JUDICIALISATION OF POLITICS AS A THREAT TO POLITICAL SOVEREIGNTY: THE NIGERIAN EXPERIENCE*

Abstract
Experience has shown that economic and social development, political stability etc are concepts that have their bearing on peace and good governance which twin concepts in turn are engendered by free and fair elections. The problems of governance in the Nigerian state are multifaceted but above all, flawed electoral process is most prominent. By virtue of the principles of separation of powers, adjudicatory powers in the country have been vested on the Judiciary. In this work, the challenges, impact and solutions to problems arising from the judicialisation of the Nigerian polity are examined as much as can be undertaken within the context of this paper.

Keywords: Judiciary, Politics, Governance, Politicization, Judicialisation, Courts, corruption

1. Introduction

It has been canvassed strongly that because of variations in legal and political contexts, the role of the courts in politics in specific circumstances should be closely circumscribed[1]. Although there may be sufficient justification for judicial intervention to resolve significant political stalemates in democratic nations where government business are organized along the lines of the principle of separation of powers, unfortunately, in a country like Nigeria, the prevalence of corruption and prebendal politics[2] makes this a double-edged sword, requiring both caution and circumspection. The danger that would discourage judicialisation of politics in a country such as Nigeria is that it might become fuel for judicial corruption. Therefore, the idea of removing political questions from the courts, notwithstanding the difficulties and sufferings that may come with that, could be an important strategy to insulate the judiciary from exposure to corrupt practices. The judiciary saddled with the responsibility of leading the war against corruption in any nation stands the risk of becoming contaminated by the bug of corruption itself where it exposes itself to the influence of the political class without guard. Generally, it is election disputes, particularly allegations of rigged ballots, more than anything else, that engender judicial intervention in politics.

The involvement of courts in political cases is no longer as contentious as in the past. For example, in *Baker v. Carr*,[3] the famous U.S. case on political questions, most of the factors offered to explain when litigation implicates political questions pertained to how rendering a judicial decision in such cases would antagonise the principles of separation of powers. Among those factors are (1) that there exists a textually demonstrable commitment of the issue in question to a co-ordinate political department, (2) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion, (3) the impossibility of a court's undertaking independent resolution without expressing lack of respect due to co-ordinate branches of government, and (4) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[4] Clearly, these considerations, however relevant they may have been in the past, have been overtaken by the new constitutionalism and have ceased to burden the power of courts over political questions. In fact, what has happened points to an irreversible demise of the political question doctrine in constitutional theory.[5]

With the apparent blurring of such neat demarcations of governmental functions and the progressive allocation of more powers to the courts in the formulation of government policies in most jurisdictions across the world, the anxiety over the involvement of courts in political controversies has subsided to a reasonable extent. Rather, for a variety of reasons that includes the argument on convenience, the courts are being used to resolve some of the most significant political dilemmas that a society can face, particularly, pronouncing the outcome of a presidential and other elections.[6], In other climes outside Nigeria the courts have been invited to resolve such questions as

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[1]B. Ugochukwu: *The Pathology of Judicialization; Politics, Corruption and the Courts in Nigeria. The Law and Development Review*, Berkeley Electronic Press, (2011): Vol. 4: No. 3, Article 4. available at http://www.bepress.com/ldr/vol14/iss3/art4

[2] R. A. Joseph: *Class, State and Prebendal Politics in Nigeria in* P. Lewis (ed.), *Africa: Dilemmas of Development and Change* (Colorado: Westview Press, 1998), p. 44-59.

[3](1962) 369 U.S. 186.

[4]B. Ugochukwu. Cited at note 5 at p. 101.

[5] R. Hirschl: Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend, 15 *Canada Journal of Law &Jurisprudence* (2002), 191, 193. 62 *The Law and Development Review, Vol. 4 [2011], Iss. 3, Art. 4 also available at*http://www.bepress.com/ldr/vol4/iss3/art4

[6]Hirschl cited at note 11 at p. 148.

ones bothering on districting and apportionment disputes,[7]defining the nation[8], increasing judicial scrutiny of core executive prerogatives.[9]

2. Judicialisation of Politics as Negativity

There is the danger in the judiciary being over used and being exposed to odium in the process of taking decisions on thorny issues of politics and governance that would affect the citizens adversely which decisions have their roots in the province of the executive arm. The courts are applauded where they go along the path of public opinion in their decisions and are vilified where they differ from the flow of public opinion. Judicialisation of the polity is fraught with dangers to the extent that it drags the judiciary which ought to be the last institution to be reached in the political equation of every nation to the public square to undress itself in the full glare of the public. However, that the judiciary should become the beast of burden in such a situation seems to be the only credible alternative to anarchy and war. The situation that arose in Kenya after the declaration of President Uhuru Kenyetta as the winner of his second term bid as well as the outcome of successive Nigeria's Presidential elections ought to have thrown both nations into serious armed conflicts but for the availability of the judicial process which served to hold forth even for some time as tempers assuaged.[10] The situation in these two black nations is not far from the situation in other African nations. While the people of the West would carry their own protest with some measure of decorum for the sake preserving the institutional framework, it is not uncommon for anger and frustration from failed elections in Africa to lead to wars. These developments indicate that countries are less concerned about the possible negative implications of the judiciary's involvement in politically sensitive cases. Rather, the reactions recorded among the citizenry in many nations indicate even a more heightened acceptability of the involvement of courts in such politically contentious disputes.[11] Previous literature on this subject dwelt primarily on the justifications for overt political courts and the contextual issues that drive this rapidly expanding culture.[12] Some accounts deal with how political accountability in the form of elections pressure move political players to avoid decisions on politically divisive issues, allowing the courts to make such decisions instead.

It is a fact that judges in Nigeria nay Africa and some other jurisdictions are not elected by popular ballots and they do not have to face the electorates to secure or renew their mandates like politicians do and are therefore, immune from the political calculations that are inevitable when explosive issues bordering on pure politics are settled by politically exposed branches and officials rather than detached courts[13]. In the barest minimum of terms, Judges are not elected and may be in a better position to pronounce on matters that would affect the welfare or privileges hitherto enjoyed by the citizenry since they won't come back to the same citizenry, seeking for votes. At the same time, the view persists that court decisions are politically constructed and that the judiciary only uses legal language, or what Stone Sweet and Matthews call the 'rhetorics of justification,[14]' to cover its political agenda.[15]Such views do not see contemporary judicialisation of politics as anything out of the ordinary and are therefore clearly unimpressed by the undue homage that current legal scholarship pays to its development. As Balkin asserts, the U.S. Supreme Court is seen by political scientists as being part of the national political

[7]Hirschl cited at note 11 at p.73.

[8]*Ibid*.

[9]*Ibid*.

[10] The atmosphere of obvious threat of political crises that preceded the Presidential election of 2019 that brought President Muhammad Buhari into office for the second term was so much that even foreign observers were threatened with death by the supporters of the incumbent President should those observers insist on standing between the president and his bid to win a second term through a manipulated election.

[11]M. C. Dorf and S. Issacharoff: 'Can Process Theory Constrain Courts?' 72 *University of Colorado Law Review* (2001), 923.

[12] Reference is made here to the contentious opposing views espoused in the rights and structure debates as justifications for judicialisation of politics. Much credit has been ascribed to great Scholars as Professor Richard L. Hasen of the Structuralist ideology on the one hand and Professor Issacharoff and Pildes on the other hand for their works on the claim that it is only on the basis of the need to pronounce on and protect individual rights that can judicial interference on political decisions can be justified. Guy Uriel, writing from the same background of judicialisation of politics in the U.S.A, found no justification for judicialisation of politic in the Rights and Structure debate but rather….

[13]D. L. Horowitz: The Courts as Guardians of the Public Interest, 37 *Public Administration Review* (1977), 148. ('Judicial opinions state results in terms of reasons.

[14]A. S. Sweet and J. Matthews: *Proportionality Balancing and Global Constitutionalism*, 47 *Columbia Journal of Transnational Law* (2008), 82.

[15]Hirschl, *cited at* note 11, p. 24 ('Taking the notion of courts as political institutions even further, recent political science scholarship suggests that judicial review is often politically constructed, and that elected officials may have political and policy reasons for empowering constitutional courts').

coalition[16]. He is joined by those who believe the courts should stop acting politically and exit from all political arenas[17].

However, irrespective of the seeming wide acceptability of the incursion of the court into decisions that are of obvious political nature, a different worry was still expressed concerning this somewhat legitimate 'judicial oversight of democratic politics[18]'Judicial mediation is undoubtedly pertinent in democratic politics given the tendency of majoritarian impulses to stultify the effective political competition that generates genuine political choices[19]. The results that could be achieved when the political arrangement of a polity is subjected to judicial scrutiny may vary across jurisdictions. A strong, independent judiciary, operating with substantial institutional legitimacy may be suited for such political exertions. On the other hand, a dependent and weak judiciary, struggling with its image, risks losing what little reputation it has by taking political cases. As H. Yusuf asserts, 'judicialisation of politics can threaten judicial integrity itself[20]. The situation of the judiciary in Nigeria today is a case in point, where the citizenry views the judiciary as the greatest enemy of society for the prevalent seemingly unacceptable decisions handed down by the courts in disputed elections, the case of the recent Governorship election appeals in Imo State, Bayelsa State, Kano State as well as the Presidential election that ushered President Muhammadu Buhari into office for a second term as the President of the Federal Republic of Nigeria, just to mention but a few have really battered the image of the Nigerian judiciary. How long the country's judiciary would survive and discharge its constitutional duties in Nigeria with such weight of moral burden is better left to guesses.

3. Judicial Corruption and Judicialisation of Politics

It must be understood as one assertion, capable of being contested, that the concern about courts becoming enmeshed in political cases may be redundant in certain jurisdictions where the courts have sufficient institutional legitimacy or 'political capital[21]' to see them through situations in which they may rightly be accused of acting corruptly. For example, the U.S. Supreme Court decision in *Bush v. Gore*[22]had many commentators seething with indignation, yet while analyzing the decision's possible impact on the institutional legitimacy of the court, Balkin, though admitting that in the short term the court's legitimacy could be in play, still concludes that in the long run the decision will make little difference regarding the court's legitimacy in the eyes of the American public[23].Such legitimacy, enough to shield the courts through waves of public denunciations, is not present everywhere, and definitely not in Nigeria. Courts in regimes of such low legitimacy, such as Nigeria presently, would therefore, do well to avoid being exposed to allegations of corruption in the determination of those political cases that would further erode their stock of political capital, which is already in dire straits. Dyzenhaus captures this dilemma in detail, especially for judges in a transition regime, when he posits that 'judges in a transition are often faced with deciding deeply political matters, which force the issue of their authority and their independence to the surface.'[24]

The issue of legitimacy is crucial to discussions about how exposure to political cases affects the credibility of judges or the judiciary as an institution. In jurisdictions where the judiciary as an institution has high public legitimacy it is rarely linked to corruption, political or otherwise. The legitimacy that the institution enjoys ensures that claims or allegations to the contrary are either quickly counteracted or discountenanced. The same cannot be said of jurisdictions where the legitimacy of the courts is low. Here claims and allegations of corruption, real or imagined, soon acquire a life of their own. The absence of legitimacy makes it easier for those claims and

[16]J.M. Balkin: What Brown Teaches Us about Constitutional Theory, 90 *Virginia Law Review* (2004), 1538; R.A. Dahl, Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, 6 *Journal of Public Law* (1957), 279 ('To consider the Supreme Court of the United States strictly as a legal institution is to underestimate its significance in the American political system. For it is a political institution, an institution, that is to say, for arriving at decisions on controversial questions of national policy.').

[17]*Colegrove v. Green*, [1945] 328 U.S. 549 at 553-554 (According to Justice Frankfurter, 'It is hostile to a democratic system to involve the judiciary in the politics of the people… courts ought not to enter this political thicket); see also K.I. Butler, 'Reapportionment, the Courts, and the Voting Rights Act: A Resegregation of the Political Process?', *56 University of Colorado Law Review* (1984-1985), 1.

[18]R.H. Pildes: The Supreme Court 2003 Term Forward: The Constitutionalization of Democratic Politics, 118 *Harvard Law Review* 29 (2004 – 2005), 41.

[19]*Ibid*., at p; 43

[20]H. Yusuf: Democratic Transition, Judicial Accountability and Judicialization of Politics in Africa: The Nigerian Experience, 50 *International Journal of Law & Management* (2008), 253.

[21]E. Chemerinsky: The Supreme Court, Public Opinion and the Role of the Academic Commentator, *South Texas Law Review* (1999), 948 B Ugochukwu cited at note 5

[22]*Bush v. Gore*, *cited at 3* note 183.

[23]J.M. Balkin, *cited at* note 22, p. 1450

[24]D. Dyzenhaus: Judicial Independence, Transitional Justice and the Rule of Law, 10 *Otago Law Review* (2003), 347-348.

allegations to become entrenched in public consciousness from where they eat away at the very foundation of that institution's credibility.[25]

The judiciary must be a temple of justice, a beacon of credibility, and repository of integrity. No matter how well structured, properly staffed, and adequately funded the judiciary is, and no matter how good the rules governing its operation and practice are, once its actors are not regarded as credible men and women of integrity, the Judiciary can hardly act as the guardian of democracy in any nation, let alone operate creditably as an honest enforcer of rights and a just redresser of wrongs. The independence of the judiciary is universally acknowledged as one of the most defining and definitive features of a functional democracy.[26]

Unfortunately, one of the greatest contributors to the situation of the Nigerian judiciary today is the flawed approach to judicial appointments. A situation where less than the best hands are appointed to the positions on the bench for whatever reasons would not do the nation any good. Controversy over judicial appointments and the politicization of the judiciary are inevitable side effects of the erosion of our national ethos and values. Today, the 'system' appoints its own persons that are considered malleable and ready to protect the 'system'. In this regards, judicial appointments are no longer governed by merit and desirable attributes found in the persons appointed. Rather they are considered investments on perceived cronies who would have as their priority, the protection of the 'system'. Nepotism and ethnic considerations are largely critical factors in the consideration of persons to be appointed on the Bench in Nigeria.

The result of this method of standing on a wrong pedestal is that even at the highest level of Nigeria's judiciary, apart from cases of personal nature, judicial decisions are governed by tribal, religious and political interests among others. It was for this reason that allegations of ethnic cleansing could be heard in the approach of the Buhari administration to what he terms anti-corruption fight in the judiciary. Try as hard as anyone would, to wish away such mundane arguments, the hard facts are there for everyone to see. The fact that most of the judges humiliated out of their offices, even on temporary basis or the ones that survived the attempts to remove them from office without justification in the President Buhari's anti-corruption campaign are of Southern Nigerian origin or of the Christian religion and the fact that till date no conviction of any of such judges were secured seems to justify such allegations. Indeed, not much was offered at their trials as evidence of their alleged corruption. It becomes doubtful in the first place whether or not they were shaken for good reasons. A Chief Justice of Nigeria had accordingly declared: 'In light of the challenges that the Nigerian judiciary grapples with, there is no disputing the fact that, as it stands today, it appears that the society we serve is not entirely satisfied with our performance'.[27] Claims of ethnic lopsidedness in the composition of the Federal Judiciary, serious allegation of corruption, ineptitude, laziness, incompetence against judicial officers, charges of abuse of office even against the Supreme Court judges in the discharge of their judicial functions, some of them stemming from want of judicial independence are rife.

It must be noted that the absence of vibrant and courageous Bar Association is also a contributory factor to the present unacceptable situation of the judiciary. It is a courageous Bar that ought to provide protection to the judiciary by insisting on the rule of law even in the battle against corruption in the judiciary. The nature of the role of the judiciary does not allow for a market-place approach in detecting corruption and punishing the offenders. The judicial institution is a fragile one as the citizenry would not feel confident to appear before a judge pronounced corrupt to make their case. The National Judicial Council is empowered to handle the cases of corrupt judicial officers, where the need be, that institution should be strengthened to carry out its role clinically. The Nigerian Bar Association has gone to sleep while the nation burns. Obviously, the leadership of that body is not free from the same allegations of corruption that has weighed the judiciary down, looking at the way some very senior members of the Bar are now used to rushing to television stations to defend indefensible actions of the Government of the day just for some expected patronages. It has got to an extent that the people of the country

[25] That was the view expressed by B. Ugochukwu, cited by B. Ugochukwu *op.cit* at note 5, p. 99, referring to the comments of a Justice of the Nigerian Court of Appeal, Olu Adekeye, that allegations of bribery of judges in Nigeria are often generalised and given wide publicity even when those who make those allegations provide no proof of them. The judge therefore urged Nigerians 'to be slow to accept sensational rumours of endemic corruption in its judiciary in order not to tarnish the reputation of its otherwise credible personnel.'

[26]Ogunye cited by Aver & Orban: *Judiciary and Democracy, Issues in Contemporary Nigerian Society, Global Journal of Arts, Humanities and Social Sciences*, European Centre for Research Training and Development UK, March 2014 Vol. 2 No. 1, p 92.

[27] D. Musdapher, CJN, cited by Aver & Orban: Judiciary and Democracy, Issues in Contemporary Nigerian Society, *Global Journal of Arts, Humanities and Social Sciences*, European Centre for Research Training and Development UK, March 2014 Vol. 2 No. 1, p 95.

have come to hate and accuse the Lawyers in Nigeria of ineptitude in the face of societal decay the same way they blame the judiciary.

It is equally, crucial to understand the peculiar nature of politics in Nigeria because of the light that such understanding would shine on the dangers of allowing the courts to become entangled in Nigeria's politics. B. Ugochukwu has referred to Nigeria's prebendal politics which according to him provides oxygen for corruption[28]. Richard Joseph describes prebendalism as a pattern of political behavior that rests on the justifying principle that state offices should be competed for and then utilized for the personal benefit of officeholders as well as for their reference or support group, and which relegates the official public purpose of these offices to a secondary concern[29]. The political field is never level for various reasons, including the inequality of financial means and the unusual impact that the power of incumbency has on electoral contests. Every so often, many disadvantaged participants are left with no alternatives than to rush to the courts for redress where they feel cheated during elections. The danger here is that politicians generally carry their manipulative propensities and their high-level venalities to the courts as well.

Whatever role the Nigerian judiciary played in electoral politics remained well in the background until the presidential election of 1979, which heralded the first return to civil rule since 1966 and the abdication of political power by the military. The part that the courts, particularly the Supreme Court, played in shaping the ultimate outcome of that election has remained controversial to this day. It was equally a harbinger of a more active involvement of the judiciary in subsequent elections, with mixed implications for the credibility of that institution. Events leading up to that election and the plain facts of the legal dispute involved have been well documented[30],yet the decision of the Supreme Court raised more questions than it answered, setting the pattern in the process for subsequent judicial somersaults in especially political cases. Moreover, Richard A. Joseph's summary fully captures its real implications. According to him, 'Before the Supreme Court actually met to consider the electoral appeal of Chief Awolowo, the Supreme Military Council announced the appointment of a new Chief Justice of the federation. The choice seemed satisfactory.

It is certain that beyond leaving the judiciary with a battered image arising from electoral adjudication which exposes the courts to avoidable corruptive practices, decisions rendered in cases where judicial officers were compromised are often not well considered and come back to haunt the political system. A court faced with the same facts in two different cases that arrives at two contradictory decisions has a mountain to climb in extricating itself from claims that it had been corrupted. The political system has an even harder job picking through a cluster of opposing judgments on similar facts[31]. The governorship results in Kebbi and Sokoto states in 2007 presented similar facts before the tribunals established in each state. Those tribunals reached the same verdict, while on appeal the Court of Appeal strangely came to two different verdicts.

In governorship election cases then[32], the Court of Appeal was the final court; no further appeals were possible after its verdict. As in all other common-law jurisdictions, Nigeria's legal system thrives relatively on the certainty of judicial precedents. Assuming that a lower tribunal is faced with a future situation that would require the application one of the two contradictory judgments of the Court of Appeal on the same facts, which one would such a tribunal choose? The dilemma is made more real given that the Court of Appeal did not indicate that it was departing from the earlier judgment, as required by the principles of judicial precedent.[33] However, no decision of the courts in Nigeria has been as ridiculous, inexplicable and opprobrious as the recent decision of the Supreme Court of Nigeria on the Governorship Election Appeal arising from the Governorship election held in Imo State on 9th March, 2019.

[28] B. Ugochukwu *cited at* note 5 at p. 52

[29] Richard Joseph: *Democracy and Prebendal Politics in Nigeria: The Rise and Fall of the Second Republic* (Cambridge: Cambridge University Press,1987), 8; Shaheen Mozaffar, Book Review of Democracy and Prebendal Politics in Nigeria: The Rise and Fall of the Second Republic by R. Joseph, 22 *International Journal of African History Studies* (1989), 500.

[30]R. A. Joseph: Democratization under Military Tutelage: Crisis and Consensus in the Nigerian 1979 Elections, 14 *Comparative Politics* (1981), 75.

[31] B. Ugochuwku, *cited at* note 5 at p. 201

[32] That law has been amended by Section 233 of the 1999 Constitution (as amended), making the Supreme Court the final court in matters of dispute concerning Governorship elections.

[33]This concern is discussed in greater detail by E. Essien, Conflicting Rationes Decidendi: The Dilemma of the Lower Courts in Nigeria, 12 *African Journal of International & Comparative Law* (2000), 23.

4. The Descent into Near Anarchy

The decision of the Supreme Court on the 14th day of January, 2020 with regards to the Imo State Gubernatorial election seems to be a complete deviation from Nigeria's electoral jurisprudence. It is trite that in Nigeria's electoral jurisprudence for the purpose of revalidation of votes already invalidated by electoral officials, it is imperative that witnesses must come from every polling unit from where the votes were purported to have emanated to lead evidence on the facts that those votes were lawfully cast by the voters at that polling unit. In this case where the Independent Electoral Commission cancelled those votes because according to the Commission election did not hold in most of those polling units and in the polling unit where election commenced, the process was aborted half way due to unbridled violence at those polling units. INEC joined issues with the petitioner and later appellant, Hope Uzodinma on these issues.

The Supreme Court shot itself on the foot and opened its doors wide to jesters and public ridicule when the court admitted the alleged results from the 388 Polling Units disputed by the petitioners and the INEC that conducted the election and already rejected by both the Election Tribunal and the Court of Appeal and used same to declare the candidate of the Ruling party as the winner of the disputed election. It is one of the great wonders of the world how the Supreme Court opened the big bags in which the result sheets were carried into the Election Tribunal by a Police Officer, counted the votes on the result sheets, Forms EC8A and added the entire votes to only the APC Candidate to get the final figure with which he was declared the winner of the election.

What is more perplexing is the fact that INEC produced a schedule of reasons why results were not produced from the 388 units by INEC staff on the Election Day. The law is settled as decided by the same Supreme Court in *Buhari v. INEC*[34]**;** that 'weight can hardly be attached to a document tendered in evidence by a witness who cannot or is not in a position to answer questions on the document. One of such persons the law identifies is the one who did not make the document. Such a person is adjudged in the eyes of the law as ignorant of the content of the document'. In the recent case of *Atiku Abubakar & Anor v. INEC & Ors*,[35]one of the major reasons why the Supreme Court refused to admit the results tendered by the appellants in respect of the disputed Polling Units, Registration Areas and Local Governments was that such results were tendered by persons other than the persons who made them or received them as agents at their place of origin.

In other words, it was the decision of the Apex Court that those results were 'dumped' on the court in negation of the Rules of Evidence that it is the duty of the person tendering a document to tie the document firmly and exclusively to the facts of his case to which the document relates. Where that fails, such documents are deemed to have been dumped on the court without any evidential value. It is not known from the judgment of the Supreme Court in the case of *Uzodimma v Ihedioha &Ors*[36] that anything has changed in relations to this principle of evidence in force in our courts or that anything has changed since the decision of the Apex Court in the case of *Atiku Abubakar & Anor. v INEC & Ors*.[37] The decision of the Supreme Court in this case has generated more questions than answers. Those questions for which there are no answers include the following:

a. Does the Supreme Court have powers to formulate and allocate votes as election results?
b. Were the said results certified by INEC as required by law?
c. Did Hope Uzodinma call 388 witnesses from the 388 witnesses from the 388 polling units to speak to the results to obviate the principle of dumping which the Supreme Court used against the PDP and her candidate, Atiku Abubakar, in the Presidential Appeal? Were the presiding officers and or party agents of the 388 polling units called to testify by Uzodinma/APC, who were the Petitioners?
d. Is the Supreme Court saying that all the votes from the alleged 388 polling units were for the APC alone in an election that was contested by over 70 candidates?

Of great interest and a fact which the Supreme Could not provide an answer till date is the fact that

at the said election the total number of accredited voters stood at	823,743
Total Valid Votes cast at the election stood at	739,485
Total cancelled votes stood at	25,130
Total valid votes stood at	714,355

But at the Supreme Court, the judgment of court reflects that the total valid votes have increased to 961,083. This accounts for 159,340 votes in excess of the total accredited votes which was 823,743 at the close of polls on the Election Day. The question is: can the Supreme Court sit in Abuja on January, 14, 2020 to increase the total

[34] (2008)19NWLR (pt.1120)246.
[35](unreported) judgment delivered by the Supreme Court of Nigeria on 13th November 2019 in Appeal Number SC1211/2019,
[36](unreported) judgment delivered by the Supreme Court of Nigeria on 14th January, 2020 in Appeal Number SC1462/2019,
[37]*Cited at* note 48.

number of accredited voters in election held in Imo State on March 9, 2019? Is there any law, which permits the Supreme Court or anyone else for that matter, to unilaterally increase the total accredited voters by any margin after the accreditation and or the election has been concluded? It is one of the cardinal provisions of the Electoral Act, 2010 at Section 53 (1) that: 'No voter shall vote for more than one candidate or record more than one vote in favour of any candidate at any one election'. (2) Where the votes cast at an election in any polling unit exceed the number of registered voters in that polling unit, the result of the election for that polling unit shall be declared void by the Commission and another election may be conducted at a date to be fixed by the Commission where the result at that polling unit affects the overall result in the Constituency. (3) Where an election is nullified in accordance with subsection (2) of this section, there shall be no return for the election until another poll has taken place in the affected area.

It is not in doubt that the judgment of the Supreme Court in the Imo Governorship Election is an affront on the foregoing provisions of the Electoral Act, 2010 (as amended), particularly, as no attempt was made at all by the Apex Court to reconcile or explain away the over voting that appeared on the face of the court's declaration of result of the Imo Governorship Election. No judgment of court has attracted worldwide condemnation in the recent times than the judgment of the Supreme Court in the Imo Gubernatorial election. Even the International Community was attracted and therefore, became interested in the whole saga. The People's Democratic Party, the political party that sponsored the candidate that won the overturned election led its candidate to apply to the Supreme Court to review its judgment with a view to setting it aside for the obvious errors manifest on the face of the judgment.

While the Imo State judgment was raising dust, the Supreme Court annulled the nomination and election of the Governorship candidate of the APC in Bayelsa State on the ground that his running mate who was to be the Deputy Governor presented fake certificates to the Electoral Commission to secure his nomination. The public outrage over the decision of the Supreme Court in Bayelsa State are not so much for the nullification of the election of the APC candidate but more from the declaration of the candidate of the PDP as the winner of the election where he got the majority of the votes cast at the election but failed to win 25% of the votes cast in two third of the local government areas in the state as required by the provisions of section 179 (2)(a) and (b) of 1999 Constitution, as amended. The ruling party, the APC also applied to the apex court to review and set aside its judgment as according to the political party and its candidate, the said judgment was also delivered *per incuriam.*

Political tension reached its highest level in Nigeria while the country waited for the Supreme Court to undertake the reviews prayed for. Meanwhile, an avalanche of applications started pouring into the Supreme Court, seeking review of its earlier judgments. The Supreme Court has in the past reviewed its judgments but not the kind of cases that it was being called upon to review. In a most dramatic way, the Supreme Court descended on the APC and its candidate, not even sparing the Senior Counsel that led the team of Lawyers that appeared to argue the application. The court maintained the same attitude in the case of the of Imo State Governorship election save that the court never descended on the Lawyers that led the PDP to court and the refusal to review the decision in Imo State was a split decision of 6 Justices of that court as against the dissenting judgment of one of their own, Nweze, JSC. The Supreme Court maintained its infallibility and finality stance by refusing to entertain the application to review the judgment on Imo State election appeal.

The decision of the Supreme Court, refusing to re-open the Imo State election appeal may work injustice on the applicant, Ihedioha and the people of Imo State as well as introduce some uncertainties into Nigeria's electoral jurisprudence. It would, as stated by Nweze, JSC hunt our electoral jurisprudence for a long time to come because it overlooked the law and existing judicial precedent on many important aspects of our electoral laws such as the effect of over voting, dumping of documents in court, geographical spread in elections into offices of the executive arm of government, etc. However, it is submitted that the Supreme Court, having erred in declaring Hope Uzodimma the winner of that election in its earlier judgment, the court had no option than to remain in that position for the sake of preserving the entire legal system. Being the apex court in the land, the Supreme Court would have opened a floodgate that would have destroyed the entire legal system if it accepted the invitation to review and set aside the said judgment.

There would have been no end to agitations to review judgments in Nigeria which occasion would also have affected the appellate arrangements in the lower courts. Litigants would have preferred to apply for review than to appeal against judgments. Momentarily, the Nigeria judiciary seems to have escaped the trap of self-destruction it set for itself but for how long can we be that lucky. What we have today in Nigeria is a situation where the votes of the electorates on the Election Day do not count as the ultimate decision of who takes the office contested would lie in judicial decisions. What happens with the ballot on the day of election becomes of little or no significance. There are two or more important consequences of this Nigerian brand of judicialisation of politics.

First and foremost, it would lead to a tyranny of the judiciary which would manifest in the election of the worst crop of leaders have ever been seen anywhere in the world to hold public offices as is presently the case with Nigeria. Most of the said elected leaders were never voted for by the people they claim to be representing but were rather imposed on those positions after the courts or tribunals had removed the legitimate person voted by the people. The person imposed by the court may have (as it is usually the case), shunned aggressive electioneering campaigns before the election that would have sold him to the electorates, knowing the game plan he had, i.e. to take victory at the election from the court.

5. The Implications of Judicialisation of Politics and Politicised Judiciary on Sovereignty in Nigeria

Democracy is underpinned by three essential components which are healthy competition among political parties, political participation by the populace in electing their leaders, and a credible electoral process. In a democracy, power and significant decisions in a society is distributed among the population which is carried out by the elected representatives of the people. Viable political parties and credible elections are essential components of a democracy. Electoral systems in civilised societies permit the co-existence of different units, tribes, nations and diverse schools of political ideologies and religious beliefs to live in peace and harmony by surrendering their rights to the people they have elected to govern and manage their resources for a given period of time.[38]An effective democracy and electoral system is founded upon the ability to hold free and fair elections, independent and effective electoral umpire, effective policing, and incorruptible and responsive judiciary.

The people's rejection of the outcome of conduct of an election and indeed the entire electoral process is seen in the volume of election petition that reach the courts and tribunals. Invariably, such volume would have depicted the confidence of the people in the judiciary. More often than not, it does not take time for the people to discover that such confidence is misplaced as it was not duly earned by the judiciary in the first place. The frustrated electorates may take to every available medium to criticize the electoral umpire and its travel partner, the judiciary. However, the anger and frustration does not end there as it would definitely surface at the next general election in the form of desperation on the part of the candidates to win at all cost, a desperation that would see the candidates ready to do all manner of things to win the election and be returned rather than go through the process of court again. No wonder each successive election in Nigeria seem to be worse than the one it succeeded in terms of wanton abuse of all known principles of free and fair election.

6. Conclusion

For the avoidance of doubt, power in a democratic arrangement belongs to the people and is given by the people to any person in a free and fair election. Resort to the court to take political power is dangerous as it is capable of engendering political apathy in the citizenry and rendering elections irrelevant. Guided or minimal judicial intervention in politics is acceptable as an inescapable means of conflict resolution to avoid full blown conflicts that may destroy lives and property. For the judiciary to dominate the political landscape by becoming the determinant of who gets into what political offices should be resisted as unacceptable in a modern democracy. A public officer who lost election on the day of election and later found himself in the same public office he contested for by the corrupt favour of the court or tribunal, owes no allegiance to the electorates because his mandate did not come from them in the first place. He may not be amenable to accountability and may end up doing much violence to the institution of government and the electorates whom he remembers now and again as having rejected him at the ballots. The legislature has got so much to do to control judicial functions by insisting that proper persons are appointed to sit in judicial offices. Ultimately, where the judiciary delivers judgment that is not agreeable to the law, it may find justification in a loophole that exists in the law. The solution to this would be found in a legislative action amending the law. In that case the effect of that amendment will have to wait for a future dispute arising on that subject matter to reflect the amendment. In extreme situations where the judgment is manifestly offensive to the law that ought to sustain it, the legislature can terminate the validity of the judgment through a legislation targeted at the judgment solely (*ad hominen* legislation). The legislature was elected by the people to represent them. A tyranny of the legislature may be more tolerable than a tyranny of the judiciary. It is ultimately better to strengthen the Electoral institutions entrusted with the conduct of elections in the country through legislative actions than to allow such institutions to conduct flawed elections that are generally un-acceptable to the people which would open the floodgate to disputes and judicial interventions.

[38]O.O. Olarinmoye, 'Godfathers, Political Parties and Electoral Corruption in Nigeria' *African Journal of Political Science and International Relations* Vol. 2 (4), pp. 066-073, December 2008 Available online at http://www.academicjournals.org/AJPSIR