



# JOSEPH AYO BABALOLA UNIVERSITY LAW JOURNAL

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- Secured Credit Transactions
- Energy Resource Law (Oil & Gas Law and Electricity Law)
- Telecommunication
- Shipping
- Intellectual and Industrial Property
- Immigration and Naturalization
- Election Petitions
- Recovery of Debts



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# ATTAINMENT OF CERTAINTY IN ELECTORAL JUSTICE: THE ROLE OF THE JUDICIARY

## INTRODUCTION

*"It is my considered view which I cherishingly uphold, that the judiciary must at all times strive to weather the storm, so to say, and be seen to have risen up to the daunting, albeit not insurmountable, challenges before it, otherwise it would one day wake up from the slumber thereof only to realize that it has lost its prestige, formidable authority and legitimacy. And I dare reiterate that the alternative to a virile, courageous, fearless, incorruptible and visionary judiciary is anarchy i.e a lawless society or nation where private self help reigns supreme."*

The above-quoted position of His Lordship, Saulawa JCA, captures the overwhelming and enormous task of the judiciary in the attainment of justice in all its ramifications in the discharge of the judicial duties of judges and others concerned in the administration of justice. The resultant effect of absence of "a virile, courageous, fearless, incorruptible and visionary judiciary is lawlessness. The search for justice in all facets of our electoral process has always been a source of concern to all and sundry and therefore there is an urgent need for the judiciary to rise up to its expectation in the attainment of certainty of electoral justice.

This presentation is aimed at addressing the concept of electoral justice, the principles guiding the attainment of electoral justice, factors militating against electoral justice and the roles of the judiciary in the attainment of certainty in electoral justice.

## THE CONCEPT OF ELECTORAL JUSTICE

In its broad sense, electoral justice connotes ensuring that electoral process in all its ramifications is in accordance with the laws and laid down regulations. It also means that the enjoyment of electoral rights is not only protected but must be seen to be protected and restored. The concept accords people, who believe their electoral rights have been denied, the ability to ventilate their grievances, get a fair hearing and receive a just determination of their grievances within a reasonable time. It encompasses both the means for preventing violation of the electoral legal framework and the mechanisms that are aimed at resolving electoral disputes that arise from the non-observance or breach of the provisions of electoral laws and regulations.

Electoral justice is broader in concept than embracing the outcome of an election conducted in accordance with the law. It further addresses the integrity of the entire electoral process as it does not just resolve electoral disputes; it protects the political and electoral rights of the citizens, such as the right to vote and be voted for; the equal right of men and women in electoral process; freedom of association as constitutionally guaranteed; the right to security and to take part in the conduct of public affairs. The concept also protects and guarantees the civil rights to freedom of

<sup>1</sup>U. O. OLATOKE, SAN, (LL.B, LL.M, MPhil, Ph.D, PGDE, FCI Arb, Notary Public) Senior Lecturer, Department of Jurisprudence and International Law, Faculty of Law, University of Ilorin, Ilorin-Nigeria .  
Re Saulawa JCA in Gadi v. Male (2010) 7 NWLR (PT 1193) 225 @286.



speech, right to peaceful assembly, right to information and right to petition for redress.

The concept of electoral justice has been succinctly described as follows:

- “Electoral Justice translates the concept of government of the people, by the people, for the people into a practical reality for all the nations and peoples of the earth. It ensures that power is deployed through democratic means rather than through the dominating disbursement of financial resources, undue influence, force or other illicit or democratically illegitimate means. It is a form of organization of power that implies the existence of an independence and impartial mechanism for the proper functioning of the state.
- Electoral Justice upholds the dignity of human beings as citizens and individuals as a proper control on the existence of power. It requires full civil participation that gives full recognition of political, civil and social rights as opposed to the mere holding of elections at regular intervals.
- Electoral Justice demands that core democratic values and principles be recognized and implemented in every corner of the world.

It permits new ideas to infuse the process of civil government over the course of time and through succeeding electoral cycles. It provides means for the just, peaceful and acceptable development of wealth and resources in society. It encourages resolution of disputes and the reaching of a broadly acceptable accommodation of important differences and of conflicting claims in society. It is a precondition to the establishment of an acceptable polity, deserving of membership of, and the respect of the international community.

- Overall, the objective in achieving electoral justice is to create a democratic environment in which electoral outcomes are accepted by the electorate and the competing candidates as a reflection of their democratic aspirations and preferences duly expressed by the voters in polls following free, fair and credible campaigning.
- Electoral Justice requires that there are institutions in place for ensuring that the procedures and decisions related to the electoral process are implemented.”

The Judiciary is the third arm of government saddled with the responsibility of interpreting laws and applying these laws in the resolution of conflicts between individuals and groups or between individual or groups and government and its agencies. It is the **“branch of government made up of Judges, Magistrates, Kadis and other adjudicators, which the constitution saddles with the responsibility of interpreting, construing and applying the laws of the land in the resolution of conflicts and disputes.”** Section 6 (1) & (2) of the 1999 Constitution (as altered) vests judicial powers in the Judiciary and the Judiciary includes the Supreme Court of

<sup>2</sup> “Electoral Justice and other Related Concepts” in Jesus Orozco Henríquez (ed), Electoral Justice. The International IDEA Handbook (The International Institute for Democracy and Electoral Assistance, Stockholm, Sweden, 2010) p.8.

<sup>3</sup> Electoral Integrity Group, “Towards an International Statement of the Principles of Electoral Justice” <[www.integrityaction.org](http://www.integrityaction.org)>



Nigeria, the Court of Appeal, the Federal High Court, the National Industrial Court, the High Court of the Federal Capital Territory, the High Court of a State, the Shariah Courts of Appeal and the Customary Courts of Appeal.

Under the doctrine of separation of powers, the judiciary is separate and distinct from the other arms of government i.e the Executive and the Legislature. The judiciary thus serves as a watch-dog especially as it concerns the actions or inactions of the other arms of government. That is the ideal model for the judiciary. This was aptly captured by Honourable Justice Oyemade when he noted that:

**I will not allow myself to be intimidated into sending innocent persons to jail. Even if this means losing my job, I am sure of leading a decent life. The only thing we have now in this country is the judiciary. We have seen politicians changing from one policy to another, but the only protection the ordinary people have against all these inconsistencies is a fearless and upright judiciary.**

If the Judiciary is the shield of the people against inconsistencies, is it not an irony in itself to have the judiciary being the mother of all inconsistencies in its judgments? Would this not give credence to the definition of a lawyer/Judge by **Ambrose Gwinett Bierce** as **"one skilled in the circumvention of the law."**

The role of the judiciary in the sustenance of democracy and nation-building cannot be taken for granted as the judiciary has shown itself to be the last hope of the common man and even the rich. Thus Prof. Akin Oyeboade aptly captured the role of the judiciary as follows:

**"It is almost axiomatic that the judiciary plays a pre-eminent role in any democratic dispensation. Indeed a political system can be considered as democratic on the basis of the extent to which the judicial arm is permitted to hold the scales of justice over and above the other arms of government. The source of authority of the judiciary for exercising this critical function is, of course, the Constitution which in fact, captures, in a rather poignant fashion, the interplay of the judiciary, constitutionalism and democracy. 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-marks of a well-functioning democratic setting."**

Thus, from the above and as probably understood by everyone, the judiciary is *sine qua non* to the effective running of a society. It has been noted that the judiciary is an **"essential bulwark against abuse of power, authoritarianism and arbitrariness."**

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<sup>1</sup>Ibid.  
<sup>2</sup>Sidi Kawa, *Extermination of Corruption: The Role of the Judiciary, Anatomy of Corruption in Nigeria: Issues, Challenges & Solutions* (eds) Yusuf O. Ali SAN, 2016

<sup>3</sup>Ibid.  
<sup>4</sup>See Egbewale Ibid at page 6



As regards the role of the judiciary in the sustenance of the democratic process, the judiciary has a task of nurturing the electoral process and upholding the rule of law.

## **THE JUDICIARY AND THE UNCERTAINTY QUAGMIRE IN NIGERIA'S ELECTORAL JUSTICE SYSTEM**

The uncertainty quagmire the judiciary is today submerged in can best be understood in the light of some of its conflicting decisions which our courts have been inundated with. While it is not out of place for there to be variations in judgments of the Court of Appeal, what makes such variations somewhat abominable is the fact that such variations are so manifest and wildly departing from each other.

### **Card Readers**

For example, what could be more inconsistent than for the Court of Appeal to decide in one breath that non-use of card readers amounted to a substantial breach of the extant electoral laws and in another breath, that card readers are unknown to law and cannot take the place of Voters' registers?

Examples can be found in the decisions of the Supreme Court in **SHINKAFI & ANOR V. YARI & ORS**, and that of **WIKE V. DAKUKU PETERSIDE**

In **SHINKAFI**'s case, the Court stated thus:

**My understanding of the function of the card reader machine is to authenticate the owner of a voters card and to prevent multi-voting by a voter. I am not aware that the card reader machine has replaced the voters register, or taken the place of statement of result in appropriate forms.**

The above position in effect, recognizes not just the place of the card reader machine, but states succinctly its use and purpose in the electoral process.

It therefore came as a rude shock, when in **WIKE'S CASE**, the same Supreme Court made a significant U-turn, departing unjustifiably from its decision in **SHINKAFI'S CASE**, by stating effectively that the card reader machine is unknown to law.

### **Use of particular specification of biros and photos**

Another issue can be seen if the cases of **AGBAJE V FASHOLA** and **FAYEMI V ONI**. The case brought about the same facts but conflicting decisions of the Court of Appeal. In **AGBAJE**'s case, Jimi Agbaje complained about his photo not being on the poll card. The Court of Appeal however held that such was not consequential stating that it was neither the fault of the candidate nor the political party. The Court of Appeal also held in the case that the use of biros other than the one prescribed in the electoral laws is not fatal to the case of the Respondent. However, in **FAYEMI**'s case, the Court held that the lack of photos on the poll register is fatal to the elections. The court further held that the provision of particular use of specific biros was mandatory and cannot be jettisoned. Thus, the Court of Appeal nullified 63 out of 177 wards in Ekiti State just because accreditation was done with red biro instead of blue biro.

### **Paragraph 18 (1) 1<sup>st</sup> Schedule to the Electoral Act and Application for Pre**

<sup>8</sup> *ibid*

<sup>9</sup> We see everyday how the rich rush to court to preserve their rights or prevent the tampering on same.

<sup>10</sup> Paper presented at the National Conference on Changes to Democracy in the New Era, held under the auspices of the Institute of Human Rights and Humanitarian Law, Port-Harcourt, August 27-28, 1999.

<sup>11</sup> Yusuf O. Ali (SAN), "The Nigerian Judiciary as the Protector of Democracy, Reflections on the Nigerian Electoral System, Vol. 1, essays in Honour of Hon. Justice Muhammadu Lawal Uwais

<sup>12</sup> See Ali *Ibid*



## Hearing Session

This principle is also far from settled as would be demonstrated anon:

Whilst in **GEBI V DAHIRU**, the Court held the use of letter for pre-hearing notice to be unassailable, when it said-

**'In my considered view, the decision of the lower tribunal to the effect that: the letter written to the tribunal as in this case complies and carries out the intention and requirement of paragraph 18(1) of the first schedule to the Electoral Act, 2010 (as amended) is unassailable. And I hereby so hold'**

This can be seen to be in line with the reasoning of the court in **ABUBAKAR & ORS V NASAMU & ORS**

A different view was however taken in **SA'EED V. YAKOWA** when **FABIYI JSC** held the not coming by way of motion for pre-hearing notice to be an irregularity.

### Use of Experts

In **AMOSUN V DANIEL**, the panel of the Court of Appeal held that one Tunde Yadeka was not an expert for the purpose of examination and analysis of election materials. Just two months after, the Court of Appeal however held in **AREGBESOLA V OYINLOLA** that the same Tunde Yadeka was an expert for the purpose of examination and analysis of election materials. What makes the average mind more curious is the fact that of the respective panels that sat on both panels, two Justices of the Court of Appeal were common to both. As a matter of fact, one chaired the panel in **AMOSUN V DANIEL**.

### Statement on Oath

This issue resonates around the question whether or not a written statement on oath must conclude with the exact words used in the Schedule to the Oaths Act. In **OBUMNEKE V. SYLVESTER**, the Court of Appeal held that a statement on oath that does not end with the exact words used in the schedule to the Oaths Act is fatal and is not admissible. However, the Court of Appeal held the opposite in the case of **IBRAHIM V INEC**. The same thing can be said of the decision of the Court of Appeal in the case of **NKEIRUKA V JOSEPH**

The above examples depict the depth of the quagmire of uncertainty the Courts in Nigeria have plunged electoral justice.

## STATEMENT OF THE PROBLEM – WHAT THEY HAVE BEEN SAYING

Many an opinion has been raised on the problems which this uncertainty phenomenon has lumbered the electoral system with over the years. As a matter of fact, this issue is no longer a knotty domestic issue but is one that has transcended the borders of this country. From the Bench, the Bar and even INEC itself, the song has been the same: a need to stop this rot.

<sup>100</sup> Majority of the Rivers State National Assembly election petition were determined along this line

<sup>101</sup> See .....

<sup>102</sup> (2016)3 SCM 135 AT 161 PARA C

<sup>103</sup> (2008) 6 NWLR (PT. 1082) 127-128 PARAS D-F

<sup>104</sup> .....

<sup>105</sup> (2012)1 NWLR (Pt. 1282) 560 AT 605 PARAS D-F PER SAULAWA, J.C.A

<sup>106</sup> (2011)12 SCM (PT II) 492 AT 505-506, E-I, A, 511

<sup>107</sup> (2013)7 NWLR (PT 1352) 124 AT 156 C-E



The Retired Chief Justice of Nigeria had the following to say on this issue:

**"I must mention that quite a number of judgments from the Court of Appeal and a few from the Supreme Court appear to have created some confusion amongst practitioners and the general public...We have witnessed a lot of confusion regarding the proper application of the principle of judicial precedent. The creation of several divisions of the Court of Appeal has also led to the unintended problem of conflicting judgments at the appellate court. Such judicial contradictions have a tendency to lead not only to confusion in judicial precedent but could cause untold hardship to litigants in their quest for justice.**

**These conflicting judgments not only confuse counsel but the public as well, further leading to uncertainty regarding the public perception of our ability to guarantee unequivocal justice. This portrays the judicial process as a game of Russian Roulette where any outcome is possible."**

A former president of the Nigerian Bar Association, Oluwarotimi Akeredolu (SAN) at the conferment of the rank of Senior Advocate of Nigeria (SAN) on lawyers in April, 2010 had the following to say:

**"The bar has notice with increasing discomfiture the conflicting decisions emanating from our appellate courts. The Court of Appeal has found itself in an embarrassing quagmire arising from the disparate pronouncements on matters which are, as lawyers will say, 'on all fours' with all decisions reached by the same court."**

A Retired Justice of the Supreme Court, Niki Tobi noted as follows:

**"even though the Abuja Division of the Court of Appeal had delivered a judgment in a similar case, the Enugu Division of the court refused to follow that decision even when the facts of the case were the same, thereby causing confusion."**

The Chairman of INEC, Prof. Mahmood Yakubu seriously lamented this phenomenon recently. His "lamentation" should be taken seriously and I may have to reproduce excerpts of this for this audience:

**"However, contrary to the subsisting judgment of the Supreme Court, there were conflicting decisions by the Appeal Courts arising from the 2015 general election. The Court of Appeal, in one judicial division, ordered INEC to conduct fresh election 'in which only the duly qualified candidates shall participate.' In another division, the Court of Appeal, under similar circumstances, nullified the election, disqualified the candidate and allowed the political party to submit the name of another candidate for the re-run election. Yet in another division, the Court of Appeal nullified and ordered INEC to conduct fresh election but is silent about the status of the disqualified candidate, thereby giving room for endless commentary and new rounds of litigation on the eligibility of the disqualified candidate to participate in re-run elections...**

<sup>24</sup> (2010) All FWLR (PT. 506) 1945 AT 1961

<sup>25</sup> (2007) 3 EPR 50 AT 66

<sup>26</sup> (2009) 5 NWLR (PT. 1135) 505 AT 525 PARAS G-H

<sup>27</sup> Ubeku C, "Conflicting Judgments in the Nigerian Courts and the CJN's Lamentation: Matters Arising available at <file:///accounts/1000/shared/downloads/CONFLICTINGJUDGMENTSINTHENIGERIANCOURTSANDTHECJN'SLAMENTATIONMATTERSARISING.html> assessed on 9th June, 2016 at 2:42pm



...Although we have implemented these judgments on their own merit, the conflicting decisions make us sometimes appear inconsistent in our application of law thereby encouraging some disqualified candidates to initiate fresh litigation in the Federal High Courts...

...While it is appreciated that courts treat each case on its own merit, certain trends point to conflicting judgments in similar cases by different divisions of the Appeal Courts.”

The consequence of not ensuring judicial precedence or stare decisis is that “neither the judiciary nor INEC will be spared of impunity by judicial actors”

## PRINCIPLES GUIDING THE ATTAINMENT OF CERTAINTY IN ELECTORAL JUSTICE

In the electoral process, some essential components of electoral justice have been identified. These components are the basic principles designed to ensure that certainty in electoral justice is achieved. These principles are discussed hereunder:

### *Integrity*

Integrity is a key element of electoral process. It is an essential ingredient required to uphold certainty in electoral justice. This entails the integrity, accountability and honesty from not only those aspiring to hold public offices through electioneering process; but also other stakeholders in the whole electoral process such as the electoral officers, judicial personnel, political parties and electorates.

### *Participation*

The electorate should not be denied their right to freely participate in the elections. This is necessary in as much as the electorates are the core of representative democracy and their full participation is manifested and appreciated when they are accorded the necessary facilities to exercise their right to vote without fear or favour. The interest of disadvantaged electorates such as disabled ones should also be adequately protected. Polling units and/or centres must be readily accessible to voters while special arrangement must be made to cater for voters in remote and/or rural areas. Voters' education and enlightenment must also be a priority.

### *Lawfulness*

The lawfulness of every electoral process and the likely consequences of its violation must be firmly established and widely understood in order to secure the legitimacy of the outcome. An election can be said to be legitimate when it is conducted in accordance with the clearly established rules within the legal framework. The electoral law must be clearly defined and made in simple intelligible language. It must be readily available and widely circulated. All facets of the electoral process must be adequately regulated and the principle, “*Ubi Jus Ibi remedium*”, must be strictly observed. Amendment to electoral laws and regulations must also be made when and where appropriate.

### *Impartiality and Fairness*

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<sup>10</sup>Ukaka (Ibid)

<sup>11</sup>Ukaka (Ibid)

<sup>12</sup>National Conference on Election Petition Tribunals and Appeals at the Appeal Court Head Quarters.

<sup>13</sup>Available at <file:///accounts/1000/shared/downloads/INECsaysConflictingJudgmentsFrustratingtheElectoralSystem%20THURSDAYLIVE.html> assessed on 6th June, 2016

<sup>14</sup>Ibid.

<sup>15</sup>These principles are stated as the Accra Guiding Principles developed by the Electoral Integrity Group. See “Towards an International Statement of the Principles of Electoral Justice” <[www.integrityaction.org](http://www.integrityaction.org)>



In electoral process, the principle of impartiality and fairness ensures equal treatment of electorates, political parties and their candidates. The principle also extends to the media and other stakeholders in the whole electoral process before, during and after the polls. The electoral bodies are expected to be appointed in a neutral atmosphere in order to ensure a discharge of their statutory responsibilities fairly and impartially.

Where the electoral laws and regulations give the electoral body any discretion, such discretion must be seen to be exercised not only judicially but also judiciously.

### ***Professionalism***

The electoral process requires technical knowledge of electoral issues. Therefore, not only must the electoral body be manned by competent personnel, the judges involved in the election petitions must be professionally competent in terms of knowledge of the relevant law, experience in the handling election matters, integrity and a mind of objectivity, efficiency, commitment and effectiveness. There must be regular and comprehensive training and re-training of electoral officials in all electoral process stages. The judicial officers involved in election petitions must also undergo serious training before embarking on the exercise.

### ***Independence***

Both the electoral body and judicial officers involved in the electoral process must be independent without any interference by any outside interest. In this regard, the appointment and selection process of judicial and electoral personnel must be open, transparent and impartial. This will avoid political interference and will ultimately ensure electoral justice.

### ***Transparency***

Transparency involves openness at all stages of electoral process and this includes access to relevant information and necessary materials on a timely basis. The whole electoral process must be open to public observation and criticism where necessary. Except in exceptional circumstances, hearing of election petitions must be made open to public observation. The election monitoring groups must also be independent and non-partisan.

### ***Timeliness***

The timeframe within which any aspect of electoral process is to be carried out must be strictly adhered to if electoral justice is to be achieved. The time for pre-election activities; the time for the conduct of election; the period within which any aggrieved party in the polls should bring petition before the election tribunal; and the statutory time within which an election petition or appeal therefrom should be heard and determined must all be clearly stated, demonstrated and complied with.

### ***Non-Violence***

Electoral justice entails freedom from threats or violence. All stages of the

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<sup>34</sup> Ibid.,



electoral process must be conducive and free of violence, intimidation, threat of violence, corruption and other conducts tending to interfere with the free and fair conduct of the election. Politics should not be a "do-or-die affair". The election tribunal and Courts created for election petitions are purposely established to decide matters before them and therefore recourse should be made to them by any aggrieved party or candidate rather than result to violence, "muscle-power" and intimidation which are now prevalent.

## **FACTORS MILITATING AGAINST ELECTORAL JUSTICE**

The challenges associated with electoral justice cut across all stages of electoral process. Thus, the challenges affect both pre-election and post-election matters. Issues, such as validity or otherwise of the nomination of a candidate; substitution of the name of candidate by political parties and issue of qualification of a candidate before an election are all pre-election matters. On the other hand, issues relating to declaration of results of elections and return of candidate at a given election; validity or otherwise of the election are post-election matters. Many other factors militate against electoral justice, some of which are:

### ***Attitude of the Parties***

Parties to election petition have the habit of delaying the hearing of the petition, especially the returned candidate who will ensure that the petition is not determined on time so as to enable him spend virtually the tenure of his office before the final determination of the petition. He may also employ the same delay tactic to appeal the decision of the tribunal even when it is glaringly clear that he has a hopeless case/appeal. The intriguing aspect of the issue is that the candidate returned (always a respondent) will have the state resources, coupled with the power of incumbency at his disposal to fight and/or defend the petition.

The effect of section 285(5)-(7) of the constitution of the Federal Republic of Nigeria 1999 (as altered) has however whittled down the efforts at delaying hearing and determination of election matters. Thus, section 285(5)-(7) of the constitution provides:

**"285 (5) An election petition shall be filed within 21 days after the date of the declaration of results of the elections.**

**(6) An election tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition.**

**(7) 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 the judgment of the tribunal or Court of Appeal"**

The effect of the above quoted provision is to ensure determination of election matters within a reasonable time, the ultimate result of which is to engender electoral

<sup>1</sup>Swanebo, C. J. and Alumona, I. M. "Incumbency Factor and Democratic Consolidation in Nigeria's Fourth Republic"  
<http://www.medwelljournals.com/fulltext/?doi=essence2011.125.130>.

<sup>2</sup>Samsoni, desmond Okekukwu, "Lack of Internal Party Democracy" *Journal of good Governance and Sustainable Development* in office Vol. 2 No 3, 2014.

<sup>3</sup>Ibid.

<sup>4</sup>[2009] 8 NWLR (Pt 616) 622@630.



justice.

### ***Attitude of Counsel Handling Election Matters***

It is the duty of counsel handling election matters to keep himself abreast of the law and regulations guiding the hearing and determination of election matters. It suffices to say that counsel should be acquainted with the time frame for the resolution of electoral disputes. However, and because of professional charges, counsel may decide to appeal any conceivable ruling that is not in his client's favour, in the belief that by appealing, he will charge extra fee for the appeal, even where the appeal appears frivolous. This threatens the attainment of certainly in electoral justice.

### ***Incumbency Factor***

This is another factor militating against electoral justice. There is gross abuse of incumbency power. This ranges right from the pre-election stage of the electoral process up to the stage of handing over power between the ruling party and the opposition. This phenomenon constitutes a serious threat to the attainment of electoral justice.

By virtue of their office and status, incumbents enjoy certain privileges which are not available to other contestants in the electoral context. The incumbency powers have been used as forces through which an incumbent leader or party attempts to influence and manipulate the constitutional and institutional frameworks that guide the electoral process thereby creating an unequal playing ground for the contestants in the electoral competition. This, ultimately, will have an alarming effect on electoral justice. Thus, in almost all the states in Nigeria, the party in power in the state wins all the Chairmanship and the Councillorship seats in the Local Government Council.

### ***Institutional Factor***

The electoral body, the Independent National Electoral Commission (INEC) is to be seen as non-partisan. A situation where the electoral body refuses to obey court's order in an election petition will be highly discouraging. INEC is not a political party/association and should avoid any act that may raise suspicion that it is partisan. A situation where INEC officials co-operate with a party to election petition on the directive of the tribunal or court for inspection of documents, but refuses to co-operate with the opposing party in the same or similar exercise will create bias in the mind of the party who is being denied of the same opportunity. The end result is a blatant electoral injustice which will hinder the attainment of electoral justice. Unfortunately, the Electoral Act makes no provision empowering the election tribunal to punish contempt *ex facie curie*. Resultantly, the INEC officials perpetrating these acts will eventually go scot-free and this will adversely affect the outcome of the decision of the tribunal and threatens stability in electoral justice.

### ***Lack of Internal Party Democracy***

The inability of the major political parties in Nigeria to operate in a democratic manner introduces tension and violence in the electoral process.

<sup>39</sup> Hon. Justice B. A. Adejumo, OFR, "The Judiciary and the Rule of Law: Challenges of Adjudication in the Electoral Process" (Being a paper delivered at the Series of Events organized to mark the 2011 Law Week of the Law Students' Association of the University of Abuja).

<sup>40</sup> Per Kayode Esho, JSC in *Yabugbe v. C. O. P* (1992) 4 NWLR (Pt. 234) 159 @ 74.



The Nigerian Political scene is bedeviled with political god-fatherism, and the so called godfathers control their political parties both at local and national levels. They select delegates and decide who gets party's nomination and leadership positions, and their activities create so much dissatisfaction in the political process in their gross disregard to formal procedures for party nomination of candidate.

The total effect of this is its enthronement of the rule of god-fatherism at the expense of electoral justice.

### **Corruption**

Corruption has eaten deep into the fabrics of our nation's polity. The menace has cut across all facets of life. It has affected both the institutional and structural frameworks of the electoral process as well. The judiciary is not spared in this regard. Instances abound where allegations of corrupt practices are levied against electoral and judicial officers. Counsel who are supposed to be ministers in the temple of justice are being used as engine to perpetrate electoral injustice through bribery and corruption. Lawyers have been de-robed and/or suspended from practice as a result of bribe being given to judges in the electoral process. This resultantly hinder the attainment of certainty in electoral justice.

### **THE ROLE OF THE JUDICIARY**

The features expected of a judge has been succinctly put by His Lordship, Niki Tobi JSC (of blessed memory) in *ERIOBUNA V. OBIORA*<sup>1</sup> as follows:

*"A judge by the nature of his position and professional calling is expected to be straightforward, upright, diligent, consistent and open in whatever he does in court and in other places of human endeavor that he happens to find himself. This is because his character as a judge is public property. He is the cynosure of the entire adjudication in the court and like Caesar's wife of Ancient Rome, he is expected to live above suspicion. If the judicial process should not experience any reverse or suffer detriment. A judge should know that by the nature of his judicial functions, he is persistently and constantly on trial for any improper conduct immediately before, during and after trial of a case"*

The primary role of the judiciary in its adjudicatory function is to ensure that justice is not only done to the parties but must be seen to be manifestly done. In any democratic setting, it is the duty of the judiciary to guard against unlawful and arbitrary use of powers in the polity; to maintain equilibrium between citizens, the government and the citizens, between government and government or between the three arms of government by way of interpretation and application of the law. This is why the judiciary has a central role to play in the resolution of electoral disputes.

In the electoral process, the duty of the judiciary becomes more special because of the  *sui generis*  nature of election matters.

The roles of the judiciary in the attainment of certainty in electoral justice cut across

<sup>1</sup>[2001] 1 NWLR (Pt. 718) 429 @ 445-446.

<sup>2</sup>[2001] 3 NWLR (Pt. 635) 495.

<sup>3</sup>[2002] 1 NWLR (Pt. 220) 699 @ 725-726.



not only election petition matters; it definitely extends to pre-election processes. The roles of the judiciary in ensuring certainty in electoral justice are discussed under the following headings:

### **Impartiality**

*"In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal or whoever it may be who sits in a judicial capacity. It does not look to see if there was real likelihood that he could or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand".*

The above depicts the true colour of impartiality expected of a judicial officer in the determination of the cases before the court, be they pre-election or post-election matters. The judge must be seen to be impartial and key elements that will ensure impartiality are independence, transparency and promptness. Judicial independence is important and without it, it would be extremely difficult to ensure the protection of the rights of the participants in the electoral process. Independence of the judiciary will also play a central role in preserving and promoting the integrity of the judge handling election petitions and ensure that election matters are adjudicated upon based on their factual and legal merits, and not on political considerations. Imbibing confidence in the judiciary will make aggrieved parties have a sense that the judiciary as the last hope of the common man will act independently and determine petitions based on well-established legal principles. The parties to any electoral dispute and members of the public should be confident that justice prevails.

On the role of court to maintain impartiality, His Lordship, Pat-Acholonu JCA (as he then was) in *ELIAS V. ELIAS* held as follows:

*"Unnecessary intervention when uncalled for is repugnant to the ethics of the profession and dips the aura of majesty that is attendant to the position of a judge whose mien and carriage should represent and reflect the amendment of justice cast in the mould of a female that is blindfolded and firmly holding the scale of justice in one hand and sword on the other"*

It has equally been held in *OKEKE V. NWOKOYE* that:

*It is an important plank in the Nigerian adversary system of adjudication that a trial judge tenaciously acts of litigation and hold the balance evenly without fear or favour. The moment the judge tends to move in favour of one of the parties by rendering the slightest assistance he renders himself freely to an attack of bias or likelihood*

<sup>1</sup> (1986) 5 NWLR (Pt. 450) 828 @ 886.

<sup>2</sup> Oputa JSC, "Understanding the place and Role of the Judiciary in our society" in Amuchazi E. and Olatawura O. (Eds) *The Judiciary and Democracy in Nigeria*, cited in



*of bias. Thus he has to hold a balance between the plaintiff and the defendant or in a criminal adjudication between the prosecution and the accused.*

Also, in *FIRST AFRICAN TRUST BANK LTD V. EZEGBU*, the Court state as follows:

*"In my humble view, judges by the nature of their delicate offices of judicial officers have a duty to protect themselves from being abused, disparaged or ridiculed by any of the parties or any other person. Judges should stand firmly in defence of their own court processes. If they do not, nobody will come to their aid. The legislators cannot. The executive cannot. It is none of their business. They will not likely to interfere with the independence of the judiciary. And so when a judge is made to understand that his orders are physically disobeyed or in the process of being disobeyed, he must take firm, decisive and adequate action and steps to arrest situation. Let us rise up to defend our integrity as the third arm of government as the traditionally acclaimed watch dog of the rights of the common man. We should not fail him. We should also not fail ourselves in the process".*

### ***Timeous Determination of Electoral Disputes***

The election tribunal and other courts involved in electoral matter must be time conscious. This is moreso when time is of essence in the determination of electoral disputes. Electoral justice dictates that election matters must be adjudicated promptly and expeditiously. This is because if electoral disputes are not expeditiously determined, the whole essence of electoral process will be jeopardized in as much as elective offices are time constraint.

Thus, the rights of the electorate would be undermined and disrespected if a person who is validly elected and ought to be returned in an election is not so returned and petitions the tribunal only for the petition to linger till few months or weeks before his tenure of office.

### ***Fairness and Justice***

In the determination of the cases before the court or tribunal handling election cases, fairness and justice are of utmost importance. The developments in the judiciary generally have shown that the court has now done away with technical justice. Fairness and substantial justice of the case are now prevalent.

In the words of My Lord, Chukwudifu Oputa JSC in *BELLO V. ATTORNEY GENERAL OF OYO STATE*:

*"The picture of law and its technical rules triumphant and justice prostrate may no doubt have its admirers. Nevertheless, the spirit of justice does not reside in forms and formalities nor in technicalities, nor is the triumph of the*

*Olufemi Oluwadare, The Role of the Judiciary in the Application of Peacebuilding Theory and Methods to Election Dispute Resolution in Nigeria"*

*"2006, Journal of Law, Policy and Globalisation, Published by International Institute for Science, Technology & Education, p. 140.*

*"2007, 7 NWLR (Pt. 1034) 2 522-523.*



*administration of justice to be found in successfully picking one's way between pitfalls of technicality. Law and all its technical rules ought to be but a handmaid of justice and legal inflexibility (which may be becoming of law) may, if strictly followed, only serve to render justice grotesque or even lead to outright injustice. The court will not endure that mere form or fiction of law, introduced for the sake of justice, should work a wrong, contrary to the truth and substance of the case before it"*

It has equally been observed that decisions of courts, and election petition tribunals in particular, based on substantial justice rather than technicalities of law, is mostly celebrated by people and rarely provoke conflict or violence. To ensure certainty in electoral justice, therefore, the judicial officers involved in election related cases must be seen to be just and fair in the manner the cases are handled.

The whole essence of justice is fair hearing and it is not merely a technical principle of administration of justice but a rule of substance. In *ALAMIEYESIGHA V. IGONIWAIRE (No. 1)*, the Court echoed the doctrine of fair trial as follows:

*"The whole essence of justice is fairness. Thus, denial of fair hearing is tantamount to a denial of justice which in itself is bad and outrageous. This is so because the denial of justice inflicts pain, grief, suffering and untold hardship on those who rely on impartial administration of justice. The doctrine of fair hearing, which is enshrined in section 36 (1) of the 1999 constitution, is not merely a technical principle of administration of justice. It is rather a rule of substance."*

#### **Role as Peace-BUILDER**

Peace building is a necessary tool for the survival of any society. It has been said that peace building is aimed at achieving a structure of peace that is based on justice, equity, and cooperation which is also known as positive peace. Change is also associated with peace building and is relevant to dispensation and administration of justice. Thus, while the judiciary should follow the law in its adjudicatory exercise of its inherent and discretionary powers, in granting of orders, consideration of parties' cases and evidence and eventual decision of the court, the court should consider the entire interest of the peace of the society. Peace, therefore, is one of the essence of law and the judiciary is an indispensable agency of peace-building, especially in the resolution of electoral disputes to ensure certainty in electoral justice.

The general position of the law is that the court does not delve into internal affairs of political parties and it will be incompetent of a court to entertain pre-election matters. However, time has changed and the position has been diametrically altered as the extant electoral law has given an avenue enabling the court to entertain pre-election matters. This is in the exercise of peace-building role of the court in resolving intra party disputes, restoring stolen mandates and exercising judicial activism.

By section 87 (9) of the Electoral Act 2010 (as amended):

*"Notwithstanding the provision of this Act or rules of a political party,*

<sup>1</sup> See Akin Olawale Oluwadayisi, "The Role of the Judiciary in the Application of Peacebuilding Theory and Methods to Election Dispute Resolution in Nigeria" 45, 2016, Journal of Law, Policy and Globalisation. Published by International Institute for Science, Technology & Education, p. 139.

<sup>2</sup> See *Onuoha v. Okafor* (1983) 14 NSCC, 494.



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

The decision of the Supreme Court in *UGWU V. ARARUME*<sup>1</sup> to the effect that Section 34 (2) of the Electoral Act 2006 does not invest a political party with an absolute power to substitute a candidate who wins the primary election was decided based on the Electoral Act 2006, the effect of which is that a political party could change any of its candidates for an election by simply notifying INEC at least 60 days to the date of the election. Certainly, the provision has been consolidated by the provision of the Electoral Act 2010 (as amended). Thus, Section 33 of the Electoral Act 2010 (as amended) provides that:

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

The implication of this is not far-fetched. The provision makes it impossible for a political party to change its candidate after nomination except in the case of death of the candidate or his withdrawal.

Examining the applicability of Sections 33 and 87(9) of the Electoral Act 2010 (as amended), the Supreme Court recently ruled on whether jurisdiction of court to determine action challenging wrongful substitution of candidate filed before election is ousted by conduct of election or not in *NOBIS-ELENDU v. INEC*, and it was held, Per Muhammed JSC that:

*In the case at hand, a communal consideration of section 31 (1) and (5), 33 and 87 (9) of the Electoral Act 2010 (as amended) readily shows that the jurisdiction conferred on the trial court under section 31 (5) is distinct and separate from subsequent, specific and special jurisdiction under section 87 (9) of the same statute. Indeed section 87 (9), by the clear and unambiguous words that make it, provides that the right of action vested in the appellant thereunder operates notwithstanding sections 31 (5) and 33 or any other provision of the Electoral Act or the rules of a political party.....*

*I am only to add that once an action pursuant to section 87 (9) has been filed before the conduct of the election in relation to which the action has arisen, on the authorities, it remains competent”*

Another Supreme Court decision that exemplifies the peace-building role of the court is *AMAECHE V. INEC*, where the Honourable Court held that the court can grant an equitable remedy or make an order not specifically claimed but which appears to it to be incidentally necessary so as to protect an established right. Oguntade JSC held on

<sup>1</sup>(2007) ALLFWLR (Pt 377) 807.

<sup>2</sup>(2005) ALLFWLR (812)1505 @ 1529-1530



page 315 as follows:

*"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 have asked 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 the 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 fall. The truth of course is that when justice has been done, the heavens stay in place. It is futile to merely declare that it was Amaechi and not Omehia that was the candidate of the PDP. What benefit will such declaration confer on Amaechi?"*

The position of the Supreme Court in UGWU and AMAECHI's cases are but a manifestation of the need to ensure substantial justice in electoral disputes.

### ***Respect for the Rule of Law***

In the electoral process, the judiciary has the onerous role of observing the rule of law. Parties must get equal treatment before the court or tribunal because they are all equal before the law. The judiciary should see itself, and must be seen, as an institution independent from other arms of government, otherwise the other arms, especially the executive, would be the dictator of the court's decisions and this will eventually result in jeopardizing the whole essence of electoral justice. The parties' rights to fair trial in electoral matters must be respected.

On the need to respect the rule of law, Aka'ahs JCA (as he then was) observed in *DAPIALONG v. DARIYE* as follows:

*"I wish to observe that our country cannot develop politically and economically unless we respect the rule of law. Where the constitution is torn into shreds by the action and inaction of those who are charged with the responsibility of upholding it, the net result is that a culture of lawlessness is sowed into the psyche of people. The end does not always justify the means."*

It goes without saying that in the attainment of certainty in electoral justice, the judiciary must observe and respect the rule of law. The doctrine of separation of power has assigned different roles to each arm of the government and the role of the judiciary is to uphold and interpret the Constitution and other statutes. And in particular, in the electoral process, where the judiciary which is supposed to act as watchdog upon other arms of the government choose to act as a mere by-stander, allowing the executive to arm twist the court proceedings, it would eventually find

<sup>51</sup> See also *Uwazuruike v. Nwachukwu* (2013) 3 NWLR (Pt. 1342) 503.

<sup>52</sup> (2008) ALLFWLR (Pt 407) 1.

<sup>53</sup> (2007) 8 NWLR (Pt. 1036) 239.



itself in a position where people will only act or omit to act with reckless abandon.

#### **Role as Custodian of the Constitution**

***"The Constitution is the highest law of the land. All other laws bow or kowtow to it for 'salvation' No law which is inconsistent with it can survive. That law must die and for the good of the society. This is the constitutional provision entrenched in section 1 of the Constitution. While section 1(1) provides for the Supremacy of the Constitution, section 1(3) provides for the prevailing power of the Constitution where any law of the land is inconsistent with it"***

The 1999 Constitution of the Federal Republic of Nigeria (as altered) is the country's *grundnorm*; it is the Supreme, organic and fundamental law of Nigeria and if any other law is inconsistent with the provision of the constitution, such other law is null, void and of no effect whatsoever to the extent of its inconsistency.

The right imbued on a political office holder through the instrumentality of electoral process is not a personal right and any breach of such right entails a breach of the Constitution as well as a breach of the rights of the electorates who voted him in. Therefore, the court has a duty to protect such rights and this is the decision of the Supreme Court in *ACN V. INEC (2012) 13 NWLR (Pt. 1370) 161 @ 186* where the Supreme Court held as follows:

***"Section 285(7) of the Constitution seeks to protect not only the right and interest of the parties to an election matter, but also those of the electorate, who have a right to expect that the matter be resolved expeditiously so that whoever has their collective mandate should settle down to discharge his/her duties instead of running in and out of court for the better part of the term of four years."***

The provisions of the Constitution are founded on the Rule of Law which should not be trampled on or otherwise allowed to be overridden by any form of illegality. Hence, the judiciary, particularly, in election related matters has in a number of cases been constrained by the principles of democracy and the doctrine of separation of powers to curb the excesses of legislative rascality or executive lawlessness. This is what has been termed judicial activism. In actual fact, it is merely a bold attempt to re-assert the supremacy and sanctity of the Constitution.

Thus, in the case of *AMAECHI V. INEC*, the Supreme Court (per Oguntade, JSC) said:

***"This court and 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***

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<sup>10</sup>Per Niki Tobi JCA (as he then was) in *Phonix Motors Ltd v. N. P. F. M. B* (1993) 1 NWLR (Pt. 272) 718 @ 730.

<sup>11</sup>Section 1 (1)-(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).



*deserves. The powers of the court are derived from the constitution not at the sufferance or generosity of any other arm of Government of Nigeria. The judiciary like all citizens of this country cannot be 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."*

## CONCLUSION AND RECOMMENDATION

The roles of the judiciary in the attainment of electoral justice have been examined in this paper. It has been found that electoral processes are bedeviled with a lot of challenges and as the last hope of the common man, the judiciary should be able to leave up to expectation in the hearing and determination of electoral disputes if electoral justice must be ascertained.

In order to ensure that electoral justice is ascertain, amendment to electoral laws and regulations must be made when and where appropriate to allow election petition to be heard and determined before the end of tenure of the incumbent and to vest the tribunal with powers to punish contempt *ex facie curia*. The principles guiding the attainment of certainty in electoral justice such as integrity, partiality and fairness, professionalism, independence, transparency and timeliness must be respected and observed. Similarly, there must be attitudinal changes for all stakeholders in the electoral process. And finally, a lot of reforms have been suggested in the report of Justice Uwais' electoral reforms Panel. Part of the recommendation of the committee is that the electoral system should aim at either eliminating or reducing the impact of incumbency and self-succession to the barest minimum. This may require amendments of the 1999 Constitution and the Electoral Act 2006. Efforts should be made to fully implement the report.

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<sup>56</sup> *Supra*