procedure Act also provides that an accused person must be taken before a magistrate court within twenty four hours.

right.⁴⁰ Sections 36 (5) and (6) also stipulates specific procedural rights of an accused which altogether constitute right to fair hearing. Specifically, (5) provides that an accused person is presumed innocent until the contrary is proved.

It must be stated that the Magistrate Court is mostly the proper court in the position to protect people's right to fair hearing in criminal cases. This is because it is the busiest court in the hierarchy of the Nigerian courts. A greater number of criminal cases are commenced at the Magistrate Courts as courts of first instance. However, in practice, this right is often jeopardised because in most cases magistrates do not necessarily see the issue of bail as a matter of discretion empowered by the law.⁴¹

Also, it seems that most magistrates consider bail merely on the content of the unsubstantiated First Information Report (F.I.R.). Thus, the courts at this level in most cases fail to protect this right consequently allowing accused persons to serve bail terms without conviction.⁴²

In safeguarding the right of an accused to fair hearing, section 36 (6) b and c provides that an accused is entitled to a legal practitioner of his choice and other facilities necessary for his defence. This right to legal practitioner was denied in the famous old case of *Awolowo v. Minister of Internal Affairs*.⁴³ In this case, the accused employed the service of a foreign legal practitioner who was denied entry into the country by the Immigration. The court in interpreting the choice restricted it to mean only a legal practitioner who is enrolled to practice in the country.

It must be stated that there is a limit to the operations of right to fair hearing under section 36. This is because section only requires that a party is given a right to be heard but when such opportunity is given and the party fails to utilise it, he cannot subsequently complain that his right has been breached. In *Segun Ajibade v. State*⁴⁴ it is held that the right to fair hearing presupposes that all parties must be given equal opportunity to present their respective cases in the manner laid down by the law without any hindrance. But, it does not mean that a party is allowed to do as he pleases. In that case, the appellant was convicted at the trial court based on his challenged confessional statements tendered by the prosecution. The appellant himself did not call any witness and did not challenge the correctness of the prosecution's case; rather he based his defence on the prosecution's case. He appealed to the Court of Appeal which affirmed his conviction by the lower court and

⁴⁰ *Ant v. State* (2000)1 N.W.L.R (pt.747) 217 at 230; see *Abiola v. Federal Republic of Nigeria* (1995)1 N.W.L.R (pt 370) 155

⁴¹ Section 118 (2) CPA provides that where a person is charged with any felony other than a felony punishable with death, the court may if it thinks fit, admit him to bail.

⁴² This probably spurred the Federal Government to take steps in 2007 towards decongesting Nigerian prisons through a prison decongestion scheme through the office of the Attorney General of the Federation.

⁴³ (1962) L.L.R 177

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he finally appealed to the Supreme Court where the decisions of the lower courts were also affirmed. *Ogunbiyi* JSC held that the court is free to accept the uncontradicted evidence of the prosecution where the accused fails to give evidence in his defence.⁴⁵

3.4 Right to Freedom of Expression and the Press

Right to freedom of expression and the press is provided for under section 39 of the Constitution. It includes freedom to hold opinions, to receive and impart ideas and information without obstruction. This right also includes right to own, establish and operate media for the purpose of dissemination of information, opinion and ideas. In fact the scope of this right has been interpreted to include schools.⁴⁶

The right to freedom of expression is a means by which individual personality is identified;⁴⁷ it also serves the purpose of pursuing, discovering and attaining the truth in the society.⁴⁸ Unhindered freedom of expression fosters understanding, respect, submissiveness, and confidence between the rulers and the ruled and among the citizens as well. This consequently builds the participatory enthusiasm in the people for the smooth running of the State. A long line of cases has shown that the Nigerian courts do not hesitate to protect the right to freedom of expression.⁴⁹ However, there is a challenge with respect to freedom of press. This is because laws of defamation, sedition and libel prosecution are being used to censor the press especially to suppress criticism of government and its officials irrespective of whether the information is true or false. Initially, judicial attitude in the period after independence was not encouraging with respect to right to freedom of expression and the press. For example, in *Chike Obi v DPP*,⁵⁰ the petitioner, as at that time a legislator in the parliament of the Federal Republic of Nigeria. He circulated a pamphlet titled "*The people: Facts you must know.*" Its contention therein was that ministers were pursuing their personal interest and not the national interest in the discharge of their duties. The petitioner on this account was charged for sedition. The Supreme Court decided the case in favour of the then Federal government against the protection of the right of the petitioner to freedom of expression and press.

Similarly, in *Tony Momoh v Senate*,⁵¹ the court in protecting the right to freedom of expression and the press held that a journalist is not under any legal obligation and cannot be compelled to disclose his source of information before the Senate

⁴⁵ *ibid* (29)
⁴⁶ *Okogie v Attorney-General of Lagos State* (1981)
⁴⁷ *Ford v Quebec* (1988) 2 S.C.R. 712
⁴⁸ *Irwin Toy Ltd v Quebec* (1989) 1 S.C.R. 927; see *Bridges v California* (1941) 314 U.S.252 at 291-293
⁴⁹ For example, *Adewole v. Alhaji Jakande & Ors* (1981) NCLR 262
⁵⁰ (1961) 1 All N.L.R 186 at 197-198
⁵¹ (1982) NCLR 105

Committee of Inquiry. However, the pronouncement of the court in this case "*before the senate Committee of Inquiry*" is restrictive and it not clear whether the same immunity applies to a journalist in a proceeding before a court of law. Earlier in *People Star Press v. Adebayo*,⁵² it was held that freedom of circulation of news of newspaper is an essential part of the right to freedom of association.⁵³

3.5 Rights to Peaceful Assembly and Association

Freedom of peaceful assembly and association hypothesizes the civil and political Rights necessary for participatory right in the political structure of a state. Human rights protection is assured under a well structured and constitutional based State politics premised on the rule of law. This position and the essential inalienable nature of the rights to peaceful assembly and association have been explained by Alexis de Tocqueville as a pre-condition for civilisation in the following words:

*The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society*⁵⁴

This right is provided for under section 40 of the 1999 Constitution. It means the right or freedom to choose freely whether or not to assemble and/or associate with other persons whether in the name of political party, trade union and other association for the protection of his interest. Light was shed on the rationale behind this assertion in an old Ghanaian case *Mensima & Others v. Attorney-General*⁵⁵ Justice Acquah of Ghana Supreme Court observed:

the essence of freedom of association is the liberty or lack of compulsion on the individual to form or to join an association.

His lordship emphasised the meaning of this to include the right to dissociate or not to associate at all with whom a person does not like to associate with other wise freedom of association would be held to be synonymous to cultism.

⁵² (1971) UILR 269

⁵³ It must be noted that there is a Freedom of Information Act 2011 which guarantees citizens' right to public information and has put pressure on government agencies to release records in response to petitions by media and activist groups. See <https://freedomhouse.org/report/freedom-press/2013/nigeria#> accessed on 1st June, 2015

⁵⁴ P. A. Atupare, *Judicial Review and the Enforcement of Human Rights: The Red and Blue Light of the Judiciary of Ghana*, (Master of laws thesis, Queen's University Kingston, Ontario, Canada, 2008), 105 where the researcher quoting from De Tocqueville *Democracy in America* (1954), cited in Beaudoin and Ratushny (eds.), *The Canadian Charter of Rights and Freedoms* (1989) 235

⁵⁵ (1996-97) SCGLR 676; see also *New Patriotic Party v. Attorney-General* (1996-97) SCGLR 929

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²⁰ F. A. McKenzie, *Indigenous Peoples and the Establishment of Human Rights: The Red and Blue Light of the Indians of Canada* (Volume of Law Series, Queen's University Kingston, Ontario, Canada, 2008), 103. Relating to us: J. C. Cunningham, *The Canadian Charter of Rights and Freedoms in America* (1984), cited in Upchurch and (1996-97) 50 B.C.L.R. 610; see also below footnote 21.

See also *Legal Profession* - *Attorney-General* (1906-97) SCUL 9.929

The attitude of the Nigerian courts in the protection of this right has been quite positive. A famous case on this is the Supreme Court decision in *Fawehinmi v. N.B.A (No2)*⁵⁶ where it was held that every individual has the right to decide to freely assemble, join association of his choice and not to join as the case may be. Similarly, in *A.C v. INEC*,⁵⁷ here, the immediate past Vice President after eight years in office contested in 2007 for the office of the President under the platform of the Action Congress, a party other than the one through which he secured the Vice Presidential ticket earlier in 1999. The Independent National Electoral Commission disqualified him from contesting the election but the Supreme Court held that INEC has no power under the Constitution or any other law to disqualify any candidate (including the 2nd Appellant) presented to it by an accredited political party i.e. the 1st Appellant (Action Congress). The relevance of the above cited case shall be appreciated through the facts and holding of the Court in *A.G of the Federation v. Abubakar*.⁵⁸ The 1st respondent was the Vice President of Nigeria for two consecutive terms, from 1999 to 2007 and elected on the platform of the Peoples' Democratic Party (PDP). Subsequently, he sought to contest for the office of the President but was denied the ticket at the party level and he consequently deflected from PDP to the Action Congress (AC) where he was nominated and sponsored to contest for the office of the President. Upon his deflection to the AC, the President declared his sit vacant, withdrew all his rights and privileges as the Vice President.

The 1st respondent then commenced an action at the Court of Appeal for the nullification of the President's declaration that the Vice President's sit was vacant amongst other reliefs. The Court of Appeal resolved in favour of the respondent. The appellant was dissatisfied and appealed to the Supreme Court. Among the contention of the appellant is that the 1st respondent was no longer loyal to the President and his disloyalty to the President by extension amount to disloyalty to the Federal Republic of Nigeria.⁵⁹ This can be inferred from the appellant's 4th relief which reads:

*Declaration that the dumping of a sponsoring party for any other party by a sitting Vice President coupled with condemnation of the President and the Government by a sitting Vice President is a breach of one mindedness, loyalty, trust and confidence expected of the Vice President and therefore constitutes constructive resignation and/or abandonment of the office of the Vice President.*⁶⁰

⁵⁶ (1989) 2 NWLR (Pt.108) 558 S.C

⁵⁷ (2007) S.C.E.R. 58

⁵⁸ (2007) S.C.E.R. 129

⁵⁹ Ibid (124)

⁶⁰ Ibid (4)

Although rights to freedom of assembly and association is not directly in issue in this case, but the Supreme Court in protecting the 1st respondent's right to freedom of association which he exercised by joining a party of his choice (AC) as guaranteed in section 40 of the Constitution held that:

It may be said that the act or conduct of the Vice President in defecting to the Action Congress after he has won the ticket on the platform of the P.D.P for that position is morally reprehensible. But until the law (in this case, the Constitution) declares the defection unlawful and prescribes in clear language, punishment for such an act, there is nothing anybody can do. The remedy if there is one, lies in the hands of the legislators. It must always be noted that what is morally reprehensible may not be legally punishable.⁶¹

The Court further maintained that unlike the senators and members of the House of Representatives,⁶² removal of either the President or the Vice President by declaring their seats vacant on ground of defection to another party is not contained in the Constitution. More so, the Vice President is not subordinate to the President rather they are only to be associates for the election period, and once they won, both are at liberty to map out their independent fortunes.

4. Challenges of the Judiciary in the Protection of Human Rights

Generally, in the discharge of its constitutional obligation of human rights protection, the judiciary through the machinery of courts has positively strived and stood to the challenges vide various judicial decisions in cases involving human rights issues. Nevertheless, there is room for improvement. This is because there are some challenges affecting the judiciary in the performance of its functions especially in the area of human rights protection. These challenges are categorized into two namely; external and internal challenges.

4.1 External Challenge

A major challenge affecting the performance of the judiciary in the discharge of its duties is political instability of Nigeria especially between the post - independence

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A.G Federation (n58) 119

Section 68 (1) (g) and section 109 (1) (g) of the Constitution

period in 1960 and up till 1999.⁶³ Thus, the prolonged military rule and epileptic democratic rule experienced in the country is a mitigating factor against the optimal performance of the judiciary in the protection of human rights. For example, during the military rule, the Constitution and its provisions were suspended;⁶⁴ this makes it easy for gross abuse of collective and individual rights of the citizens. In fact, traditionally, the military ruler's first assignment is usurping of judicial powers.⁶⁵

Although, military rule has become a past issue in Nigeria as there has been relative political stability since the advent of the fourth republic in 1999. However, the civilian government have also on many occasions shown disrespect for the rule of law and by extension the judiciary. The politicians often attempt to influence the judicial processes; this is encouraged due to the concentration of more power in the executive arm of the government.⁶⁶ More so, the legal structure of the power of the other two arms of government does not give the judiciary the required independence to effectively discharge its functions especially in protecting peoples' rights against the government. The integrity and personal independence of judges are neither guaranteed nor assured in Nigeria because, the executive in collaboration with the legislature sees itself as the authority that can hire and fire judges at will.⁶⁷

Consequently, the lack of security of tenure of office, life and economy securities make it difficult for the judiciary through the machineries of courts administered by judges to take independent decisions without interference from other arms especially where any of the constitutional guaranteed rights has been or about to be violated by the government and its agencies.

A curious case is the decision in *Abubakar v. Yar'adua*⁶⁸ which was to challenge the election of late former President *Umar Musa Yar'adua*. The Supreme Court upheld

⁶³ A.O Oguno. Turning back the Hands of Time: The Liability of Present Governments for Human Rights Violation of Previous Government in Nigeria. in Yerokun (ed.) et al, *The Jurist*, (Vol.12, Nigeria Law Student Society, University of Ilorin, 2007), 257 where the author gave account of various military coups in Nigeria first which occurred on the 29th of January 1966 which led to the assassination of the founding fathers of the Nigerian Political system and prominent leaders who agitated and fought for Nigerian independence, such as Sir Ahmadu Bello and Tafawa Balewa. This was followed by the 1975, 1976, 1983, the successful and failed coups 1985 and 1990. Also the 1993 coup which was elongated till 1999 before the present democratic rule was ushered in.

⁶⁴ The military junta usually justifies first the uncivilized process of coming into power, by doing this they suspend the Constitution either in part or in whole with various decrees. Example is Decree No 1 of 1984 which was passed to suspend an important part of the Constitution in the area of right to personal liberty.

⁶⁵ Ouster clause, with which the judiciary was rendered inactive in protecting people's fundamental right through the judicial proceedings. Section 4 (2) Decree No 2 of 1984 suspended the whole of chapter IV of the 1979 Constitution in which the human rights was enshrined and consequently rendered same unenforceable in any court of law. In addition to this, the same section of the Decree ousted the jurisdiction of courts from hearing any suit relating to matters in the Decree.

⁶⁶ Akande (n3) 25-26

⁶⁷ *Hon. Justice Raliat Elelu-Habeeb v. National Judicial Council & Others* (Unreported) Suit No FHIC/IL/CS/13/09

⁶⁸ (2008) 12 SCNJ 217

the election of the then President despite the open admission by the then President Yar'adua that the election was fraught with irregularities. He stated in his inaugural speech of 29th May, 2007 that:

We acknowledge that our elections had some shortcomings. Thankfully, we have well-established legal avenues of redress, and I urge anyone aggrieved to pursue them. I also believe that our experiences represent an opportunity to learn from our mistakes. Accordingly, I will set up a panel 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.⁶⁹

Corroborating this is the dissenting judgement of *Oguntade JSC* in the case where he says:

"I hold that the petitioners/applicants by a preponderance of evidence established that the 1st petitioner/appellant, a candidate validly nominated, was unlawfully excluded from the election. I therefore order that the presidential elections held in Nigeria on 21st April, 2007 be annulled and a new election be conducted within 90 days from today"

On another ground His Lordship further observed:

*"Let me also observe that if I had to decide this case on the ground of non-compliance with section 45(2) of the Electoral Act, 2006, I would make the same order as I have made in Appeal No. SC.51/2008 that the election be annulled. I would do so because there is abundant evidence including the sworn deposition filed by the Chairman of INEC in answer to the interrogatories served to him that the ballot papers used for the April 21st presidential elections were not serialised and bound in booklets as required under section 45(2) of the Electoral Act 2006."*⁷⁰

Nevertheless, the majority decision of the Supreme Court upheld the decision. Instances like this case perhaps justify the opinion that the judiciary is greatly influenced by the executive. As it seemed that the Supreme Court had been influenced in the majority decision of this case and with the consequence that the nation had been denied the right to elect a leader of its choice.

⁶⁹ Yar'Adua's Inaugural Speech, "The Challenge is Great, The Goal is Clear" Inaugural Address of Umaru Musa Yar'adua, President of the Federal Republic of Nigeria and Commander-In-Chief of The Armed Forces, May 29, 2007. Posted in May 30, 2007 ~ 11:12 am by loomnie14 <http://loomnie.com/2007/05/30/yaraduas-inaugural-speech/> accessed on 28th September 2009

⁷⁰ Abubakar (n68) 379-380

JUDICIAL ATTITUDE TO FUNDAMENTAL RIGHTS PROTECTION IN NIGERIA

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Abstract

The judiciary is one of the three arms of government recognised under the 1999 Constitution of Nigeria. As a result, there are constitutional provisions on the roles and powers of the judiciary in governance which is essentially to interpret the law and adjudicate on matters within a legal framework. Fundamental human right is one of the areas in which the Constitution empowers the judiciary to adjudicate over. The aim of this paper is to examine the roles and limitation of the judiciary in the protection of fundamental human rights in Nigeria. In doing this, the paper examines the constitutional powers and jurisdiction of the judiciary in respect of fundamental human rights cases. It also examines the attitude of the judiciary in applying its constitutional powers and this is through an examination of some of the decided cases on fundamental human rights. This paper adopts the doctrinal legal research approach through content analysis of concepts, laws and cases. It finds that the Nigerian judiciary has been proactive in enforcing the constitutional provisions on fundamental human rights and by extension in the protection of fundamental human rights. Nevertheless, unnecessary interference and lack of independence is a challenge affecting the optimal performance of the judiciary in the protection of human rights. This paper therefore recommends that there is the need for both institutional and personal independence of the judiciary in order to live to its name as the last hope of the common man.

Keywords Constitution, Judiciary, Fundamental Human Right

Introduction

Human rights are natural rights of man which has been in our consciousness since the era of renaissance humanism in the early modern era.¹ It is a global phenomenon and a major responsibility of every civil society. Nigeria as a country within the global village is not left out in the recognition of human rights as the inalienable rights of man. Fundamental rights are similar to human rights; however, unlike human rights,

¹ En wikipedia.org/wiki/History-of-human-rights accessed on 1st June, 2015

Fundamental rights have legal sanctions and are thus enforceable in courts. The 1999 Constitution recognises and classifies some rights as the inalienable and fundamental human rights. These rights are provided in Chapter IV of the Constitution as follows: Right to life, Right to dignity of human person, Right to personal liberty, Right to fair hearing, Right to private and family life, Right to freedom of thought, conscience and religion, Right to freedom of expression and the press, Right to peaceful assembly and association, Right to freedom of movement, Right to freedom from discrimination and Right to acquire and own immovable property.

Judiciary carved out of the Latin word *judiciarius* from the word *judicium* literally means judgement.¹ The judiciary is the third arm of government and a constitutional creation, the working machine of which are the courts under the functional attitudes of judges as the managers. The 1999 Constitution creates the judiciary as an arm of government and confers power on it which includes as an institution for the protection of the constitutionally guaranteed human rights. The powers and jurisdiction of courts for the protection of human rights are discussed as follows. The 1999 Constitution vests judicial powers on the courts established by the Constitution and any other courts that are created by the national or state legislature. In the same vein, it confers jurisdiction on courts to guide in the exercise of judicial powers.

2. Judicial Power and Jurisdiction

Judicial power can be described as the power of court to decide on, pronounce judgement and give effect to same in cases between litigating parties. On the other hand, jurisdiction although often used interchangeable with judicial power, can be defined as the authority of courts to exercise judicial power in a particular case under a specific circumstance. Jurisdiction therefore has been considered as a pre-requisite for the exercise of judicial power.²

Section 6 (1) of the 1999 Constitution vests judicial powers on the constitutionally established courts listed in section 6 (5)³ and other courts as may be established by either the National or State Assemblies.⁴ Furtherance to the exercise of judicial power, the Constitution also gives these courts wide jurisdiction to entertain all actions and proceedings including questions of fundamental rights contained in chapter IV, as to civil rights and obligations between persons, or between government, individual and other authorities in Nigeria.⁵ However, there is a

¹ Oxford Advanced Learner's Dictionary (7th edn, Oxford University Press, 2005) 729.
² J. O. Akande, *The Constitution of the Federal Republic of Nigeria: with Annotations* (MLJ Publishers 2000) 32.
³ These are superior courts of records.
⁴ Section 6 (4) (a).
⁵ Section 6 (6) (a & b).

institution to the judicial power granted in section 6 and it is to the effect that judicial power shall not extend to any issue as to whether any law or judicial decision is in conformity with the Fundamental Objective and Directive Principle of State Policy stated in Chapter II of the Constitution.¹

It must be noted that the Constitution recognises a hierarchy of courts system with the Supreme Court at the apex, followed by the Court of Appeal, the High Courts and the Sharia/Customary Courts of Appeal.² The Court of Appeal is empowered in section 241 (1) to hear and determine appeal as of right from the Federal High Court or a High Court of a State of the Federal Capital Territory. Thus, whenever any of the provisions of chapter IV has been violated, a dissatisfied party can go on an appeal from the High Court to the Court of Appeal. In the same vein, appeal lies to the Supreme Court in the same manner.³

The power of the Nigerian Courts includes specifically to protect human rights guaranteed in the Nigerian constitution under the judicial power confer on it both at the national and state levels by the Constitution.⁴ In addition to the general judicial power stated above, courts are given specific jurisdiction for the enforcement and to uphold of the values of these rights. This is enabled by the provision of the Fundamental Rights (Enforcement Procedure) Rules⁵ where it provides:

Any person who alleges that any of the Fundamental Rights provided for in the Constitution and to which he is entitled, has been, is being, or is likely to be infringed may, apply to the court in the state where the infringement occurs or is likely to occur for redress.⁶ Thus, the Fundamental Rights (Enforcement Procedure) Rule is a positive measure taken by the judiciary for the protection of human rights. The Rule is pursuant to the provisions of section 46(3) of 1999 Constitution which empowers the Chief Justice to make provisions for the practicability of the jurisdiction conferred on the High Court by the Constitution. This is mainly aimed at re-enforcing the practical role of the judiciary in the protection of human rights. It must be stated that the power conferred on the judiciary herein with particular reference to the protection of human rights is not limited to infringement from government and its organs alone, rather it includes infringement of rights by individuals and any other authority.

¹ Section 6(2)(c), see also section 6(1)(d)

² Section 6(2), there are the superior courts of records recognised under the Constitution. However, section 6(4) allows the National and State Assembly to establish courts subordinate to the superior courts of records.

³ Section 233 (1)

⁴ Section 6, see also section 233 (3) (c)

⁵ The rule is cited as Fundamental Rights (Enforcement Procedure) Rules 1979 which came into force on 1st January, 1980. The rule was made pursuant to section 46 (3) of the 1999 Constitution.

⁶ Order 1 rule 2 (1) of the Fundamental Rights (Enforcement Procedure) Rules 1979 a derivation of sub-section 2 of section 46 of the Constitution

In addition, fair hearing has been described as one of the indivisible twin pillars of natural justice i.e audi alteram partem and Nemo judex in causa sua, the effect of failure to observe it renders proceedings a nullity³⁴ if bias is proved and it occasioned miscarriage of justice.³⁵ On this *Nnaemeka-Agu J.C.A* as he then was says:

*The rule of audi alteram partem postulates that the court or other tribunals must hear both sides at every material stage of the proceedings before handing down a decision on that stage. It is a rule of fairness. A court cannot be fair unless it considers both sides of the case as may be presented by both sides.*³⁶

Courts in civil cases have also protected this right to the extent of holding wrongful exclusion of evidence as a violation of the right to fair hearing. This was the position of the Supreme Court in the case of *Agbahomovo v. Eduyegbe*.³⁷ In this case, the trial court did not use the statement of defence of the respondents as the basis of his judgement. The learned trial judge also restrained the respondents from asking questions at a crucial stage of the proceedings. In addition, the respondents were also precluded by the trial judge from giving evidence relating to exhibits already admitted before the court and the judge went ahead to expunge their evidence from the record. Thus, the Supreme Court declared all these actions of the trial judge as a denial of the right to fair hearing and therefore a violation of section 36 of the Constitution. In protecting the respondents' rights to fair hearing in the instant case, the court in dismissing this appeal, upheld the decision of the Court of Appeal which allowed the respondents appeal on that ground by setting aside the judgement and orders of the trial court.

It must be noted that the right to fair hearing in criminal cases is more elaborated under the Nigerian Constitution.³⁸ In other words, any person charged with a criminal offence has a wider scope of protection of his right to fair hearing. Therefore, from the provisions of section 35 of the Constitution, the right to fair hearing of an accused person starts from his right to be arraigned in court within a specified period of time by the law.³⁹ For a proper understanding of this position, section 36 is read together with section 35 of the Constitution. In a criminal charge, an accused person has the fundamental right to be presumed innocent, this is one of the grounds for the consideration his entitlement to be admitted to bail pending trial as a constitutional

³⁴ *Adigun v A-G of Oyo State* (1987)1 N.W.L.R (pt 53) 678

³⁵ *Bamgboye v University of Ilorin* (1999) 6 S.C.N.J. 305 at 308

³⁶ *Ekuma v. Silver Eagle Shipping Agencies Ltd* (1987) 4 N.W.L.R. (pt. 65) 472 at 486 (1999) 2 S.C.N.J 100

³⁷ Sub-sections 4 to 12 of section 36

³⁸ Section 9 of the Criminal Procedure Act also provides that an accused person must be taken before a magistrate court within twenty four hours.

right.⁴⁰ Sections 36 (5) and (6) also stipulates specific procedural rights of an accused which altogether constitute right to fair hearing. Specifically, (5) provides that an accused person is presumed innocent until the contrary is proved.

It must be stated that the Magistrate Court is mostly the proper court in the position to protect people's right to fair hearing in criminal cases. This is because it is the busiest court in the hierarchy of the Nigerian courts. A greater number of criminal cases are commenced at the Magistrate Courts as courts of first instance. However, in practice, this right is often jeopardised because in most cases magistrates do not necessarily see the issue of bail as a matter of discretion empowered by the law.⁴¹ Also, it seems that most magistrates consider bail merely on the content of the unsubstantiated First Information Report (F.I.R.). Thus, the courts at this level in most cases fail to protect this right consequently allowing accused persons to serve jail terms without conviction.⁴²

In safe guarding the right of an accused to fair hearing, section 36 (6) b and c provides that an accused is entitled to a legal practitioner of his choice and other facilities necessary for his defence. This right to legal practitioner was denied in the famous old case of *Awolowo v. Minister of Internal Affairs*.⁴³ In this case, the accused employed the service of a foreign legal practitioner who was denied entry into the country by the Immigration. The court in interpreting the choice restricted it to mean only a legal practitioner who is enrolled to practice in the country.

It must be stated that there is a limit to the operations of right to fair hearing under section 36. This is because section only requires that a party is given a right to be heard but when such opportunity is given and the party fails to utilise it, he cannot subsequently complain that his right has been breached. In *Segun Ajibade v. State*⁴⁴ it was held that the right to fair hearing presupposes that all parties must be given equal opportunity to present their respective cases in the manner laid down by the law without any hindrance. But, it does not mean that a party is allowed to do as he wishes. In that case, the appellant was convicted at the trial court based on his unchallenged confessional statements tendered by the prosecution. The appellant counsel did not call any witness and did not challenge the correctness of the prosecution's case; rather he based his defence on the prosecution's case. He appealed to the Court of Appeal which affirmed his conviction by the lower court and

⁴⁰ *Ami v. State* (2000)1 N.W.L.R (pt.747) 217 at 230, see *Abiola v. Federal Republic of Nigeria* (1995)1 N.W.L.R (pt.370) 155

⁴¹ Section 118 (2) CPA provides that where a person is charged with any felony other than a felony punishable with death, the court may if it thinks fit, admit him to bail

⁴² This probably spurred the Federal Government to take steps in 2007 towards decongesting Nigerian prisons through a prison decongestion scheme through the office of the Attorney General of the Federation.

⁴³ (1962) L.L.R 177

⁴⁴ (2012) LPELR-15531

he finally appealed to the Supreme Court where the decisions of the lower courts were also affirmed. *Ogunbiyi JSC*⁴⁵ held that the court is free to accept the uncontradicted evidence of the prosecution where the accused fails to give evidence in his defence.⁴⁶

3.4 Right to Freedom of Expression and the Press

Right to freedom of expression and the press is provided for under section 39 of the Constitution. It includes freedom to hold opinions, to receive and impart ideas and information without obstruction. This right also includes right to own, establish and operate media for the purpose of dissemination of information, opinion and ideas. In fact the scope of this right has been interpreted to include schools.⁴⁶

The right to freedom of expression is a means by which individual personality is identified;⁴⁷ it also serves the purpose of pursuing, discovering and attaining the truth in the society.⁴⁸ Unhindered freedom of expression fosters understanding, respect, submissiveness, and confidence between the rulers and the ruled and among the citizens as well. This consequently builds the participatory enthusiasm in the people for the smooth running of the State. A long line of cases has shown that the Nigerian courts do not hesitate to protect the right to freedom of expression.⁴⁹ However, there is a challenge with respect to freedom of press. This is because laws of defamation, sedition and libel prosecution are being used to censor the press especially to suppress criticism of government and its officials irrespective of whether the information is true or false. Initially, judicial attitude in the period after independence was not encouraging with respect to right to freedom of expression and the press. For example, in *Chike Obi v DPP*,⁵⁰ the petitioner, as at that time a legislator in the parliament of the Federal Republic of Nigeria. He circulated a pamphlet titled "*The people: Facts you must know.*" Its contention therein was that ministers were pursuing their personal interest and not the national interest in the discharge of their duties. The petitioner on this account was charged for sedition. The Supreme Court decided the case in favour of the then Federal government against the protection of the right of the petitioner to freedom of expression and press.

Similarly, in *Tony Momoh v Senate*,⁵¹ the court in protecting the right to freedom of expression and the press held that a journalist is not under any legal obligation and cannot be compelled to disclose his source of information before the Senate

⁴⁵ *ibid* (29)

⁴⁶ *Ologie v Attorney-General of Lagos State* (1981)

⁴⁷ *Ford v Quebec* (1988) 2 S.C.R. 712

⁴⁸ *Irwin Toy Ltd v Quebec* (1989) 1 S.C.R. 927, see *Bridge v California* (1991) 314 U.S.252 at 281-286

⁴⁹ For example, *Adewole v Alhaji Jakande & Ors* (1981) NCLR 262

⁵⁰ (1961) 1 All N.L.R. 186 at 197-198

⁵¹ (1982) NCLR 105

Committee of Inquiry. However, the pronouncement of the court in this case “before the senate Committee of Inquiry” is restrictive and it not clear whether the same immunity applies to a journalist in a proceeding before a court of law. Earlier in *People Star Press v. Adebayo*,⁵² it was held that freedom of circulation of news of newspaper is an essential part of the right to freedom of association.⁵³

6.5 Rights to Peaceful Assembly and Association

Freedom of peaceful assembly and association hypothesizes the civil and political rights necessary for participatory right in the political structure of a state. Human rights protection is assured under a well structured and constitutional based State politics premised on the rule of law. This position and the essential inalienable nature of the rights to peaceful assembly and association have been explained by Alexis de Tocqueville as a pre-condition for civilisation in the following words:

*The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society*⁵⁴

This right is provided for under section 40 of the 1999 Constitution. It means the right or freedom to choose freely whether or not to assemble and/or associate with other persons whether in the name of political party, trade union and other association for the protection of his interest. Light was shed on the rationale behind his assertion in an old Ghanaian case *Mensima & Others v. Attorney-General*⁵⁵ Justice Acquah of Ghana Supreme Court observed:

the essence of freedom of association is the liberty or lack of compulsion on the individual to form or to join an association.

His lordship emphasised the meaning of this to include the right to dissociate or not to associate at all with whom a person does not like to associate with other wise freedom of association would be held to be synonymous to cultism.

⁵² (1971) UILR 269

⁵³ It must be noted that there is a Freedom of Information Act 2011 which guarantees citizens' right to public information and has put pressure on government agencies to release records in response to petitions by media and activist groups. See <https://freedomhouse.org/report/freedom-press/2013/nigeria#> accessed on 1st June, 2015

⁵⁴ P. A. Atupare, *Judicial Review and the Enforcement of Human Rights: The Red and Blue Light of the Judiciary of Ghana*, (Master of laws thesis, Queen's University Kingston, Ontario, Canada, 2008), 105 where the researcher quoting from De Tocqueville *Democracy in America* (1954), cited in Beaudoin and Ratushny (eds.), *The Canadian Charter of Rights and Freedoms* (1989) 235

⁵⁵ (1996-97) SCGLR 676; see also *New Patriotic Party v. Attorney-General* (1996-97) SCGLR 929

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⁴¹ Section 118 (2) CPA provides that where a person is charged with any felony other than a felony punishable with death, the court may if it thinks fit, admit him to bail.

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⁴⁴ (2012) LPELR-15531

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3.4 Right to Freedom of Expression and the Press

Right to freedom of expression and the press is provided for under section 39 of the Constitution. It includes freedom to hold opinions, to receive and impart ideas and information without obstruction. This right also includes right to own, establish and operate media for the purpose of dissemination of information, opinion and ideas. In fact the scope of this right has been interpreted to include schools.⁴⁶

The right to freedom of expression is a means by which individual personality is identified;⁴⁷ it also serves the purpose of pursuing, discovering and attaining the truth in the society.⁴⁸ Unhindered freedom of expression fosters understanding, respect, submissiveness, and confidence between the rulers and the ruled and among the citizens as well. This consequently builds the participatory enthusiasm in the people for the smooth running of the State. A long line of cases has shown that the Nigerian courts do not hesitate to protect the right to freedom of expression.⁴⁹ However, there is a challenge with respect to freedom of press. This is because laws of defamation, sedition and libel prosecution are being used to censor the press especially to suppress criticism of government and its officials irrespective of whether the information is true or false. Initially, judicial attitude in the period after independence was not encouraging with respect to right to freedom of expression and the press. For example, in *Chike Obi v DPP*,⁵⁰ the petitioner, as at that time a legislator in the parliament of the Federal Republic of Nigeria. He circulated a pamphlet titled "*The people: Facts you must know.*" Its contention therein was that ministers were pursuing their personal interest and not the national interest in the discharge of their duties. The petitioner on this account was charged for sedition. The Supreme Court decided the case in favour of the then Federal government against the protection of the right of the petitioner to freedom of expression and press.

Similarly, in *Tony Momoh v Senate*,⁵¹ the court in protecting the right to freedom of expression and the press held that a journalist is not under any legal obligation and cannot be compelled to disclose his source of information before the Senate

⁴⁵ ibid (29)

⁴⁶ *Okogie v Attorney-General of Lagos State* (1981)

⁴⁷ *Ford v Quebec* (1988) 2 S.C.R 712

⁴⁸ *Irwin Toy Ltd v Quebec* (1989) 1 S.C.R 927, see *Bridges v California* (1941) 314 U.S.252 at 291-293

⁴⁹ For example, *Adewole v. Alhaji Jakande & Ors* (1981) NCLR 262

⁵⁰ (1961) 1 All N.L.R 186 at 197-198

⁵¹ (1982) NCLR 105

Committee of Inquiry. However, the pronouncement of the court in this case "*before the senate Committee of Inquiry*" is restrictive and it not clear whether the same immunity applies to a journalist in a proceeding before a court of law. Earlier in *People Star Press v. Adebayo*,⁵² it was held that freedom of circulation of news of newspaper is an essential part of the right to freedom of association.⁵³

3.5 Rights to Peaceful Assembly and Association

Freedom of peaceful assembly and association hypothesizes the civil and political Rights necessary for participatory right in the political structure of a state. Human rights protection is assured under a well structured and constitutional based State politics premised on the rule of law. This position and the essential inalienable nature of the rights to peaceful assembly and association have been explained by Alexis de Tocqueville as a pre-condition for civilisation in the following words:

*The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society*⁵⁴

This right is provided for under section 40 of the 1999 Constitution. It means the right or freedom to choose freely whether or not to assemble and/or associate with other persons whether in the name of political party, trade union and other association for the protection of his interest. Light was shed on the rationale behind this assertion in an old Ghanaian case *Mensima & Others v. Attorney-General*⁵⁵ Justice Acquah of Ghana Supreme Court observed:

the essence of freedom of association is the liberty or lack of compulsion on the individual to form or to join an association.

His lordship emphasised the meaning of this to include the right to dissociate or not to associate at all with whom a person does not like to associate with other wise freedom of association would be held to be synonymous to cultism.

⁵² (1971) UILR 269

⁵³ It must be noted that there is a Freedom of Information Act 2011 which guarantees citizens' right to public information and has put pressure on government agencies to release records in response to petitions by media and activist groups. See <https://freedomhouse.org/report/freedom-press/2013/nigeria#> accessed on 1st June, 2015

⁵⁴ P. A. Atupare, *Judicial Review and the Enforcement of Human Rights: The Red and Blue Light of the Judiciary of Ghana*, (Master of laws thesis, Queen's University Kingston, Ontario, Canada, 2008), 105 where the researcher quoting from De Tocqueville *Democracy in America* (1954), cited in Beaudoin and Ratushny (eds.), *The Canadian Charter of Rights and Freedoms* (1989) 235

⁵⁵ (1996-97) SCGLR 676; see also *New Patriotic Party v. Attorney-General* (1996-97) SCGLR 929

The attitude of the Nigerian courts in the protection of this right has been quite positive. A famous case on this is the Supreme Court decision in *Fawehinmi v. N.B.A (No2)*⁵⁶ where it was held that every individual has the right to decide to freely assemble, join association of his choice and not to join as the case may be. Similarly, in *A.C v. INEC*,⁵⁷ here, the immediate past Vice President after eight years in office contested in 2007 for the office of the President under the platform of the Action Congress, a party other than the one through which he secured the Vice Presidential ticket earlier in 1999. The Independent National Electoral Commission disqualified him from contesting the election but the Supreme Court held that INEC has no power under the Constitution or any other law to disqualify any candidate (including the 2nd Appellant) presented to it by an accredited political party i.e. the 1st Appellant (Action Congress). The relevance of the above cited case shall be appreciated through the facts and holding of the Court in *A.G of the Federation v. Abubakar*.⁵⁸ The 1st respondent was the Vice President of Nigeria for two consecutive terms, from 1999 to 2007 and elected on the platform of the Peoples' Democratic Party (PDP). Subsequently, he sought to contest for the office of the President but was denied the ticket at the party level and he consequently deflected from PDP to the Action Congress (AC) where he was nominated and sponsored to contest for the office of the President. Upon his deflection to the AC, the President declared his sit vacant, withdrew all his rights and privileges as the Vice President.

The 1st respondent then commenced an action at the Court of Appeal for the nullification of the President's declaration that the Vice President's sit was vacant amongst other reliefs. The Court of Appeal resolved in favour of the respondent. The appellant was dissatisfied and appealed to the Supreme Court. Among the contention of the appellant is that the 1st respondent was no longer loyal to the President and his disloyalty to the President by extension amount to disloyalty to the Federal Republic of Nigeria.⁵⁹ This can be inferred from the appellant's 4th relief which reads:

*Declaration that the dumping of a sponsoring party for any other party by a sitting Vice President coupled with condemnation of the President and the Government by a sitting Vice President is a breach of one mindedness, loyalty, trust and confidence expected of the Vice President and therefore constitutes constructive resignation and/or abandonment of the office of the Vice President.*⁶⁰

⁵⁶ (1989) 2 NWLR (Pt.108) 558 S.C

⁵⁷ (2007) S.C.E.R. 58

⁵⁸ (2007) S.C.E.R. 129

⁵⁹ Ibid (124)

⁶⁰ Ibid (4)

Although rights to freedom of assembly and association is not directly in issue in this case, but the Supreme Court in protecting the 1st respondent's right to freedom of association which he exercised by joining a party of his choice (AC) as guaranteed in section 40 of the Constitution held that:

It may be said that the act or conduct of the Vice President in defecting to the Action Congress after he has won the ticket on the platform of the P.D.P for that position is morally reprehensible. But until the law (in this case, the Constitution) declares the defection unlawful and prescribes in clear language, punishment for such an act, there is nothing anybody can do. The remedy if there is one, lies in the hands of the legislators. It must always be noted that what is morally reprehensible may not be legally punishable.⁶¹

The Court further maintained that unlike the senators and members of the House of Representatives,⁶² removal of either the President or the Vice President by declaring their seats vacant on ground of defection to another party is not contained in the Constitution. More so, the Vice President is not subordinate to the President rather they are only to be associates for the election period, and once they won, both are at liberty to map out their independent fortunes.

4. Challenges of the Judiciary in the Protection of Human Rights

Generally, in the discharge of its constitutional obligation of human rights protection, the judiciary through the machinery of courts has positively strived and stood to the challenges vide various judicial decisions in cases involving human rights issues. Nevertheless, there is room for improvement. This is because there are some challenges affecting the judiciary in the performance of its functions especially in the area of human rights protection. These challenges are categorized into two namely; external and internal challenges.

4.1 External Challenge

A major challenge affecting the performance of the judiciary in the discharge of its duties is political instability of Nigeria especially between the post - independence

⁶¹ A.G. Federalton (1958) 119
⁶² Section 65 (1) (g) and section 109 (1) (g) of the Constitution

period in 1960 and up till 1999.⁶³ Thus, the prolonged military rule and epileptic democratic rule experienced in the country is a mitigating factor against the optimal performance of the judiciary in the protection of human rights. For example, during the military rule, the Constitution and its provisions were suspended;⁶⁴ this makes it easy for gross abuse of collective and individual rights of the citizens. In fact, traditionally, the military ruler's first assignment is usurping of judicial powers.⁶⁵

Although, military rule has become a past issue in Nigeria as there has been relative political stability since the advent of the fourth republic in 1999. However, the civilian government have also on many occasions shown disrespect for the rule of law and by extension the judiciary. The politicians often attempt to influence the judicial processes; this is encouraged due to the concentration of more power in the executive arm of the government.⁶⁶ More so, the legal structure of the power of the other two arms of government does not give the judiciary the required independence to effectively discharge its functions especially in protecting peoples' rights against the government. The integrity and personal independence of judges are neither guaranteed nor assured in Nigeria because, the executive in collaboration with the legislature sees itself as the authority that can hire and fire judges at will.⁶⁷

Consequently, the lack of security of tenure of office, life and economy securities make it difficult for the judiciary through the machineries of courts administered by judges to take independent decisions without interference from other arms especially where any of the constitutional guaranteed rights has been or about to be violated by the government and its agencies.

A curious case is the decision in *Abubakar v. Yar'adua*⁶⁸ which was to challenge the election of late former President *Umar Musa Yar'adua*. The Supreme Court upheld

⁶³ A.O Oguno, Turning back the Hands of Time: The Liability of Present Governments for Human Rights Violation of Previous Government in Nigeria. in Yerokun (ed.) et al. *The Jurist*, (Vol.12, Nigeria Law Student Society, University of Ilorin, 2007), 257 where the author gave account of various military coups in Nigeria first which occurred on the 29th of January 1966 which led to the assassination of the founding fathers of the Nigerian Political system and prominent leaders who agitated and fought for Nigerian independence, such as Sir Ahmadu Bello and Tafawa Balewa. This was followed by the 1975, 1976, 1983, the successful and failed coups 1985 and 1990. Also the 1993 coup which was elongated till 1999 before the present democratic rule was ushered in.

⁶⁴ The military junta usually justifies first the uncivilized process of coming into power, by doing this they suspend the Constitution either in part or in whole with various decrees. Example is Decree No 1 of 1984 which was passed to suspend an important part of the Constitution in the area of right to personal liberty.

⁶⁵ Ouster clause, with which the judiciary was rendered inactive in protecting people's fundamental right through the judicial proceedings. Section 4 (2) Decree No 2 of 1984 suspended the whole of chapter IV of the 1979 Constitution in which the human rights was enshrined and consequently rendered same unenforceable in any court of law. In addition to this, the same section of the Decree ousted the jurisdiction of courts from hearing any suit relating to matters in the Decree.

⁶⁶ Akande (n3) 25-26

⁶⁷ *Hon. Justice Raliat Elelu-Habeeb v. National Judicial Council & Others* (Unreported) Suit No FHC/IL/CS/13/09

⁶⁸ (2008) 12 SCNJ 217

the election of the then President despite the open admission by the then President Yar'adua that the election was fraught with irregularities. He stated in his inaugural speech of 29th May, 2007 that:

We acknowledge that our elections had some shortcomings. Thankfully, we have well-established legal avenues of redress, and I urge anyone aggrieved to pursue them. I also believe that our experiences represent an opportunity to learn from our mistakes. Accordingly, I will set up a panel 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.⁶⁹

Corroborating this is the dissenting judgement of *Oguntade JSC* in the case where he says:

"I hold that the petitioners/applicants by a preponderance of evidence established that the 1st petitioner/appellant, a candidate validly nominated, was unlawfully excluded from the election. I therefore order that the presidential elections held in Nigeria on 21st April, 2007 be annulled and a new election be conducted within 90 days from today"

On another ground His Lordship further observed:

*"Let me also observe that if I had to decide this case on the ground of non-compliance with section 45(2) of the Electoral Act, 2006, I would make the same order as I have made in Appeal No. SC.51/2008 that the election be annulled. I would do so because there is abundant evidence including the sworn deposition filed by the Chairman of INEC in answer to the interrogatories served to him that the ballot papers used for the April 21st presidential elections were not serialised and bound in booklets as required under section 45(2) of the Electoral Act 2006."*⁷⁰

Nevertheless, the majority decision of the Supreme Court upheld the decision. Instances like this case perhaps justify the opinion that the judiciary is greatly influenced by the executive. As it seemed that the Supreme Court had been influenced in the majority decision of this case and with the consequence that the nation had been denied the right to elect a leader of its choice.

⁶⁹ Yar'Adua's Inaugural Speech, "The Challenge is Great; The Goal is Clear" Inaugural Address of Umaru Musa Yar'Adua, President of the Federal Republic of Nigeria and Commander-In-Chief of The Armed Forces, May 29, 2007, Posted in May 30, 2007 ~ 11:12 amh.loomnie14 Comments » <http://loomnie.com/2007/05/30/yaraduas-inaugural-speech/> accessed on 28th September 2009

⁷⁰ Abubakar (n68) 379-380

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