

NIGERIA’S ELECTORAL LEGAL FRAMEWORK: ANY NEED FOR JUDICIAL RECONSTRUCTION AND LEGISLATIVE REFORMS?

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“Men make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past. The tradition of all dead generations weighs like a nightmare on the brains of the living (Karl Marx: 1852).

ABSTRACT

There can be no credible democracy without credible elections. There can be no credible elections without a credible legal framework, which includes judicial interpretation of constitutional and statutory provisions. There is a relationship between the integrity of an election and the memory of the state of the law on key electoral challenges. Existing judicial precedents, for example, tend to influence electorates’ conduct, either positively or negatively.

This paper examines the existing legal framework on the electoral process with a view to assessing how the state of the law might have influenced the character, conduct and outcome of the 2015 elections. The ultimate goal is to explore critical areas for judicial reconstruction and/or legislative reforms in order to engender improvements on future processes. The scope of the paper is limited to examining the legal framework governing limits of INEC’s powers in respect of disqualification of candidates for constitutionally recognized elective public offices and the effects of non-compliance and substantial non-compliance with the Electoral Act, including the legal consequences of corrupt practices, irregularities, violence and other forms of criminal activities. After establishing the state of the law on the identified issues, recommendations are

proffered for legislative reforms and or judicial reconstruction of certain entrenched legal principles.

INTRODUCTION

In terms of ordinary ranking, the most fundamental right next to the right to life is perhaps the right to vote. But in reality, the quality of the right to life often depends upon the quality of the circumstances under which the right to vote takes place. Thus, a despotic self-serving or a people-oriented government may be 'elected' as a product of the voting process. A desecration of the right to vote may therefore translate to a desecration of all other democratic rights, if it is accepted that the essence of democratic elections is to guarantee the protection of the rights of the majority.

Though the 2015 general election is generally perceived to be free and fair, using past experiences as the standard, in several ways, elections in Nigeria tend to be exercises in celebration of the desecration of the right to vote. Indices of the desecration of the right to vote include, but are not limited to the following: weak or compromised 'independent' electoral commission, manipulated or compromised voters register, large scale disenfranchisement, physical violence, commodification of votes, judicial blessing of obvious electoral charades, and so on.

For example, as at 23rd March 2015, that is, about 5 days to the Presidential and National Assembly elections, out of about 69million registered voters, only about 56million (or 82%) had collected their Permanent Voters' Cards. From the public admission of INEC, not all PVCs were actually produced.

In terms of challenge of insecurity, INEC was compelled, by the advice of security agencies, to shift the dates of the election from 14 and 28 February 2015 to 28 March and 11 April 2015. The National Human Rights Commission's (NHRC's) Report and Advisory (2015) on pre-election violence revealed that within a period of about 50 days before the commencement of the elections, 61 incidences of election-related violence occurred in 22 states with 58 people killed¹. Indeed, media reports showed ethnic-based massive migration of Nigerians from one geographic area to another out of palpable fears that the outcome of the election, whichever way it went, might provoke reprisal attacks². Indeed, considering politicians' culture of ethnic and religious based hate speeches and open declaration of preparedness to wage wars if their candidates did not win, the entire nation was gripped by the expectation that Nigeria might not survive the election as a united country.

The mood of the nation pre the 2015 elections is perhaps best captured by the "Foreword" to the NHRC's Report and Advisory (2015: 5), which states as follows:

In Nigeria, however, the records suggest that voting has always been dangerous and the laws that govern its conduct have not always been respected or obeyed by those who should. There is a well-established habit of tolerating election violence in Nigeria and granting impunity to those who orchestrate, perpetrate or benefit from it because it can guarantee a pre-determined outcome.

The result is that the exercise of voting on a national scale has increasingly become a periodic test for coexistence in and the stability of Nigeria, around

¹ <http://www.premiumtimesng.com/news/headlines/176802-58-nigerians-killed-2015-pre-election-violence-far-rights-commission.html> accessed online on 27/6/15.

² <http://www.nigerianobservernews.com/2015/01/18/2015-elections-nigerians-afraid/> accessed online on 27/6/15.

which fears of violence are rife and death and displacement are commonplace. This frightens citizens, residents, neighbours and friends of Nigeria everywhere. It also perpetuates an unfortunate caricature of a country incapable of governing itself. A country endowed with Nigeria's wealth of human and natural resources as well as talent must find the will to call time on this.

The challenges that tend to desecrate the electoral processes in Nigeria, the 2015 elections inclusive, are multiple. However, the concern of this paper is limited to analysing two key areas in which it is considered that the existing legal framework might have negatively impacted on the 2015 elections. The hope is that through legislative reforms and/or judicial reconstruction of existing constitutional and statutory provisions, there may be improvements in future endeavours at establishing governments representing the aspirations of the majority of the people through choices freely made by the electorate who exercise or are allowed to exercise their voting rights.

The scope of this paper is limited to examining:

1. The powers of INEC in respect of disqualification of candidates for constitutionally recognized elective public offices, and
2. The legal effects of non-compliance and substantial non-compliance with the Electoral Act, as well as the legal consequences of corrupt practices, irregularities, violence and other forms of criminal activities.

In order to put the discourse in proper perspective, the next segment of this paper offers a conceptual clarification of the concept of the right to vote. This is followed by an examination of the state of the law in the identified two major areas of concern – the powers of INEC in respect of disqualification of candidates and the effects of non-compliance and substantial non-

compliance. The last segment of the paper proffers recommendations for either legislative reforms and/or judicial reconstruction of certain entrenched legal principles. The INEC is equally challenged to carry out certain critical but neglected constitutional roles.

CONCEPTUAL CLARIFICATION: THE RIGHT TO VOTE³

The right to vote is not only constitutionally⁴ guaranteed, it is also protected under International Human Rights Law⁵. Indeed, international human rights law provides that the right to vote (including other rights recognized under the Covenant) shall not be subject to unreasonable restrictions and distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status⁶. Where the right is violated, effective remedies are to be provided⁷. The court is also empowered, by necessary implication, to protect the right to vote⁸, recognizing that it is not a right in the category of Chapter 2 rights, which section 6(6)(c) of the Constitution excludes from being justiciable. Indeed, the right to vote, being an element of civil and political rights, is a constitutionally recognized fundamental political right⁹, which is justiciable¹⁰.

³ The concept of the right to vote also includes the right to be voted for.

⁴ See FRN. Constitution of the Federal Republic of Nigeria, CFRN, 1999, as amended: sections 1(2), 7(4), 117(2), 118, 135(5) and 178(5).

⁵ See Universal Declaration of Human Rights, UDHR, 1948, Article 21, International Covenant on Civil and Political Rights, 1966, Article 25, African Charter on Human and Peoples Rights, 1981/1986, Article 13.

⁶ See ss. 2 (1) and 25, International Covenant on Civil and Political Rights, 1966.

⁷ Article 2(3), International Covenant on Civil and Political Rights, 1966.

⁸ See for example, the combined provisions of CFRN, 1999 as amended, ss, 1(2), 117(2), 7(4), 118(5), 178(5) at the background of s.36 – right to fair hearing and s. 42 – freedom from discrimination.

⁹ The work of Joshua A. Douglas (2008). *Is the Right to Vote Really Fundamental?* 18 Cornell J. L. & Pub. Pol'y 143 shows that the courts in South Africa have not maintained a consistent position on whether or not the right to vote is a fundamental right. Two judicial trends have thus exist, one upholding the view that the right to vote is fundamental while the other maintains a contrary position. See http://uknowledge.uky.edu/law_facpub/10/ as at 21/6/15.

¹⁰ See also CFRN, 1999, as amended, s. 6(a) and (b), s. 39 - freedom of expression and s. 40 – right to peaceful assembly and association, and s. 46 – access to court to enforce fundamental rights in Chapter 4 of the Constitution.

In *Wesberry v Sanders*¹¹, the court upheld the fundamental character of the right to vote when it said:

*“No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live. Other rights even the most basic are illusory if the right to vote is undetermined.”*¹²

Section 1 sub section (2) of the Constitution of the Federal Republic of Nigeria, 1999, as amended, establishes the right to vote as the foundation of a political regime based on democratic elections. It prescribes that:

“1. (2) The Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.”

Thus, other sections of the Constitution such as sections 7(4), 117(2), 118, 135(5) and 178(5) recognize the right to vote and the necessity of registering eligible voters as the basis of elections into various executive arms of government. It therefore means that any derogation or desecration of the right to vote derogates or desecrates the system of governance termed ‘democracy’.

Indeed, Article 21(3) of the Universal Declaration of Human Rights, 1948, in particular recognizes that only governments produced through the freely given will of the people demonstrated through the right to vote can be accorded legitimacy. In other words,

¹¹ *Wesberry v. Sanders* 376 US 1 (1964).

¹² Cited in O. E. EKO-DAVIES (2011). A Critical Appraisal of Election Laws In Nigeria. Long Essay Submitted to the Faculty of Law, University of Ilorin, Ilorin, Nigeria, in Partial Fulfilment of the Requirements for the Award of the LLB Degree

governments that emerge in violation of the sacred right to vote are illegitimate. Article 21(3) provides:

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 25 of the International Covenant on Civil and Political Rights (ICCPR), 1966 establishes a relationship between the genuine exercise of the right to vote and genuine democracy as well as the basis for the expectation that ordinary people could have access to ‘*dividends of democracy*’, as follows:

25. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country

The critical significance of the right to vote has been underscored by scholars and upheld judicially.

Boyer (1981: 121) opines that:

*“The franchise – the right to vote for one’s representative – is **the** fundamental political right. It produces the most direct verdict by citizens on the performance*

*of those who govern them. It is ... “the key stone in the arch of the modern system of political rights in this country.”*¹³

Also, in *Haig v Canada* 105 DLR (4th) 577 (SCC), Cory, J., held at 613 that:

All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is a proud badge of freedom. While the Charter guarantees certain electoral rights, the right to vote is generally granted and defined by statute. That statutory right is so fundamental that a broad and liberal interpretation must be given to it. Every reasonable effort should be made to enfranchise citizens. Conversely, every care should be taken to guard against disenfranchisement.

Reiterating the principle underpinned in *Haig v Canada*, the Constitutional Court of South Africa, in a unanimous decision read by Sachs, J. in *Arnold Keith August & 1 or v. The Electoral Commission & 3 ors*¹⁴ held that prisoners cannot, by the fact of incarceration, be deprived of being registered to vote:

“... The Commission's duty is to manage the elections, not to determine the electorate; it must decide the how of voting, not the who. Similarly the task of this Court is to ensure that fundamental rights and democratic processes are protected.”

¹³ Cited in James R. Robertson. 2008. The Canadian Electoral System. Accessed online at www.parl.gc.ca/content/lop/researchpublications/bp437-e.htm on 28/6/15.

¹⁴ *Arnold Keith August & 1 or v. The Electoral Commission & 3 or* (Case CCT 8/99 at p. P. 33) – accessed online at <http://www.saflii.org/za/cases/ZACC/1999/3.pdf> on 21/6/15.

On the basis of the principle of *Ubi jus, ibi remedium*¹⁵, the Court went ahead to order the Electoral Commission to make reasonable arrangements to ensure the registration of the affected prisoners, in spite of the formal closure of registration activities:

*The 1996 Constitution guaranteed his right to vote in unqualified terms. Parliament has not sought to limit that right at all. He is informed that his right to vote remains intact and that the registration centres are as open to him as to anybody else. The only problem is that he is locked up. That a right requires an appropriate remedy was trenchantly affirmed by Centlivres CJ in Minister of the Interior and Another v Harris and Others*¹⁶:

“As I understand Mr Beyers’ argument the substantive right would, in the event of such an Act having been passed, remain intact but there would be no adjective or procedural law whereby it could be enforced: in other words the individual concerned whose right was guaranteed by the Constitution would be left in the position of possessing a right which would be of no value whatsoever. To call the rights entrenched in the Constitution constitutional guarantees and at the same time to deny to the holders of those rights any remedy in law would be to reduce the safeguards enshrined in sec. 152 to nothing. There can to my mind be no doubt that the authors of the Constitution intended that those rights should be enforceable by the Courts of Law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. Ubi jus, ibi remedium.”

¹⁵ This means where there is a wrong, there must be a remedy.

¹⁶ 1952 (4) SA 769 (A) at 780 -1.

The Constitutional Court of South Africa then went further to order specified remedies on pages 37-38, as follows:

1. *(not copied)*.
2. *The order made by Els J in the High Court is set aside and replaced with the order made in 3 below.*
- 3.....*(not copied)*.
- 3.1.*(not copied)*.
- 3.2.*(not copied)*.
- 3.3 *The respondents are to make all reasonable arrangements necessary to enable the applicants and other prisoners referred to in paragraph 3.1 above to register as voters on the national common voters' roll;*
- 3.4 *The respondents are to make all reasonable arrangements necessary to enable the applicants and other prisoners referred to in paragraph 3.2 above to vote at the forthcoming general election;*
- 3.5 *The first respondent is required, on or before Friday 16 April 1999, to serve on the applicants and the third and fourth respondents, and lodge with the Registrar of this Court, an affidavit setting out the manner in which it will comply with paragraph 3.3 and 3.4 of this order. Any interested person may inspect this affidavit at the registrar's office once it has been lodged;*
- 3.6 *The first respondent is ordered to pay the applicants' costs, such costs to include those occasioned by the employment of two counsel.*

4. The first respondent is ordered to pay the costs of the appeal to this Court, including the costs of the application for a certificate, such costs to include those occasioned by the employment of two counsel.

Within the context of the foregoing judicial precedents in other jurisdictions referred to, as well as the constitutional and universal status of the right to vote as a fundamental right, it may be concluded that the combined factors and processes that contribute to voter apathy, disenfranchisement, non-registration of eligible voters, non-production of Permanent Voters Cards (PVCs) for all registered voters, non-distribution of a significant portion of PVCs produced to registered voters, violent political environment, and so on, seriously diminish Nigeria's democratic (or more appropriately, civil rule) system, including the 2015 elections.

At the background of the above conceptual clarification, the next section of this paper is an attempt to assess the state of the electoral law in Nigeria in the following key areas – the legal framework governing limits of INEC powers in respect of disqualification of candidates for constitutionally recognized elective public offices and the effects of non-compliance and substantial non-compliance with the Electoral Act, including the legal consequences of corrupt practices, irregularities, violence and other forms of criminal activities, which might have impacted on the conduct of politicians and sections of the electorate, one way or the other.

THE POWER OF INEC IN RESPECT OF DISQUALIFICATION OF CANDIDATES FOR CONSTITUTIONALLY RECOGNIZED ELECTIVE PUBLIC OFFICES

The Supreme Court, in *Action Congress & anor v. Independent National Electoral Commission & ors. (2007)*,¹⁷ has decided that the INEC has no power to disqualify a candidate from contesting an election. Rather, the Court of law must be approached to determine the qualification or otherwise of any candidate whose name has been submitted to INEC.

Although the judicial power of the court was invoked to specifically determine the limit of the powers of INEC to disqualify candidates in relation to an allegation of criminal offences under section 137 (1) (i) of the Constitution¹⁸, the Supreme Court went beyond reiterating the requirement of proof beyond reasonable doubt in criminal prosecution and made a general pronouncement, declaring that “*in any event, there is no provision in the Constitution that confers the power to disqualify candidates on the defendant [INEC] either expressly or by necessary implication.*”

I argue in this paper, along with the decision of the Court of Appeal, that by necessary implication, the INEC is constitutionally empowered to screen and disqualify candidates nominated by political parties for election, if, where and when necessary. I also argue that in terms of desirable normative values, it is in the interest of deepening civil or democratic rule for INEC to be empowered to disqualify political parties from presenting candidates for election and by extension disqualifying certain candidates where fundamental provisions of the Constitution, such as section 224, have been observed in the breach. The only fear is whether or not the persons constituting INEC authorities would consistently have the strength of character to carry

¹⁷ *Action Congress & anor v. Independent National Electoral Commission & ors. (2007)* 12 NWLR (Pt. 1048) 220 (also reported in 30 NSCQR Part 2, 1254.

¹⁸ This section has now been deleted by a 2011 Alteration Act.

out their constitutional functions objectively without succumbing to the dictates of *Aso Rock*. However, where it is perceived that the INEC has been compromised, the courts should be able to determine the constitutionality of INEC's decisions.

I deal first with the constitutional power of INEC to screen and disqualify parties and/or their candidates for election.

Various sections of the Constitution prescribe qualifying criteria¹⁹ for any person or candidate to contest election into public offices in Nigeria. A common condition is that only a registered political party can sponsor members of the party as candidates for elections²⁰. Other conditions include: being a citizen of Nigeria, attainment of the age of at least 30 to 40 years; and being educated up to at least secondary school level or its equivalent.

Similarly, there are disqualifying criteria²¹. Though the disqualifying criteria are similar, the discussion here is mainly based on the provisions of section 137, which prescribe disqualifying criteria for the office of the President.

137. (1) A person shall not be qualified for election to the office of President if -

(a) subject to the provisions of section 28 of this Constitution, he has voluntarily acquired the citizenship of a country other than Nigeria or, except in such cases as may be prescribed by the National Assembly, he has made a declaration of allegiance to such other country; or

(b) he has been elected to such office at any two previous elections; or

(c) under the law in any part of Nigeria, he is adjudged to be a lunatic or otherwise declared to be of unsound mind;

¹⁹ For example, Ss. 65, qualification for membership of the National Assembly; 106, membership of House of Assembly of the State; 131, qualification for election as President; 177, qualification for election as Governor.

²⁰ S. 221, CFRN, 1999, as amended.

²¹ For example, ss. 66; 107; 137; and 182 make provisions for disqualification for election as a member of the National Assembly; House of Assembly, President and Governor, respectively.

d) he is under a sentence of death imposed by any competent court of law or tribunal in Nigeria or a sentence of imprisonment or fine for any offence involving dishonesty or fraud (by whatever name called) or for any other offence, imposed on him by any court or tribunal or substituted by a competent authority for any other sentence imposed on him by such a court or tribunal; or

(e) within a period of less than ten years before the date of the election to the office of President he has been convicted and sentenced for an offence involving dishonesty or he has been found guilty of the contravention of the Code of Conduct; or

(f) he is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in Nigeria or any other country; or

(g) being a person employed in the civil or public service of the Federation or of any State, he has not resigned, withdrawn or retired from the employment at least thirty days before the date of the election; or

(h) he is a member of any secret society; or

(i) he has been indicted for embezzlement or fraud by a Judicial Commission of Inquiry or an Administrative Panel of Inquiry or a Tribunal set up under the Tribunals of Inquiry Act, a Tribunals of Inquiry Law or any other law by the Federal or State Government which indictment has been accepted by the Federal or State Government, respectively²²; or

(j) he has presented a forged certificate to the Independent National Electoral Commission.

²² Though this provision has now been deleted by the Alteration Act, 2011, it was still subsisting as at the

Although the Supreme Court, in *Action Congress v. INEC* (supra) held that “there is no provision in the Constitution that confers the power to disqualify candidates” on INEC, I argue that INEC, by necessary implication, is empowered, not only to prevent political parties from sponsoring candidates for elections, it can indeed withdraw registration certificates and pronounce candidates disqualified on the ground of breach of certain provisions of the constitution and the electoral Act. These constitutional and statutory provisions include Powers of INEC under:

1. s. 222 (c), CFRN,1999 (with regard to the mandatory requirement to register the party’s constitution);
2. S. 224, CFRN, 1999 (on the mandatory requirement that the aims and objects, programmes and manifesto of a registered political party to conform with Chapter 2 of the Constitution);
3. s. 223 (1), CFRN, 1999 (on the mandatory requirement of parties to elect NEC members on democratic basis);
4. constitutional provisions on qualification and disqualification criteria (earlier referred to above);
5. the Third Schedule, Item F, Paragraph 15 (of the Constitution); and
6. s. 87(9) of the Electoral Act.

While section 221 of the Constitution provides that only members of a political party can be sponsored by the party as candidates for elective offices, section 222(c) provides, **mandatorily**, that “No association by whatever name called **shall** function as a party, unless” its constitution is registered with INEC, as follows -

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

Section 224 of the Constitution makes mandatory provision for the nature and character of the programme, aims and objects of the Constitution of an association applying to be registered as a political party, as follows:

*“The programme as well as the aims and objects of a political party **shall** conform with the provisions of Chapter II of this Constitution”*

Section 224 is thus inextricably predicated upon section 222 on conditions to be met before a political association can be registered as a political party. The basic question is: could the sponsoring political party have been registered if INEC did not screen the party to ensure it met the constitutional registration requirements? If, as held in *INEC v. Musa* that the Constitution empowers INEC to register any political association as a political party based only on satisfying prescribed constitutional requirements, what would be the basis for disempowering INEC from screening candidates (and their parties) with a view to ensuring they satisfy prescribed constitutional and statutory requirements? If a political party at any point in time fails to satisfy the constitutional requirements, such as (and particularly) those contained in section 224, does that party have the constitutional basis to exist, let alone to nominate candidates for elections?

Similarly, section 223 of the Constitution **mandatorily** provides that:

*223. (1) The constitution and rules of a political party **shall**-*

(a) provide for the periodical election on a democratic basis of the principal officers and members of the executive committee or other governing body of the political party; and

(b) ensure that the members of the executive committee or other governing body of the political party reflect the federal character of Nigeria.

The relevant question again is: can a political party continue to function as such if it fails to observe s. 223 of the Constitution? Where a party fails to fulfill the **mandatory** provisions in section 223 (and 224), could INEC be validly deprived of the power to reject the nomination of such a political party for elections?

In particular, Section 87 (9), Electoral Act, 2010, as amended, provides that:

*“Where a political party fails to comply with the provisions of this Act in the conduct of its primaries, its candidate for election **shall not** be included in the election for the particular position in issue.”*

Since laws and the Constitution are made to be obeyed, it is submitted that failure to observe constitutionally prescribed provisions, particularly sections 222 and 224, upon which the party was registered in the first place automatically deprives such a party the right to present candidates for election.

Although the 2010 amendment of the Electoral Act now provides that INEC shall not reject or disqualify candidate(s) for any reason whatsoever”, Sagay (2012: 147) has argued that this amendment is unconstitutional and that the general powers of INEC to disqualify candidates on the strength of section 137 (1) is thus unaffected.

Indeed, Sagay’s position is rightly rooted in the holdings of the same Supreme Court in *INEC v. Musa* (2003) 3 NWLR (Pt. 806) 72 at 158, paras B-F; 203-204, paras D-D (ratio 3), where the Supreme Court held, among others, that:

Where the Constitution has provided exhaustively for any situation and on any subject, a legislative authority that claims to legislate in addition to what the

constitution has enacted must show that, and how, it has derived its legislative authority to do so from the Constitution itself. In this case, section 222 of the Constitution having set out the conditions upon which an association can function as a political party, the National Assembly could not validly by legislation alter those conditions by addition or subtraction and could not by legislation authorize the Independent National Electoral Commission to do so, unless the constitution itself has so permitted.

It is humbly submitted that apart from section 222, the mandatory provisions of sections 223 and 224 (and particularly 224) are conditions precedent for any political party to continue to function as a political party under the Constitution such that where a party fails to have a constitution in conformity with section 224 and Chapter 2 of the Constitution²³, such a party has automatically lost the right, not only of submitting candidates for election, it has also lost the constitutional right to continue to exist as a political party.

It is also contended that based on the provisions of the Third Schedule (to the Constitution), Item F, Paragraph 15, INEC is empowered, by necessary implication, to reject candidates nominated by political parties for election where INEC discovers, based on its monitoring functions, that a party has failed to observe fundamental provisions of the Constitution. Under the Third Schedule, Item F, Paragraph 15, it is provided that

15. “the Commission shall have power to:

*“(a) **organise, undertake and supervise** all elections to the offices of the President and Vice-President, the Governor and Deputy Governor of a State, and*

²³ Chapter 2 of the CFRN, 1999, as amended guarantees socio-economic rights such as the right to education, health and so on. It is thus expected that, under section 224 of the Constitution, every registered political party ought to base its programmes and activities on implementation of the rights in chapter 2.

to the membership of the Senate, the House of Representatives and the House of Assembly of each State of the Federation;

(b) register political parties in accordance with the provisions of this Constitution and an Act of the National Assembly;

(c) monitor the organisation and operation of the political parties, including their finances;

(d) arrange for the annual examination and auditing of the funds and accounts of political parties, and publish a report on such examination and audit for public information;

(e) arrange and conduct the registration of persons qualified to vote and prepare, maintain and revise the register of voters for the purpose of any election under this Constitution;

(f) monitor political campaigns and provide rules and regulations which shall govern the political parties.

Although there are objectionable conditions²⁴ under section 222, I argue that section 224 should be retained as a condition for the continued functioning of a party as such. This is because chapter 2 of the Constitution is the most important Chapter from the point of view of ensuring delivery of ‘*dividends of democracy*’ to the marginalized and economically excluded segments of the population. It is fundamentally from this point of view that I argue in support of retaining the constitutional power of INEC to reject candidates nominated and/or sponsored by political parties for elections. Unless section 224 is retained as a constitutional condition for the existence

²⁴ These include the provisions that make it impossible for independent candidates to emerge and those that aim at the establishment of parties as national institutions rather than parties built on ideas, regardless of the spread of membership and leadership at any point in time.

of any political party in Nigeria, the tendency for successive ruling parties in Nigeria is to rule in utter disregard of the material wellbeing of ordinary people.

If any party is deregistered or its candidates are rejected by INEC on the ground of failure to satisfy s. 224 of the Constitution, such a party reserves the right to approach the court and invoke the judicial powers of the court to determine the constitutionally or legality of INEC's decisions.

My critical concern is that **unless INEC acts with a view to enforcing s. 224 of the Constitution, elections in Nigeria will continue to be based on the elitist competitive desires for power, position and money rather than being based on issues, policies, programmes and perspectives on how best the socio-economic wellbeing of ordinary people can be enhanced.**

EFFECTS OF NON-COMPLIANCE AND SUBSTANTIAL NON-COMPLIANCE

The Supreme Court has, in all successive elections, consistently given the same interpretation to equivalent sections of the Electoral Act dealing with non-compliance and substantial non-compliance with the provisions of the Electoral Act. Simply put, it is to the effect that a Petitioner who alleges that an election has been conducted in breach of the Electoral Act has two burdens to prove:

- a) That non-compliance with the provisions of the Electoral Act took place, and
- b) That the non-compliance substantially affected the result of the election.

However, this interpretation has been a source of concern, tension and inconsistency on the part of the courts, showing that some form of legislative reform and/or judicial reconstruction may be required.

In *Ojukwu v. Yar' Adua & 4 ORS*²⁵, the Supreme Court dismissed the Appeal by a majority decision of 4 to 3 and held that:

By virtue of the combined provisions of sections 145 (1) (b) and 146 (1) of the Electoral Act, 2006 a petitioner who challenges the election of a respondent on the ground of non-compliance with the provisions of the Electoral Act must plead not just the fact of the alleged non-compliance, but must go a step further to plead that the non-compliance substantially affected the result of the election. In the instant case, the appellant did not plead that the alleged non-compliance with the Electoral Act, 2006 substantially affected the result of the election. In the circumstances, the Court of Appeal rightly struck out ground 1 of the appellant's petition. [Buhari v. Obasanjo (2005) 2 NWLR (Pt. 910) 241; Yusuf v. Obasanjo (2005) 13 NWLR (Pt. 756) referred to. (Ratio 7).

However, in his dissenting opinion, Oguntade, JSC (at 160-161, paras. H-E) expressed concern that:

... it is saddening in the extreme that section 146 (1) above, a provision which was designed to ensure that minor infractions of the Electoral Act which could not in any event be expected to have an effect on the result of an election has been elevated by our courts into a ground for an accommodation of the most glaring failure to comply with the provisions of the Electoral Act. ... Where a petitioner's complaint is founded on non-compliance with an essential condition precedent to the conduct of the election, this cannot and ought not to be seen as a non-compliance which did not substantially affect the result of the election. ... My view is that the preponderant majority of election petitions in Nigeria would fail

²⁵ *Ojukwu v. Yar' Adua & 4 ORS* (2009) 12 NWLR (Pt. 1154) 50 at 113, paras. A-B; 149, paras E-F, per Tabai, JSC.

in our courts even in the face of clear evidence of serious malpractices unless, a proper and correct interpretation is given to section 146 (1)''. (emphasis mine).

Oguntade, JSC, restated the allegations of the petitioner²⁶ that the election was not conducted in compliance with the 1999 Constitution and the Electoral Act, 2006, on the following particulars:

- a) Non-display of the Voters' List
- b) Non-publication of the supplementary Voters' list register
- c) Failure to number the ballot papers serially

Contrary to sections 20 and 45 of the Electoral Act, 2006.

Oguntade, JSC then held that:

sections 20 and 45 [of the Electoral Act, 2006] above are the mandatory steps to be taken before the date of the election. They are imperative in their language. A petitioner who complains that these acts were not done as provided by the law is in fact saying that the election was invalidly conducted. This complaint by its very nature would not have anything to do with the result. On the other hand a person who complains about the late commencement of voting at an election or whose grouse is that sufficient ballot papers were not released for the election would bear the burden of showing that the non-compliance affected the result of the election. This is because the nature of such complaint, the effect is always localized in which case it is necessary to show that such non-compliance affected the result of the election nationally.

²⁶ See pp. 161-162, paras F-G, of the Law Report.

A complaint premised on the invalidity of an election is not the same with one premised on some localized concurrences in the conduct of the election²⁷.

ONNOGHEN, J.S.C²⁸, also dissented from the majority decision and held that where an election is held with proven invalid ballot papers or an invalid voters register, such non-compliances go to the root of the election and render the election null and void - without the need for the petitioner to show that the non compliance affected the result of the election. He also maintained that if at all it has to be proved that the non-compliance did or did not affect the result substantially, it is the respondent (who stands to lose if no proof is given) who should bear the burden of such a proof once the petitioner proves non-compliance with the Electoral Act. Onnoghen, JSC held:

There are certain non-compliances that go to the root of an election in that they are absolute in the sense that once established the purported election is invalid and as such there would be no result to be substantially affected by the non-compliance. For instance where an election is conducted with an invalid voters register can there be a result of an election to be substantially affected by the non-compliance? Obviously, none as the purported election is null and void ab initio.

Secondly, voting is by ballot papers. It is the ballot papers cast in an election that is [are] counted at the end of the election to determine the winner and loser(s) of the election, which is, the result of the election. The Electoral Act, 2006 makes provisions for ballot papers and determines what a valid ballot paper is. In section 45(2) of the Act, a valid ballot paper must be printed in booklet form and

²⁷ See pp. 162-163, paras F-A of the Law Report.

²⁸ See pages 175 – 176, paras. D-C.

serialized. Where 'ballot papers' used in an election are alleged not to be serialized or in conformity with section 45 (2) of the Act, they are in law, not ballot papers as they are invalid.

*Consequently, **any election conducted with invalid ballot papers is a nullity** and you cannot expect any result to come out of such an election as, in law, you cannot have something out of nothing; that is in accord also with common sense. Section 67 (1) of the Act provides clearly that an invalid ballot paper cast at an election is not to be counted as vote. In the instant case all the ballot papers used at the election in question are alleged to be invalid by reason of non-compliance with the Act. Where then is the result of the election to be affected substantially by the noncompliance? Obviously none!*

That apart, I hold the view that the duty to plead and prove that the non-compliance did not affect substantially the result of the election, where relevant, lies with the respondent as it would be the respondent that would lose since the non-compliance of the nature of non-serialisation of ballot papers erodes the foundation of the electoral process leaving the election with no result recognized by law.

Thirdly, can there be valid election where there is total failure to accredit voters at an election? I hold the considered view that once a petitioner is able to prove that there was no accreditation of voters in an election, that election is invalid ab initio.

However, whereas Hon. Justice Onnoghen, JSC inspiringly held, as stated above in *Ojukwu v. Yar'Adua*, that conducting an election with an invalid voters register renders the election invalid,

null and void, without the need to show whether or not the non-compliance affects the result, the same Justice took a completely contrary position in *AKEREDOLU V. MIMIKO*²⁹ and held (in agreeing with the lead judgment) that in addition to proving that there was non-compliance with the Electoral Act on the ground of the use of an invalid voters register, the petitioner still had to show that the non-compliance substantially affected the result. According to Hon. Justice Onnoghen, JSC:

It is not in doubt that the lower courts did find/hold that there was non-compliance with the provisions of the Electoral Act, 2010, (as amended) in the compilation of the Voters Register used in the election in question. Also not in dispute is the fact that the lower courts, after making the above concurrent findings, went further to hold that appellant did not prove that the non-compliance substantially affected the result of the election and consequently resolved the issue against the appellant.

Section 139(1) of the Electoral Act, 2010, (as amended) provides as follows:-

“An election shall not be liable to be invalidated by reason of non-compliance with the provisions of the Act if it appears to the Election Tribunal or court that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election”.

From the above provision, it is clear that it is not enough for the election tribunal/court to find that there was non-compliance with the provisions of the Electoral Act in the conduct of the election in issue for the non-compliance so found to vitiate the election. The petitioner, in the circumstance of the case must

²⁹ *AKEREDOLU V. MIMIKO* [2014] 1 NWLR (Pt. 1388) 402 at 445-446, paras B-C.

satisfy the tribunal/court that the non-compliance alleged and found to have occurred in the conduct of the election, substantially affected the result of the election and that the election was not conducted substantially in accordance with the principles of the Electoral Act, 2010 (as amended).

In the instant case, the non-compliance is said to be unlawful injection of names into the voters register, which is said to include double and multiple registrations and that were other registrants whose finger prints were not captured.

However, I hold the considered view that the existence of those facts, without more, is not sufficient having regards to the provisions of section 139 (1) of the Electoral Act, 2010, (as amended) and reproduced supra. For the non-compliance complained of to be relevant and/or weighty enough to vitiate the election, it must be proved by evidence that those people who were so wrongfully included in the voters register actually voted in the election in issue and that if their number is deducted from the total votes cast for the winner, the petitioner would have won by majority of lawful votes. None of these has been done in this case.

I therefore agree with the lower courts that appellant had the duty to establish by evidence that the non-compliance complained of substantially affected the result of the election in issue and that the failure to do so is fatal to the case of the appellant.

Hon. Justice Onnoghen, JSC's judicial somersaults are generating public concerns: what is the source of the sudden change of judicial attitude? Is the somersault informed by the fact that Hon. Justice Onnoghen, JSC was overruled by the majority in **Ojukwu v. Yar'Adua**? Or is the

judicial somersault a product of a better appreciation of certain facts that were previously unknown or better understanding of the law? It is submitted that Hon. Justice Onnoghen, JSC would have helped to deepen Nigeria's jurisprudence in electoral law if the reasons for the change of attitude were explained such that *Ojukwu v. Yar'Adua* is differentiated from *AKEREDOLU V. MIMIKO* (supra).

THE LEGAL CONSEQUENCES OF IRREGULARITY, ILLEGALITY, CORRUPT PRACTICES AND VIOLENCE

Indeed, the principle that an election can only be vitiated if non-compliance with the Electoral Act substantially affects the result of the election has somewhat been extended to other forms of irregularity, illegality, corrupt practices, violence and so on. The principle of law that has been upheld in this regard is that irregularities at an election, corrupt practices, violence and other forms of illegality and criminality cannot ground nullification of an election and the victorious party cannot be held responsible unless a nexus is established between the criminal acts and the consent or active participation of the winner of an election³⁰. Sagay (2012: 330 and 331) submits (and I agree with him) that this principle is not only misleading, it is also grossly unjust and perverse.

RECOMMENDATIONS

In the context of the foregoing, it is suggested that Section 139 of the Electoral Act should further be amended to the effect that **the court is empowered to hold that any election is vitiated or voided once non-compliance with fundamental elements of the Electoral Act, which go to the root of the election, such as corrupt practices, irregularities, violence,**

³⁰ See *Buhari v. Obasanjo* (2005) 50 WRN 1, at 269 and 236, per Edozie, JSC and Ejiwunmi, JSC, respectively. See also *Mufutau v. Muideen* (2009) 32 WRN 150 at 169, per Thomas, JCA and *Lawl v. Mogaji* (2010) 8 WRN 102 at 172, all cited in Sagay (2012), op. cit.

invalid voters registers, invalid ballot papers, and so on, are successfully proved, whether or not the petitioner succeeds in proving that the result is affected and whether or not the results are affected.

In other words, only one burden of proof should be required – non-compliance with the Electoral Act, particularly where serious breaches of statutory and constitutional provisions are proven. The concern is that the occurrence of certain irregularities, illegalities and violence should automatically be sufficient to nullify elections in the affected constituencies or polling units, without the need to prove that the result of the election was affected. It appears superfluous and/or arduous to require the petitioner to prove that the result of an election has been substantially affected where certain fundamental non-compliances have been established. That is why many petitions brought on the ground of non-compliance tend to fail. The goal of perpetrators of violence tends to be to scare the majority of the electorate away so as to leave behind only very few people, just to justify that election has taken place. In such a situation, only the supporters of the perpetrators of violence are likely to have the guts to remain behind. An amendment of the Act along the line suggested may have deterrence effect on promoters of violence.

Lord Denning had also interpreted S. 37(1) of the People Act 1949, which had similar provisions as the Nigeria's Section 139(1) of the Electoral Act 2010 in such a way that permits the court to nullify elections **either when the two burdens of proof** (non-compliance, and non-compliance substantially affecting the result of the election) **obtain conjunctively or disjunctively (i.e. having to prove the two burdens together or separately).**

For the avoidance of doubt, the provisions of S. 37(1) of the People Act are reproduced verbatim below:

No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local elections rules if it appears to the tribunal having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to election and that the act or omission did not affect its result (cited By Tobi, JSC, in Abubakar v. Yar' Adua (2008) 19 NWLR 1 SC at p. 166).

As rightly pointed out by Tobi (JSC)³¹, Lord Denning explained that the above S. 37(1) of the People Act 1949 was stated in the negative and that a positive reformulation is possible. Lord Denning then reformulated the section positively and **showed that the two burdens could obtain disjunctively**. In the words of Lord Denning:

That section is expressed in the negative... The question of law in this case is whether it should be transformed into the positive so as to show when an election is to be declared invalid. So that it would run: 'A local government election shall be declared invalid (by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local elections rules) if it appears to the tribunal having cognizance of the question that the election was not so conducted as to be substantially in accordance with the law as to elections or that the act or omission did affect its result'. I think that the section should be transformed so as to read positively in the way I have stated. I have come to this conclusion from the history of the law as to election and the cases under the statutes to which I now turn, underlining the important points (cited By Tobi, JSC, in Abubakar v. Yar' Adua (2008) 19 NWLR 1 SC at p. 166).

³¹ See *Abubakar v. Yar' Adua* (2008) 19 NWLR 1 SC at p. 166.

Lord Denning then went further to state the position of the law on the issue of substantial compliance or substantial non-compliance with the law of election. The crux of Lord Denning's holding is essentially that in certain situations, **elections may be nullified without the two burdens being proved conjunctively**. In Lord Denning's words:

Collating all these cases together, I suggest that the law can be stated in these propositions.

- 1. If the election was conducted so badly that it was **not substantially in accordance** with the law as to elections, the election is vitiated, **irrespective of whether the result was affected or not**. That is shown by the Hackney case, where two out of 19 polling stations were closed all day, and 5,000 voters were unable to vote.*
- 2. If the election was so conducted that it was **substantially in accordance** with the law as to elections, it is **not vitiated by a breach of the rules** of mistake at the polls **provided that it did not affect the result of the election**. That is shown by the Islington case where 14 ballot papers were issued after 8pm.*
- 3. But even though the election was conducted **substantially in accordance with the law as to elections**, nevertheless if there was a **breach of the rules or a mistake at the polls and it did affect the result then the election is vitiated**. That is shown by Gunn Sharp, where the mistake in not stamping 102 ballot papers did affect the result.*

Applying these propositions, it is clear that in this case, although the election was conducted substantially in accordance with the law, nevertheless the mistake in not

*stamping 44 papers did affect the result. So the election is vitiated. The election of Mr. Simpson must be declared invalid*³².

Considering the three propositions by Lord Denning above, it may be concluded that the provisions of Nigeria's Section 139(1) of the Electoral Act are too restrictive and rigid, in the absence of the court invoking its equitable power to avoid hardship and do justice, as Lord Denning did in the above case of *Morgan v. Simpson*. My point of advocacy is that the Electoral Act should be improved upon so as to give room for Lord Denning's propositions and allow the court greater flexibility in dealing with issues of substantial compliance or non-compliance with the provisions of the Electoral Act. The existing provision of S. 139(1) of the Electoral Act can only be retained at the risk of encouraging greater degrees of voter apathy when elections which ought to be nullified on the ground of violence are upheld on the ground that the petitioner is unable to discharge the second burden of proof, that the election result has been affected as a result of non-compliance.

The worries expressed by Hon. Justice Niki Tobi, JCA (as he then was) in *Salisu Ali Basheer v. Polycarp Same & ors*³³ constitutes further justification for the necessity to either legislatively amend s. 139(1) or to judicially reconstruct same along the lines suggested by Lord Denning, as stated earlier. Hon. Justice Niki Tobi, JCA (as he then was) in *Salisu Ali Basheer v. Polycarp Same & ors* cries out in protest, that:

.... The word 'substantially' ..., in my view, means either 'materially' or 'essentially'. ...

In my view, the two limbs are distinct, and separate and should be read disjunctively.

In other words, election may be invalidated if the reverse situation anticipated in

³² cited By Tobi, JSC, in *Abubakar v. Yar' Adua* (2008) 19 NWLR 1 SC at p. 167.

³³ *Salisu Ali Basheer v. Polycarp Same & ors* (1992) 4 NWLR (Pt. 236) 491 at 509.

either limb of the subsection occurs. That is to say (an election may be invalidated if the conduct of the election was not in substantial compliance with the principle of the Decree OR (2 if the non-compliance substantially affected the result of the election.

I would like to say by way of passing remark that I do not like the word 'principle' in the subsection. (emphasis mine). I would have preferred the word 'provision'. I say this because it is not quite easy for a tribunal or this Court to determine what constitutes the 'principle' of the Decree, particularly in the absence of a definition of the word. But that does not lie in my mouth; the judge that I am. It lies in the mouth of the lawmaker and so let it be 'principle'³⁴.

In short, there should be statutory definition and differentiation of non-compliance with the Electoral Act which go to the root of an election and which should be regarded as sufficient to vitiate an election from other non-fundamental non-compliances which have to be shown by evidence that the result of the election has been substantially affected before such elections are voided.

Where non-fundamental non-compliance with the Electoral Act occurs and it is necessary to show by evidence that the result of the election has been substantially (or not substantially) affected, the burden of proof should be put on the electoral commission rather than on any of the contending parties, as the electoral commission ought to, ordinarily, be disinterested in who wins or loses.

Similarly, whether or not it is proven that the winner of an election consents or participates in perpetuating irregularities, illegality, corrupt practices and acts of violence, the law should be

³⁴ cited in Hon. Justice P. A. Onamade. 2010. **Advocacy in Election Petitions**. Lagos: Philade Co. Ltd., p. I. 22.

developed such that the election is nullified, once the allegations are proven by evidence. The essence of elections is not about the individual contestant/candidate; it is not even about the political parties. It is indeed about the fate, fortune or misfortune and future of a whole society. As Aderemi, JSC aptly put it in his dissenting opinion in *Ojuwku v. Yar' Adua* (2009) 12 NWLR (Pt. 1154) 50 at 192, paras E-F:

Let it be said that quest for justice is insatiable when it is realized that that great phenomenon called justice is not a one way traffic; not even a two-way traffic; I beg to say a court of law which is also a court of justice must always ensure that justice flowing out from its sanctuary which, of course, must be in accordance with the laws of the land, is not only for the plaintiff (the complainant) not even only for the defendant (the person complained against) but also for the larger society whose psyche is always affected, one way or the other, by any judicial pronouncement.

On the powers of INEC to disqualify candidates for election: It is suggested that the constitutional power of INEC by necessary implication to reject candidates for election in the event of breach of constitutional and statutory provisions be strengthened through legislative reforms. The Supreme Court may also consider a revision of its holding in this regard whenever an opportunity arises. Specifically, the continued functioning of political parties as such and their sponsorship of candidates for elections should be predicated upon adopting programmes, aims and objects that are in conformity with the provisions of chapter 2 of the subsisting constitution.

Alternatively, a special AD-HOC quasi-judicial body may be set up as a small unit to screen candidates for elections and to determine their eligibility based on constitutional and

statutory criteria. The formation of such a body may be the bridge between the usual prolonged delays in disposing of litigations by the courts and the possibility of lack of independence of the ‘Independent’ National Electoral Commission in objectively determining the qualification of candidates as it happened in the case of the former Vice President Atiku.

In order to further liberalise and make the political space more inclusive and expansive, constitutional amendments are necessary to the effect that public sector workers could be granted leave without pay in order to contest elections into public offices while independent candidature should be allowed in addition to sponsorship of candidates by political parties.

There appears to be a relationship between the deepening socio-economic exclusion and deprivation of the masses on one hand and rising insecurity and criminality on the other. These challenges may find enduring solution from fixing the deficits at the electoral contestations. In spite of all the shortcomings of Nigeria’s legislative and judicial subsystems, legislative reforms and bold judicial reconstruction of certain principles in the interest of justice may offer some interim way out of the politically inspired frightening daily life experiences in Nigeria.

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30 June 2015.

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