

CIVIL LITIGATION: THE COURTS AND THE SURVIVAL OF DEMOCRACY

PRESENTED BY AUGIE, JCA AT THE ANNUAL GENERAL AND DELEGATES CONFERENCE
OF THE NIGERIAN BAR ASSOCIATION, ABUJA, ON THE 27th OF AUGUST, 2008

"I can find no other country in practice of democracy that has its Courts interpreting the Constitution and the Electoral Laws more than Nigeria. Our Courts are always pre-occupied with pre-election and post-election litigations around any election year and their prowess in sustaining the onslaught of Politicians and the active Press is legendary. It is not uncommon to have one or two Politicians hurling blame for their failure at the elections on the Courts. This is, however an exception rather than the rule".

Hon. Justice S. M. A. Belgore, JSC (as he then was) -¹

The very apt observation of Belgore, JSC (as he then was) says it all and sets the tone for this paper. Without a doubt, the story of Nigeria's dance with democratic rule cannot be told without narrating the role played by the Courts in its emergence and continued survival, and this is self-evident when we look at the backlash from the 2007 Elections. Apart from Bauchi and Jigawa States, the Governorship Elections in the other 34 States of the Federation were contested at the Election Tribunals and the Court of Appeal. There have been five cases of Court-ordered fresh elections, and there are appeals pending at the Court of Appeal against the nullification of elections in Abia, Edo & Ondo States. The Presidential Election was not left out, and there is a pending appeal at the Supreme Court against the decision of the Court of Appeal on it. Two Governorship matters were also settled at the Supreme Court and both resulted in the removal of the presumed winners of the elections. The Courts have therefore been faced with the responsibility of steering electoral disputes in such a way that the catchphrase "Electoral Justice" is now a familiar saying and this paper will focus on the laws provided to ensure justice after elections, and how the Courts have interpreted them.

Political Participation in a Democracy

"The people must be mobilized for direct involvement, beyond elections, in political administration and governance. The role of the people must go beyond coming out from the creeks, farmsteads, hunting camps, herding fields, motor parks, market places, workplaces, city slums, etc, to elect the so-called government of the people and then return to the abyss until another round of "democratic" elections. The people must be mobilized fully, in such a way that ensures that in between elections, the government is by the people and for the people". - J. G. Nkem Onyekpe²⁻

Democracy, it is said, is the rule of the people by the people and for the people and a democratic administration is one in which the people, all of them, are enabled to express a free choice on all matters affecting them. Democracy is not an event; it is a process, which constitutes the creation

and maintenance of operational institutions and a fitting political culture; that culture is natured through institutions that embody enhanced opportunities for political participation and competition for all citizens. Thus, the concept of participation is part of the culture of democracy, and by definition, political participation refers to the gamut of activities through which citizens and groupings in society choose their leaders and directly or indirectly determine public policy. Political participation in democracies has been ranked into a hierarchy of activities ranging from exposing one's self to political influences and voting at elections to actually holding public and party office. The full hierarchy includes –

- Holding party and public office
- Being a candidate for office
- Soliciting political funds
- Attending a caucus or strategy meeting
- Becoming an active member of a party
- Contributing time to political campaigns
- Attending a political meeting or rally
- Monetary contributions to a party or candidate
- Attempting to persuade others to vote in a certain way
- Voting
- Exposing oneself to political stimuli

Participation has therefore been justified as a -

- A means of actualizing individual desire for public office;
- A means of effecting changes in governance; and
- As a way of protecting socio-economic interests.

The Evolution of the Electoral Process

"History makes men wise. It helps them to know the past, to understand the present and to forecast the future" **Professor A. L. Rowse**³⁻

Democracy connotes a form of government by the people directly or indirectly by representation and since it is not possible for "all the people" to take part in the government as "rulers", they take part through elected representatives. In other words, election is at the heart of democracy. There was no election in Nigeria before 1922 when the Clifford Constitution, for the first time in the Country, introduced the principle of elections into the Legislative Council established under the Constitution. Between 1923 and

1950, the natives were only entitled to be elected into the four elective posts created under the 1922 Constitution, which was replaced with the Richards Constitution of 1946) but the Constitution did not increase the number of elective posts. It was under the 1951 Constitution that a Central Legislative (House of Representatives) was established, which was to be made up of 148 Members, 136 of whom were to be elected Nigerians. However, under the 1954 Constitution, which replaced the 1951 Constitution, a unicameral legislature made up of 184 elected members was established. The 1954 Electoral Regulations of the Western Region, Eastern Region, Southern Cameroon and Lagos had no provision dealing with election Petition, but under the Northern Region Electoral Regulations, Members of the House of Representatives were to be elected through an Electoral College, and provision was made for election Petitions by a complainant of undue election or undue return of a Member of the House. In 1958, the Nigerian (Electoral Provisions) Order in Council for the elections into the House of Representatives was promulgated, and it created an "Electoral Commission" with the responsibility of preparing Register of Voters and conducting elections. Electoral offences were created and a convicted person was barred from participating in election for five years, etc.

The origin of electoral Commissions in Nigeria was the establishment of Electoral Commission of Nigeria [ECN], which was responsible for the conduct of the 1959 elections. The Federal Electoral Commission [FEC] of 1960 which replaced the ECN, conducted the Federal Parliamentary Elections of 1964 and the Regional Parliamentary Elections of 1965. However, on taking over power in 1966, the Military abrogated the FEC. To prepare the country for civil rule, they promulgated the Federal Electoral Commission Decree of 1977, which established the Federal Electoral Commission [FEDECO], and the 1977 Electoral Decree, which provided for a Presidential System of Government and recognized political parties in Nigerian politics. The Decree was used to conduct the 1979 General Elections, which "led to military disengagement from power and the installation of a civilian regime patterned after the American Presidential System."⁴ In 1982, the National Assembly enacted a new Electoral Act, with similar provisions to the 1977 Decree but unlike what obtained under the 1977 Decree where jurisdiction to hear and determine Election Petitions were conferred on Tribunals, the Act vested jurisdiction over Election Petitions from the Presidential Election on the Federal high Court and the High Court of the Federal Capital Territory, while the State High Court was vested jurisdiction over Election Petitions from elections into other offices. The 1982 Act was used to conduct the 1983 General Elections. The Military struck again in 1983 and dissolved FEDECO. In 1985, there was a palace coup and General Babangida immediately announced that he would embark on a transition programme to lead the country back to civil rule. To make way for "New Breed Politicians", a Decree banned some persons from participating in politics either for life or during the transition. The preparation also led to the establishment of the National electoral Commission [NEC] vested with the same powers as the FEDECO. However, unlike

FEDECO, NEC could only register two political parties established by the Armed Forces Ruling Council, the National Republican Convention [NRC] and Social Democratic Party [SDP], and was vested with power to conduct all elections without the exception of Local Government elections, as was the case with the 1977 Decree. General Babangida “stepped aside” in August 1993, and the Interim National Government was by General Abacha in November 1993. General Abacha introduced his own Transition Programme and promulgated the National Electoral Commission of Nigeria [NECON], empowered to issue guidelines for the formation and registration of political parties, not limited to any number, and to conduct the elections. Commenting on Abacha’s regime, **Basil Ugochukwu** noted as follows⁵-

“Though Abacha’s regime organized Local Government, State Assemblies and National Assembly elections between 1997 and 1998, which spurned cases at Election Tribunals, yet the term ‘electoral justice’ was not in vogue at that time. It started gaining currency only after the 1999 elections due mainly to the increasing role of the judiciary in breaking electoral gridlocks and as well the enhanced attention being paid to the resolution of electoral disputes through the monitoring of Tribunals established for that purpose.”

Be that as it may, NECON was dissolved in 1998 by the Administration of General Abubakar after the death of General Abacha in June 1998, and the Independent National Electoral Commission (Establishment) Decree No. 17 of 1998 as amended by Decree No. 33 of 1998 established the Independent National Electoral Commission [INEC], which is now one of the Federal Executive Bodies listed in Section 153 of the 1999 Constitution, charged with the responsibility to “organize, undertake and supervise all elections”, and “register political parties”. The Electoral Act signed into law by President Obasanjo on the 6th of December, 2001 was later repealed by the Electoral Act of 2002, which in turn was repealed by the Electoral Act of 2006.

The Rule of Law and the Judiciary

“The social order of the Nigeria nation is founded on the ideals of freedom, equality and justice, and institutionalized machinery for the attainment of justice in any society is law. Bearing that in mind, it is clear that the paramount importance of justice in the Nigerian society becomes much more pronounced when it is realized that justice is indispensably necessary to the sustenance of our nascent democracy.” -Hon Justice Umaru Abdullahi, C.O.N⁶

The concept of the Rule of Law has undergone such adaptation and expansion as is necessary to meet new and challenging circumstances, but whichever way it is adapted or stretched out, the bottom line is that democracy and the rule of law go together. **Professor Gary Slapper**⁷ cited the Rule of Law as one of Ten Key Legal Principles, and added -

" This is the defining characteristics of civilized democracies, the principle means that everyone, however powerful, must obey the democratically passed law, no one is above the law, the rules are more important than important people. We are ruled by rules, not rulers."

Generations of jurists from highly diverse nationalities have enabled certain basic conditions and principles to be elaborated without which, the Rule of Law cannot be sustained. A summary of these are -

The separation of powers, a principle which must be defended not only in relations between the Legislative, the Executive and the Judiciary, but also in any area in which a complete concentration of powers may occur;

Judges' independence, not only from the public authorities but also from any influence other than that of the law;

The requirement that any power emerging from the collective authority -in particular the Legislative and the Executive -must respect the individual's fundamental rights and freedoms;

The legality of administrative action;

Control of legislation and administration by independent Judges; and

The need for a Bar, which maintains its independence from the authorities and which is devoted to defending the notion of the Rule of law.

Since they are inherently interlinked, none of these conditions and principles can function without the others, as **Adama Dieng**⁸ said -

"The notion of the Rule of Law is therefore intended in particular to submit the administration to respect of the law. Legislation passed by Parliament, which represents the electorate, is the instrument through which the people's sovereignty is imposed on the administration, preventing it from becoming an autocracy. As an abstract principle of general application, law guarantees freedom, equality and security to the individual. By imposing respect for stable norms of State Bodies, it reduces the risk of arbitrary initiatives".

The adjudicatory process or system is a sine qua non as a dispute resolution mechanism between individuals and institutions in any form of civilized setting. The essence of litigation is to resolve disputes that would most certainly arise in society between individuals and also between institutions. The process becomes more complex as the dynamics and contradictions within communities and societies evolve. The Judiciary is the only arm of government that is saddled with the responsibility of settling disputes between

the government and the governed, and between individuals as well as other juristic entities. Although the Judiciary is an independent organ of the Government, it is part of the Government. Nigeria operates in a democracy where there are three constitutional branches in a presidential system of government. The three branches are equal in status and the relationship between them is one of checks and balances. The constitutional arrangement is designed to assure that each branch operates within the parameter of its authority and no branch has unlimited powers. The Judiciary is the only department that can declare a violation of the Constitution void, be it an act of the Legislative department

or an action of the Executive branch. Its strength lies in its wisdom in meaningfully and honestly interpreting the provisions of the Constitution for the attainment of the rule of law; this is where Courts have unwittingly been led into the political arena. Certainly, Judicial Officers are not in the same category as Politicians. Politicians openly seek access to state power and are primarily initiating and making laws to advance theirs or their supporters' vision of what the State's government should be doing. They come up with public policy proposals in areas they think appropriate in a democracy, and seek support to translate them into law.

To **Richard Hodder-Williams** -*"They are -- the means in a modern polity by which popular demands are transmitted to governmental structures and then acted upon"*⁹.

The Courts and law-makers/Policy-maker

"When a Judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which it ought to have said, and that is very close to substituting what he himself thinks is right --Nobody does this exactly right; great judges do it better than the rest of us. It is necessary that someone shall do it, if we are to realize the hope that we can collectively rule ourselves". **Judge Learned Hand**¹⁰ -

The judicial process is the very centre of the art and science of jurisprudence in a common law system, because as the law is applied and explained in particular cases, even where in theory it is unchanging, in practice it acquires growing, changing meaning as it is applied to new problems arising in the changing conditions of human life. For instance, a Court's interpretation of an ambiguous Statute can set matters right. As

Eso, JSC observed in **Trans bridge Co. ltd. V. Survey Int. ltd.**¹¹-

" It would be tragic to reduce Judges to a sterile role and make an automation of them. I believe, it is the function of Judges to keep the law alive, in motion, and to make it progressive for the purpose of arriving at the end of justice, without being inhibited by technicalities, to find every conceivable, but acceptable way of avoiding narrowness

that would spell injustice. Short of being a legislator, a Judge, to my mind, must possess an aggressive stance in interpreting the law".

This brings up the age-old argument of whether Judges make laws. **Francis Bacon's** admonition was that – “Judges ought to remember that this office is *jus dicere*¹² and not *jus dare*¹³, to interpret law, and not to make law, or give law”. **Sir Mathew Hale**, writing in the 17th century, stated the declaratory theory of judicial decisions that the Courts cannot -

"Make a law properly so called, for that only the King and Parliament can do; yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is, especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times, and though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons -"

On the American system, **Charles Evans Hughes** puts it this way -*"We are under a Constitution, but the Constitution is what the Judges say it is"*.

Starr, on the other hand, defined Common law as Judge-made.

Ekundayo, J.¹⁴ agreed with this definition. His own view is as follows-

"The legislature of a nation cannot possibly legislate for all matters, in all situations, and under all conditions. Most things must not be left to the common sense of the citizen. The Judge is the notional "reasonable man on the street" by whose assessment what is "reasonable in the circumstance" is to be ascertained. This has to be so to prevent "reasonableness" becoming a subjective rather than an objective entity. Thus, the discovery, development and interpretation of what is "right" or "wrong" for the citizen to do, when there is no written law guiding the situation, has to be left to the Judge to determine, assisted by cultural and environmental evolution". Let us take -- the common saying: "An Englishman's house is his Castle." This saying is on the tongue of every Englishman, whatever his class. The English people left the task of interpreting this adage to their Judges whom they trusted would make a jolly good job of it. From that saying developed a number of common law protective "Judges -Laws made to ensure that the executive could not enter his -house, except in accordance with law. From it developed the ever-growing tort of trespass to property --the tort of invasion of privacy"

Nnaemeka-Agu, JSC, has an extremely divergent view. He said ¹⁵-

"It is part of the public policy of the Nigerian State as enshrined in the Constitution that a Judge shall exercise his judicial powers and interpretative jurisdiction over the Constitution, in line with the issues, the evidence and the argument placed before him. ---

How far does a Judge have to be influenced by such matters as public policy? I may here refer to what my learned brother, Eso, JSC, said in a paper on this topic during the 1982 conference. He stated:

"But, if one is to appeal to public policy as a determining factor in the interpretations of a constitution, then questions would be asked. Which public? Who determines majority opinion? There are dangers inherent in a serious importation of the quip "public policy", into the philosophy determining the intention of the provisions of the Constitution. Does one wade into the arena of politics or are there factors therein, which are unknown to the Judge or even unsavoury to the public?"

Then he referred to the warning statement of Lord Radcliff in his paper: "The lawyer and his times", where he said:

"We cannot run the risk of finding the archetype image of the Judge confused in men's minds with the very different image of the legislator".

From these it must be obvious to all the Judges here present that their function is to interpret and apply the Constitution when called upon to do so, not to make a new one or part of it. As Lord Simmonds put it in the House of Lords in the celebrated case of *Magor And St. Melons R.D. C. V. Newport Corporation*-

"If a gap is disclosed, the remedy lies in an amending Act".

So it is in the Judge's exercise of his *interpretative jurisdiction over the 1999 Constitution. If there is a gap in the provisions, it requires an amendment. The Judge cannot fill the gap.*" (Italics mine)

Whichever it is looked at, the storm will always rage over this issue. Judges, it has been argued are also Policy-makers. To **Carl A. Auerbach**,¹⁶ "ordinarily, we tend to think of the legislature rather than the Court as being concerned with public policy issues. Yet the Courts are as significantly- though usually not as openly concerned with such issues".

He referred to **Professor Leon Green**'s observation, as follows-

"While public policy is the basis of all law, it is sometimes forgotten that it lies at the base of every judicial decision. All that it means is that 'we the people' are a third party to every case in litigation. Ordinarily the weighing of policy is only implicit, for the policy has already been set by Constitution, statute or former decision. Ordinarily, any open appeal to public policy is in recognition of some principle likewise established. But implicit or open, an appeal to public policy is not infrequently made when Constitution, statute and former decision are silent. It is here that the Courts extend, limit or modify some old principle, or recognize some

new principles. There is nothing startling in their reliance on public policy. What is startling, and only because of its rarity, in cases of serious departure from an old principle or of recognition of a new one, is for a Court to put its fingers on the particular policy relied upon. Here the Courts are inclined to talk in terms of the broadest generalities. The policies, which the courts most clearly articulate, are those, which concern the administration of the Courts themselves. They hesitate to modify the law if the decision will 'open the door to a flood of litigation', make it difficult to define limits of liability, require an investigation of factual details for which their processes are not well designed, make the re-examination of corollary or subsidiary principles necessary, or threaten to upset an established equilibrium in social convention, trade practices property transactions. Nor will Courts ordinarily venture openly into a field still troubled by economic or political debate. In all these cases policy dictates no upsetting of the apple cart even though an individual litigant may suffer admitted injustice and hardship. Only when the demand is so urgent or the injustice so blatant in these situations that the pressures of *"we the people" cannot be withstood will courts take notice of the urgency. Even then they will usually refer the problem to the legislature. Thus it is that the open appeal to public policy is more frequently made to justify the court in not taking some bold step than to justify taking the step*".

Auerbach further pointed out that the usual questions that arise are-

"What influenced the Courts to make the particular fact-assumptions and value-choices that they did? Were the Courts bowing to political, economic or other social forces". Were they biased? Were they impelled to their conclusions by "legal consideration" and professional traditions? To what extent was judicial ignorance of facts significant?

Being a Judge, I will not even attempt to answer the above questions. Besides, it is easier for Judges to agree on a rule for a concrete type of situation than on a statement of policy which justify that rule. As **Holmes** put it -"it is ordinarily easier to drill a squad than to manoeuvre an army".

The Courts Involved

"The Courts hold a unique position among democratic institutions. --they represent one of the last bastions of participatory democracy in which disputants go directly before a Judge -to resolve an issue. In no other governmental context does an individual have the opportunity to take a problem to a decision maker who represents the full force and power of that particular branch of government. This direct interchange between the individual and the State is the heart of democratic process.

We must protect this unique heritage and strive to preserve the values it represents. -
Rose E. Bird¹⁷⁻

The hierarchical set up of the Judiciary is directly related to the functions and jurisdictions of the respective Courts. At the apex is the Supreme Court of Nigeria, which is the final Court of Appeal in this country and no appeal lies to anybody or authority anywhere from the Supreme Court. The Supreme Court is the most distinctive feature of the American system of government. It is in fact with regard to the extent of the powers of the Court, a wholly unique feature. The democratic nations of England and France, as well as the non-democratic nations of Germany, Italy, and Russia, have nothing corresponding to it. Canada, Australia, British South Africa, and some of the South American states have given to their Courts a strictly limited right to review legislation under certain circumstances, but no other nation has placed the Judiciary above the Legislature with authority practically to nullify the acts of the latter without appeal save through the difficulty of constitutional amendment. According to **Ernest Sutherland Bates**¹⁸⁻ "The Supreme Court of the United States is the supremest Supreme Court in all the world", adding -

" It did not have this proud position in the beginning. Its present authority, decried in many quarters even today, has been won after nearly a century and a half of struggle with the other branches of the government in a series of legal battles far more intellectually thrilling than those cruder ones determined by musketry and force".

The Supreme Court of Nigeria is cut from the same cloth, and is by the expressed provisions of the Constitution in a very pre-eminent position. Its decision binds every authority or person in Nigeria, and is by law to be enforced by all authorities, persons, and Courts throughout Nigeria.

The Supreme Court as a Court of last resort has a special original jurisdiction to the exclusion of any other Court in any dispute between the federation and a State or between the States on any question of law or of fact on which the extent of a legal right depends, and appellate jurisdiction to hear and determine appeals from the Court of Appeal. The Court of Appeal, which is immediately below the Supreme Court, has original jurisdiction to hear and determine whether -

Any person has been validly elected to the office of President or Vice President under this Constitution; or

The term of office of the President or Vice-President has ceased; or

The office of President or Vice-President has become vacant.

Its appellate jurisdiction is spelt out in Section 240 of the Constitution, which states that the Court shall have jurisdiction to the exclusion of any other Court of law in Nigeria, to hear and determine appeals from -

The Federal High Court

The High Court of the Federal Capital Territory, Abuja

The High Court of a State

Sharia Court of Appeal of the FCT I Abuja

Sharia Court of Appeal of a State

Customary Court of Appeal of the FCT, Abuja

Customary Court of Appeal of a State, and from

Decisions of a Court Martial or other Tribunals as may be prescribed by an Act of the National Assembly.

In addition, Section 246 of the 1999 Constitution further provides -

(1) An appeal to the Court of Appeal shall lie as of right from -

Decisions of the Code of Conduct Tribunal established in the Fifth Schedule to this Constitution

Decisions of the National Assembly Election Tribunals and Governorship and Legislative Houses Election Tribunals on any question as to whether -

Any person has been validly elected as a member of the National Assembly or of a House of Assembly of a State under this Constitution,

Any person who has been validly elected to the office of Governor or Deputy Governor, or

The term of office of any person has ceased or the seat of any such person has become vacant.

Subsection (3) to Section 246 further provides as follows -

" The decisions of the Court of Appeal in respect of appeals arising from elections petitions shall be final". (Italics mine)

The Electoral Laws since 1977 contain provisions for the establishment of Election Tribunals with powers to determine questions arising from the conduct of elections only. Election Tribunals cannot entertain matters, which have not been vested in it by the enabling Electoral laws.

The Court's Decisions on Electoral Matters: An Overview

"Judges should excel by doing the essence of justice, which is to give a person what is lawfully due to him; to compel him to do what the law obliges him to do and restrain him from doing what the law enjoins him not to do".

-Hon" Justice Mohammed Bello, CON, GCON, CJN -19

Time and time again, elections are being conducted in this country and, as is usual in any election, there will always be winners and losers. These days, an increasing number of those who lose the election or believe the elections were rigged against them seek electoral Justice, and it is in this area that the Courts have had to face challenges. **Professor Taiwo Osipitan** states this clearly. He pointed out that²⁰ -

"The result of some elections has to be acceptable to contestants. In some cases, the results will be unacceptable to the losers. Such losers will likely challenge the results of the election through election petitions. These petitions will be determined by Tribunals and appellate Courts assisted by counsel engaged by the parties. Unless Judges, and lawyers who will be key players in election petitions are alive to their responsibilities, -aggrieved losers may resort to self-help and violence in order to redress perceived or actual wrongs. It is evident, that the Tribunals, the appellate Courts and lawyers have great responsibilities to discharge during election petitions".

These days, it is becoming more and more apparent that the combat zone has shifted from polling booths to the Tribunals/Court of Appeal. There are ten Divisions of the Court of Appeal and as at 20th June 2008, 12 Governorship, 57 National Assembly, and 31 State House of Assembly appeals were filed at the Kaduna Division, which covers Kaduna, Katsina, Kano, Jigawa, Kebbi, Sokoto and Zamfara States. Certainly, some Combatants have found out the hard way that the battle in the Court is a far cry from what they are proficient in at polling booths. As **Aderemi Olatubora** so aptly stated in the Preface to his Book²¹ -

"I have discovered that election Petition cases are highly technical and that the procedures applicable weigh heavily against the Petitioners. I have observed that many otherwise meritorious cases that would ordinarily have led to the reversal of some returns in elections in the Election Tribunals and Courts have failed largely as a result of the failure of Petitioners to adhere to the strict and peculiar rules applicable in election cases which distinguish them from ordinary civil proceedings". (Italics mine)

Election Petitions are not the ordinary or run-of-the-mill kind of cases; they are said to be sui generis. In effect, they are in a class of their own. They are peculiar from the point of view of public policy, and are considered to be distinct and completely divorced from civil

proceedings. Courts are therefore enjoined to hear them without allowing technicalities to unduly fetter their jurisdiction -see **Nwobodo V. Onoh**²² and **Orubu V. NEC**²³ where **Uwais, JSC** (as he then was) observed as follows -

" An election Petition is not the same as ordinary civil proceedings, it is a special proceedings because of the peculiar nature of elections which by reason of their importance to the well being of a democratic society, are regarded with an aura that places them over and above the normal day to day transactions between individuals which gives rise to ordinary or general claims in Court. As a matter of deliberate policy to enhance urgency, election Petitions are expected to be devoid of the procedural cogs that cause delay in the disposition of the substantive dispute". (Italics mine).

Be that as it may, in order to participate in the election process, an individual must belong to a political party, which is defined as follows -

" An organization of voters formed to influence the government's conduct and policies by nominating and electing candidates to public office".²⁴

It was the 1977 Electoral Decree as Amended that introduced the registration of political parties; it was incorporated into the 1979 Constitution and retained in the 1999 Constitution. Section 221 reads-

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

See also **Idris V. ANPP & ors**²⁵ where the Court of Appeal held that what a political party needs to do in order to obtain *locus standi* to present a Petition is simply to show that it actually participated in the election being challenged. **Omage, JCA** further stated as follows

"When therefore, a political party has articulated its interests which it believed and nominated a candidate for an election, the right of that political party is assaulted and abused when its nominated candidate is prevented from contesting the projected election. *The party therefore has a right to sue particularly as the 1999 Constitution directs that "no association other than a political party shall canvass for votes for any candidate at any election".* - Why should the ANPP not have a locus standi? (Italics mine)

Nigeria copied its Presidential System from the United States of America [USA], which has traditionally maintained a two-party system that today comprises the Democratic and Republican Parties. There is no provision under its Constitution for the operation of political parties, and according to Afe Babalola, SAN²⁶ "in American political history,

political institutions(parties) and processes of creating them are outside formal governmental approval, which therefore enhances their independence". The ding-dong between those who want Nigeria to take on a two-party system and those who want the multi-party system in operation to stay is still raging and is on the front burner of topical issues in controversy. The Tribune Newspaper of 3rd August 2008 carried a two-page analysis titled "Party Systems and Survival of Democracy",²⁷ which caught my attention as I was in the process of writing this paper on the same topic. The arguments of those whose views were published are illustrative. **Dr. Dennis Obokoh**, Political Scientist and Public: Affairs Analyst, said-

"The two-party system offers a better chance of uniting the country, because it shortlists the options to two in any major decision making. Once the two positions emerge from the parties, the reconciliation process begins and often a decision would be reached without much acrimony. If one party loses, they would more readily accept the outcome knowing that they can win on another issue and blame the other party if the policy fails", He further said -"Under a multi-party system there is usually a plethora of options offered by various parties along with the potential for more contentious disagreements. It is also more difficult to assign blame for failure in a multi-party context because the policies are almost always convoluted by-products of compromises and alliances that weaken or water down the originality of the policies".

Hon. Kunbi Audu argued to the contrary. He was of the view that -

"The two-party system all by itself, cannot completely integrate a country. However, it would take away the potential for ethnic manipulation and national disintegration that the multi-party system poses. It also renders decision making and consensus building easier because it significantly reduces the number of players without jeopardizing the right to dissent".

Professor Esemien Udoh, Professor of Political Science Rtd., argued -

"Two-party system offers stronger, majority government which can pass needed legislation without fettering the minor parties. Bickering of narrowly based ideological factions in multi-party systems can lead to a torpid legislative process. If they (factions) gain enough influence via winning seats they can adopt a by-any-means-necessary mentality of furthering their agenda which can include purposely blocking or delaying important legislation".

As it is, all the arguments for and against notwithstanding; Nigeria operates a multi-party system, and the Supreme Court endorsed it in the case of **INEC v Musa & ors**,²⁸ wherein Ayoola, JSC stated as follows -

"To put the issues in the appeal in proper perspective it is expedient to pause to emphasize that by Section 14 (1) of the Constitution, the Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice. Political parties are essential organs of the democratic system. They are organs of political discussion and formulation of ideas, policies and programmes. Plurality of parties widens the channel of political discussion and discourse, engenders plurality of political issues, promotes the formulation of competing ideas, policies and programmes and generally provides the citizens with a choice of forum for participation in governance, whether as a member of a party in government or a party in opposition, thereby ensuring the reality of government by discussion which democracy is all about in the final analysis. Unduly to restrict the formation of political parties or stifle their growth, ultimately weakens the democratic structure. However, to leave political parties completely unregulated and unmonitored may eventually make the democratic system so unmanageable as to become a hindrance to progress, national unity, good government and the growth of healthy democratic culture. Between the two extremes - over-regulation and complete absence of regulation is the need for balanced regulation".

In that case, **INEC v Musa**, the issues calling for determination were -

Whether INEC had powers to make guidelines for Political Associations seeking to transform into Political Parties.

Whether the guidelines made by INEC were unconstitutional, null and void

The Court of Appeal held that INEC had exceeded its powers and acted unconstitutionally, but the Supreme Court decided that INEC has power to make guidelines for registration of parties but such guidelines must be in conformity with the Constitution. It is also beyond question that the decision of a political party as to who it will sponsor for a particular office cannot be challenged by way of election Petition in an Election Tribunal or through any other process in any other Court. In the case of **Onuoha v Okafor**²⁹ the Supreme Court per **Irikefe, JSC** observed as follows -

"The matter in controversy in the appeal is whether a Court has jurisdiction to entertain a claim whereby it can compel a political party to sponsor one candidate in preference for another candidate of the self-same political party. If the Court could do this, it would in effect be managing the political party for the members thereof. The issue of who should be a candidate of a given political party of any election is clearly a political one, to be determined by the rules and constitution of the said party. It is thus a domestic issue and not such as would be justiciable in a Court of Law."
(Italics mine)

This position is only as far as nomination of a candidate by a political party is concerned; it is a different kettle of fish on the issue of substitution of a candidate already nominated by the party. The Supreme Court clarified this issue in its recent decision in the case of Senator **H. Ehinlanwo V. Chief O. Oke & 2 ors**¹⁰, wherein **Onnoghen, JSC** said -

"The parties agree that the law still remains that the Courts do not interfere in the affairs of political parties and that matters raising political questions as to how a political party should be run or who should be its candidate at an election is strictly a matter within the exclusive jurisdiction of the political parties, which the Courts lack the jurisdiction to interfere. The position was stated clearly by this Court in **Onuoha v Okafor** supra thus -

"Sponsorship -- is not a right guaranteed to the members of NPP alone under the party's constitution or the 1979 Constitution or under any statute or common law. --Nowhere in the 1979 Constitution is a right to sponsorship by the NPP guaranteed to the members of the party .--".

It is therefore the law that a political party --has the unfettered right to nominate or sponsor a candidate it likes for any election and the Courts have no jurisdiction to enquire into that issue except in circumstances as decided in the case of **Ugwu v. Ararume** and the provisions of Section 34 (2) of the Electoral Act 2006. The above exception has to do with substitution of a candidate already nominated and submitted to INEC 120 days to the election and the political party intending the change or substitution of the nominated candidate must give cogent and verifiable reasons before the change or substitution can be effected. -- Where no cogent and verifiable reason(s) is/are given by the political party concerned, the substitution or change of candidate cannot be effected and the original candidate presented to INEC by the political party in accordance with the law remains the candidate --".

Onnoghen, JSC concluded as follows on the issue of nomination -

" The name of the Appellant may have gotten into that list by dubious means but that is not the issue before the Court --You cannot say that it really was not the intention of the 2nd Respondent to sponsor the Appellant who did not win the primaries in place of the 1st Respondent who did as it is within the powers of the 2nd Respondent to determine the candidate for an election --Once the 2nd Respondent submitted the name of the Appellant, that is the end of the matter as the Court is without jurisdiction to inquire as to how the Appellant made the list. The jurisdiction of the Court is only activated when the party seeks to change or substitute the candidate. It is however unfortunate that a winner of the primaries-- was prevented from being submitted as candidate for the election in a democracy while the man who lost became the sponsored candidate. There is nothing to be

done about that --This case presents the stark realities of the Nigerian situation particularly as it relates to the attitude of the political class which sees election into any position as a matter of life and death and is consequently ready to do anything possible to attain the ambition. The Appellant in this case, a Distinguished Senator, simply exploited the state of the relevant law to his advantage irrespective of the fact that he lost the primary election and his appeal against same was refused by the Peoples Democratic Party (PDP)".

Obviously, I cannot conclude this paper without touching on the decision of the Supreme Court in **Amaechi V. INEC & ors**³¹. It speaks for itself and I will merely reproduce **Oguntade, JSC's** reasoning there, as follow-

"The political parties in Nigeria are the creation of the Constitution. They therefore have an important stake in flying high and loftily the banner of the rule of law. In this case, the PDP did not live up to that standard. It did everything possible to subvert the rule of law, frustrate Amaechi and hold the Court before the general public as supine and irrelevant. Sadly, INEC and Omehia also did the same. In relation to Ararume, the message sent to the general public translated into saying that the PDP was not bound to obey the Judgment of the Court. The PDP by publicly announcing that it had no candidate for Imo State Governorship election clearly destroyed the efficacy of the Judgment in favour of Ararume given by this Court in order to destroy his chances at the election. In relation to Amaechi's case; the message to the public was that whatever Judgment the Court gave was irrelevant. Worse still, the PDP went before the Court below to ask that the appeal in Amaechi's case be struck out on the ground that with his expulsion, the Court had lost the jurisdiction to hear the case. Let me say for the avoidance of doubt that the expulsion of Amaechi from the PDP at the time when his appeal was pending before the Court below was unlawful and amounts to a calculated attempt to undermine judicial authority. --The reliance on the plainly contemptuous conduct of PDP in expelling Amaechi as a basis to deny the Court below the jurisdiction to hear his appeal is particularly alarming -- Remarkably and perhaps unexpectedly, the Court below did not react as it should in punishing this behaviour of the PDP. More shockingly, the Court below struck out Amaechi's appeal on the ground that he had been expelled from PDP during the pendency of his appeal. And when this Court, following an appeal by Amaechi against the order striking out his appeal, ordered that the appeal be heard expeditiously, the Court below at the behest of Omehia's counsel, supported by INEC's and PDP's counsel, concluded that the appeal be heard expeditiously needed further clarification before it could be obeyed. These occurrences needlessly brought the administration of justice to disrepute and I am greatly alarmed by these developments. The results of this calculated and improper

behaviour was that the Respondents ensured that the elections for the Governorship office in Rivers State were held and Omehia sworn in as Governor before Amaechi's appeal was heard. Before us in this appeal, the Respondents who had improperly prevented the expeditious hearing of the appeal argued that this Court has no jurisdiction on the ground that elections had been held and further that because Omehia has been sworn in as Governor of Rivers State, he now enjoys immunity from civil suits. In other words, they relied on their own wrongdoing to oust the jurisdiction of this Court. This Court 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 deserves. The powers of the Court are derived from the Constitution not at the sufferance or generosity of any other arm of the Government of Nigeria. The Judiciary like all citizens of this Country cannot be a passive on-looker when any person attempts to subvert the administration of justice and will not hesitate to use the powers available to it to do justice in the cases before it".

There is no question that our law, including our judicial decisions, particularly those emanating from the Supreme Court, embodies policy judgments and has policy consequences. The choice of interests to be protected and of policies to be promoted or effectuated is apparent in many of these decisions. It may be argued that the balancing of interests or weighing of policies was not a conscious deliberative process, but the case of **Amaechi V. INEC** is a clear testimony of the power of the Supreme Court; it is the final Court and would be regarded as a toothless bulldog if it did not have that added edge of a Court of Policy with powers to make consequential orders that will ensure justice.

Another volatile issue that has been burning up the pages of newspapers and is yet to be pronounced upon by the Supreme Court is the "re-run elections and tenure controversy". The issue was the subject of Thisday Newspaper's editorial of 6th of August 2008, and it reads -

"Several gray areas of the 1999 Constitution and the Electoral Act continue to threaten the nation's political stability, good governance and administrative accountability. One of such gray areas is Section 180 (1) of the Constitution -- Ordinarily, this provision should not be the subject of any controversy -- But this rather innocuous provision has assumed a ridiculous dimension since the Supreme Court decided in the Peter Obi vs. INEC case that Obi's tenure should be from March 17th 2006 when he took office as Anambra State Governor, three clear years after his opponent in the 2003 Governorship election, Dr. Chris Ngige was said to have been wrongly sworn in. Since then, many sitting Governors whose elections were voided but who have won the ordered re-run, now seem to have indirectly obtained tenure extension --The issue at stake here is two-pronged. One is based on strict legal

interpretation of the law while the other has to do with the morality of its application. In strict legal sense, a tenure of office starts on the swearing in date. But it is the same law that limits a Governor's term of office to four years. In that case, is it morally or even legally justified for a governor who, having already spent two years in office has his election cancelled only to win a re-run poll, to now insist on beginning a fresh tenure from the day of his second oath of office? The case of Obi, which now appears to provide the precedence on which the "fresh mandate" agitators are basing their argument, is clear and it is in order. But the case of Governors, who have spent some time in office before their election were invalidated and are now claiming a fresh mandate after winning the re-run, is simply laughable as it is one of the manifestations of the selfish application of an otherwise well-meaning provision of the Constitution. It is unfortunate that a Governor whose election was cancelled on the grounds of malpractice would be unwittingly rewarded by a virtual tenure extension after winning the re-run polls".

In my view, this controversy remains speculation until pronounced upon.

Conclusion

Democracy and lawlessness have nothing in common and never have had anything in common. In fact, it is other forms of government that can be associated with disorder and absence of due process. Democracy is recognition of a right to be part and parcel of governance, to perform duties and enjoy rights: with the awareness that you're right to do what you want ends where my nose begins.

-Prince Tony Momoh³² -

Litigation has been identified as one of the key means of protecting and enforcing the rights of individual. No other institution of the State is bestowed with the duty but the Courts and other ancillary institutions. Most of the monumental achievement of the human right community the world over has been achieved through the Courts. Sadly, the fact that quite a number of the citizenry are ignorant of the law is the reason for many of the pitfalls that drag us back from achieving true democracy. No doubt, legal consciousness is the beginning of political awareness. Sometimes outsiders get to tell us what should be obvious to us. I will conclude my paper with the following comment by **John Campbell³³ -**

"Nigerians are among the most resourceful, talented, engaging, dynamic people on this planet. I am persuaded that Nigeria will secure the dividends of democracy. An independent judiciary that applies the law 'without fear or favour' must form the foundation of the edifice we call the Federal Republic of Nigeria. An electoral system that conducts 'free and fair' elections where the result will reflect the will of the

people must be the bedrock of 21st century Nigeria. That is why with rights come responsibilities; these are the core democratic values".

Thank you.