DISENFRANCHISEMENT AS AN ALBATROSS TO CREDIBLE ELECTORAL PROCESS□ □ □ □

Abstract
The right to vote otherwise known as the enfranchisement right is an inalienable right which should be sparingly taken away from citizens. The right has root in ancient socio-legal philosophy and has even been espoused by international and regional legal instruments. Some judicial authorities in several jurisdictions have also given judicial imprimatur to enfranchisement rights. Nonetheless, many jurisdictions justify the exclusion of certain persons from participation in the electoral process, while interpretation and application of laws create instances of disenfranchisement. The paper discusses the nature and scope of disenfranchisement, classes of disenfranchisement and justifications adopted by disenfranchisement protagonists. In conclusion it is advanced in the paper that disenfranchising a citizen is as condemnable as the denial of the other rights that are fundamental to the existence of persons in any civilized society.

Keywords: *Disenfranchisement, Albatross, Credible Electoral Process, Nigeria*

1. Introduction

The enfranchisement right is at the base of electoral processes. It is one of the methods for gauging the compliance by a state with democratic electoral principles. It refers to the criteria that legal frameworks impose on persons to be able to exercise their right to vote, often through prior registration.[1] Formal constitutional or legal recognition of the right and opportunity to vote is common to democratic states, and plays both a substantive and a confidence-building role. Voting is regarded as a fundamental right because it is preservative of all rights and any restriction on the right to vote strikes at the heart of representative government. Without political enfranchisement, politicians have little political incentive to act in accordance with the political interests of the citizenry. The right and opportunity to vote is guaranteed at universal, regional and national levels through respective legal instruments, though often subject to certain qualifications, such as citizenship, age and residency requirements. At the universal level, the Universal Declaration on Human Rights (UNDHR) 1948 provides that everyone has the right to take part in the government of his country, directly or through freely chosen representatives.[2] It further provided that the will of the people shall be the basis of the authority of government and the will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage.[3] Universally also, the International Covenant on Civil and Political Rights (ICCPR)[4] provides that every citizen shall have the right and the opportunity and without unreasonable restrictions to participate in elections. At the regional level, the African Charter on Human and Peoples' Rights 1981 which was domesticated by Nigeria provides that 'every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.[5] Further provisions that guarantee voters' rights are contained in Articles 13(1) and 20 of the Charter. Further Principles enunciated by the Declaration of African Union Principles Governing Democratic Elections in Africa[6] provided that every citizen has the right to fully participate in the electoral processes of the country, including the right to vote or be voted for, according to the laws of the country and as guaranteed by the Constitution, without any kind of discrimination. The African Charter on Democracy, Elections and Governance which was adopted in 2007 but came into force in February 2012 recognised popular participation through universal suffrage as the inalienable right of the people.[7]

At the domestic level, the Nigerian Constitution, 1999 (as amended) made inelegant and unnecessarily staggered provisions on eligibility to vote in different elections. It separately provided for eligibility for local government elections in section 7(4) where it provided that: '[T]he Government of a State shall ensure that every person who is entitled to vote or be voted for at an election to House of Assembly shall have the right to vote or be voted for at an election to a local government council'. For immediate clarity, the requirement for voting in elections to the House of Assembly is that 'every citizen of Nigeria, who has attained the age of eighteen years residing in Nigeria at the

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[1] International Obligations for Elections *Guidelines for Legal Frameworks (eds.) Domenico Tuccinardi and ors***,** International Institute for Democracy and Electoral Assistance 2014.
[2] Article 21(1).
[3] ibid article 21(3).
[4] Article 25.
[5] Article 3.
[6] 38th Ordinary Session of the Organization of African Unity on 8th July 2002
[7] Article 4(2).

time of the registration of voters for purposes of election to any legislative house, shall be entitled to be registered as a voter for that election'.[8] For elections to the National Assembly, the Constitution provides in exactly the same words that every citizen of Nigeria, who has attained the age of eighteen years 'residing in Nigeria at the time of the registration of voters for purposes of election to a legislative house, shall be entitled to be registered as a voter for that election.'[9] To make the eligibility test applicable to elections to executive offices, the Constitution provides that qualification for voting into legislative houses applies to president[10] while the same eligibility requirements were repeated in exactly the same words for voting for persons contesting for the position of Governor.[11] With greatest respect for the drafters of the 1999 Constitution, it would have been sufficient to state the voter eligibility requirements in one section since the same applies to all elections. This was the style adopted in the Electoral Act which stated the generally applicable eligibility requirement for qualifying to be registered as a voter.[12] The importance of the right to vote has also been given judicial imprimatur. In *Haig v Canada (Chief Electoral Officer)*[13], the Court held that:

> All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist. …. It is a proud badge of freedom. While the …Charter of Rights and Freedom guarantees certain electoral rights, the right to vote is generally granted and defined by statute. That statutory right is so fundamental that a broad and liberal interpretation must be given to it. Every reasonable effort should be taken to guard against disenfranchisement.

In South Africa, the Constitutional Court in *August v. Electoral Commission* (South Africa) [14] said that the universality of the franchise is important not only for nationhood and democracy. Quite literally, it says that everybody counts. The Supreme Court of Nigeria in *Amaechi v INEC*[15] firmly stated that *'democracy is based on every individual's enjoyment of rights of which even the majority cannot deny him simply because the power of the majority is in its hands.'* Going further, Musdapher JSC quoted with approval the work of Roland Dworkin in 'A Bill of Rights for Britain':

> True democracy is not just statistical democracy, in which anything a majority or plurality wants is legitimate for that reason, but communal democracy in which majority decision is legitimate only when it is a majority decision within a community of equals. That means not only that everyone must be allowed to participate in politics as an equal through the vote. Each individual person must be guaranteed fundamental civil and political rights no combination of other citizens can take away, no matter how numerous they are or how much they despise his or her race or morals or way of life,'

2. Nature and Scope of Disenfranchisement

Disenfranchisement is the act of taking away the right to vote in public elections from a citizen or class of citizens.'[16] It therefore means the deprivation of the 'power, opportunity, especially to vote, from a person or group. Disenfranchisement may also occur where the votes of the electorate do not count or where the winner of an election is determined through any other means apart from the votes of the voters. Disenfranchisement may affect an individual, group, communities or races directly or indirectly. Direct disenfranchisement arises in the case of express ban placed on a person, a group or community prohibiting them from voting, being voted for or having their votes counted or being taken into account. Indirect disenfranchisement manifests through prescription of certain requirements or criteria that should be satisfied to be eligible to vote or voted for. Where such prescriptions impose unfair disadvantage to an individual, group or community or others, indirect disenfranchisement has occurred. Disenfranchisement is subtly or explicitly in existence in the electoral processes of many countries, even in the developed Western world. Variation abounds only in the extent or degree of the disenfranchisement.

Classes of Disenfranchisement

Disenfranchisement may be classified for the purpose of this article into statutory, Institutional and Judicial disenfranchisement.

[8] Constitution of the Federal Republic of Nigeria 1999 (as amended), s. 117(2).
[9] Ibid s.**77**(2).
[10] Ibid s. 132(5).
[11] Ibid, s. 178(5).
[12] Electoral 2010 (as amended), s 12.
[13] (1993) 2 SCR. 995.
[14] Case CCT 8/99, April 1, 1999, para. 17).
[15] (2008) 10 WRN 1.
[16] Bryan A. Garner (ed) *Black's Law Dictionary*, (Thomon West 2004) 501.

Statutory Disenfranchisement

Statutory disenfranchisement refers to disenfranchisement that arises from the insufficiency of legislative provisions. This may arise where the legislature fails to make provisions that relate to certain matters or affect the right of certain persons to vote. This may affect persons because of their age, place of residency, physical disability, and level of literacy.

Age of Voting

The Constitution[17] and the Electoral Act[18] preclude persons below the age of 18 years from registering as voters. If the person turns 18 years after the registration process but before an opportunity to register for an election, he is disenfranchised. The laws do not provide any reason for disenfranchising this class of people. One may argue that citizens under 18 lack the ability and motivation to participate effectively in elections. Some critics have also argued that a further consequence would be that citizens under eighteen might not make use of their vote as effectively as older voters. While they might vote for the sake of voting, they would not challenge the government to respond to their interests. Thus, their vote choice would be driven more strongly by expressive instead of instrumental considerations and their policy views would not be well-represented by political actors.[19] This is one of the most crucial elements in children's political and social subordination. Parents and other concerned adults cannot simply vote *on behalf* of children because there is little reason to think that the interests of the adults are identical to those of children, nor is there any reason to believe that parents or other adults are perfect judges of children's interests.[20] Where conflicts of interest between children and adults might exist, if children are not allowed to express their own interests independently in a way that others must pay attention to such as by voting, those conflicts will be ignored and dismissed. Moreover when the adults who are engaged in a conflict of interest are also the ones relied upon to act in the interests of children, it is clearly in their interest to deny that the conflict exists.[21] Given this potential dilemma, no substitute for direct political enfranchisement is sufficient to protect children's interests.

Another common objection is that children are not sufficiently informed to vote.[22] There are a number of basic flaws in this objection. The objection that children are not intelligent or educated enough to vote also seems to imply that adults are able to vote because they are intelligent and educated. It may be true that children are less educated, and depending on one's definition of intelligence, less 'intelligent' on average than adults. If being able to cast well informed votes were a criterion for voting, it is unclear who would be permitted to vote. Moreover, to have such knowledge would mean knowing which candidates would keep their campaign promises, how unforeseen events would affect their interests, how different elected officials would respond and how all of the variables in the complex world interact with each other to effect governmental decisions in practice. Voting is not a crowd-sourcing exercise where the superior knowledge of the public at large ensures good government. It is instead a way of insuring that those who govern can be held accountable to those they represent. [23]Besides, citizens below 18 years can testify in Nigerian Courts within the provisions of the Evidence Act[24] (below 14 years) if they understand the questions put to them. Another fear that is raised against granting children a right and opportunity to vote is that children will simply vote however their parents tell them to vote. The result would be that a parent would in effect, have greater voting power than a non-parent. It might be pointed out that this fear parallels a historic objection to women's suffrage that wives would vote the way their husbands told them to.[25] There are numerous problems with this objection. Firstly, the counterfactual case is one where parents and children are undercounted. A family of three should collectively have three votes to have the same proportional representation as a group of three adult strangers because there are three people in both groups. So, it makes more sense to think of the current situation as being one where families with children are underrepresented, than one where parents might be overrepresented if children had the vote. Given the secret ballot system, once inside a voting booth, children could vote without their parents knowing who they voted for, thus removing the real potential for parents to sanction or reward their children for their voting choices. The fear that parents could influence the voting

[17] Ss. 7(4), 77(2), 117(2), 132(5) and 178(5).
[18] S. 12(2).
[19] G. Tóka, 'Expressive Versus Instrumental Motivation of Turnout, Partisanship and Political Learning' *in* H.D. Klingemann (Ed.), *The Comparative Study of Electoral Systems*, Oxford University Press, Oxford (2009), pp. 269-307
[20] H. Cohen, *Equal Rights for Children, (Totowa N.J; Littlefield Adams and Company* 1980) 11
[21] ibid.
[22] *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970).
[23] Jeff Howe, 'The Rise of Crowdsourcing,' (2006). *Northwestern Interdisciplinary Law Review Samantha Godwin* 298.
[24] Evidence Act, Laws of the Federation of Nigeria 2011, s 209.
[25] H K. Johnson, *Women and the Republic* (Echo Library, 2009) 139.

choices of their children may be entirely misplaced: a fundamental part of constitutionally protected political speech is attempting to persuade others to vote the way you want them to.

Another objection to the voting rights of children is that one must 'draw the line somewhere.' While it should be easy to imagine young teenagers voting, to think that toddlers and infants could vote is inconceivable. Having the *right* to vote does not require actually *exercising* that vote. Many adults choose not to vote. Infants and toddlers without the wherewithal to vote simply would not vote even if they had the right to vote. Possessing a legal right to vote simply means that the state and third parties cannot actively prevent the right holder from voting. An additional objection is based on the economic dependence of children and their lack of economic contributions to society. However, economically dependent adults, including very young adults who have yet to contribute anything to the economy and remain just as financially dependent as children, are permitted to vote. Property qualifications for voting are generally constitutionally impermissible. Arguing that children can be excluded from the political franchise based on a lack of economic participation then is to apply to them a double standard not applied to adults. In any case many teenagers had either finished secondary school, got employed, undertaking undergraduate studies or even gone to earn money abroad at 16 years. More encouraging is the fact that in Argentina, Austria, Brazil, Cuba, Ecuador, Nicaragua and Isle of Man the voting age is 16 years while teenagers between 16 and 18 years are eligible to vote in Bosnia, Serbia and Montenegro if they are employed.

Nigerians in Diaspora

The Nigerian Constitution and the Electoral Act expressly disenfranchised Nigerians in diaspora by the 'residency' requirement at the time of registration of voters.[26] By these provisions Nigerians resident outside the country are denied the right and opportunity to vote because of the difficulty in registration. Apart from registration, the Electoral Act provides that 'no voter shall record his vote otherwise than by personally attending at the polling unit and recording his vote in the manner prescribed by the Commission.'[27] Some prominent Nigerians justify this exclusion and disenfranchisement. A former Minister of Finance and Presidential aspirant, Chief Olu Falae had this to say:

> There are two ways of looking at the issue. First, look at it from the fact that they too are Nigerians and the fact that they live abroad does not mean that they are no longer Nigerians…. But on the other hand, they don't live here. They don't know what is going on in the country, though they can read newspaper, listen to radio or television. They don't experience and feel what the rest of us at home feel. Therefore it can be argued that they are not well informed enough to make very rational use of their vote. Apart from this, inefficiency in Nigerian election system will encourage a lot of malpractices. Such ballot from abroad might be open to a lot of manipulation. So for me, I will say the time is not ripe for them to participate in the election; this country is yet to mature for such a system.[28]

With due respect, this view sounds unduly pessimistic. Nigerians in diaspora constitute a significant number of the Nigerian population. It is estimated that about Four million Nigerians reside in the United States of America and Canada while about One million live in the United Kingdom. The financial remittances from these three countries alone to Nigeria amounted to over 20 billion Dollars in 2014.[29] With such credentials, it is impermissible to describe them as not being insufficiently informed to take an interest in who governs them and their people to whom they make these remittances.

Internally Displaced and Relocated Persons.

Internally Displaced Persons (IDPs) are persons who are forced to flee from their homes due to violence, war or violation of their human rights but who are still within the borders of their country. Relocated Persons (RPs) are persons who because of marriage, change of employment, transfers, education or other factors that do not constitute threat to their lives or violation of their fundamental rights relocate from one part of the country to another. Both IDPs and RPs are disenfranchised because of the provisions of sections 57 and 58 of the Electoral Act 2010. While section 57 requires personal attendance to the polling centres to be able to vote, section 58 insists that 'no person shall be permitted to vote at any polling unit other than the one to which he is allotted.' These provisions make it difficult or impossible for students who registered while in school but may have travelled on holidays that may fall within an election to vote in that election. Even the security personnel, INEC

[26] Above, fns 17 and 18.
[27] Electoral Act 2010, s 57.
[28] Adeleke Adesanya, 'Diaspora Nigerians and Long Road to Voting in Elections,' *The Point Newspaper,* August, 2016.
[29] Vanguard online newspaper report of 26th August 2015: www.vanguardngr.com. accessed 08 May, 2018.

permanent and ad-hoc staff who conduct the elections outside the polling units where they registered are disenfranchised.

Prisoners and Detainees

The right to vote, as the mechanism which protects individual electoral entitlement, has a special constitutional significance. Despite this, many legal systems including that of Nigeria continue to disenfranchise prisoners. Most apply this disqualification only to convicted offenders, although some extend it also to those in custody awaiting trial, and a few to those who have served their sentence, perhaps even rendering the exclusion perpetual.[30] Prisoner disenfranchisement, it is argued here, undermines the idea of universal suffrage to which developed democracies are keen to plead attachment. It is also strongly arguable that it is inconsistent with the idea and practice of voting as a human right. Under the Nigerian electoral system, prisoners and detainees are not statutorily excluded from participating in elections. Even in the case of *Victor Emenuwe & ors (for and on behalf of Inmates of Nigeria Prisons) v INEC and Controller General of Nigeria Prisons Service* (unreported), the Federal High Court sitting in Benin held that prisoners in Nigerian prisons have the right to vote in all elections. However, the requirement of *personal attendance*[31] at polling centres on voting days makes it impossible for them to vote. Though the Independent National Electoral Commission does not carry out registration exercises in prisons, police stations and detention centres of other security agencies, those who registered before being imprisoned or detained cannot vote because of the provision of section 57 of the Electoral Act.

Justifications for Prisoner Disenfranchisement

Prisoner disenfranchisement has been defended on a number of grounds. Those who seek to justify the practice tend not, however, to articulate clearly the separate claims they are making, relying instead on an amalgam of indistinct arguments about the legitimacy of denying prisoners the vote. This tends to be so both in political debate and in judicial reasoning. If the practice is to be defended convincingly, however, each argument in favour of the disenfranchisement should be separately assessed.

Punishment

According to this argument, disenfranchisement is intended to be a punitive measure. It represents a supplementary punishment imposed on any offender sentenced to a term of imprisonment. The difficulty with the use of disenfranchisement to punish prisoners is that it conflicts with the basic idea that all members of the political community are, and remain entitled to be regarded as, political equals. The right to vote ought properly to be regarded as being possessed and exercised in an entirely separate sphere from that in which judgments about the criminality of actions are delivered and executed. Prisoners may indeed merit censure, but the political equality ascribed to them prior to their crimes is irrevocable: it persists throughout imprisonment, and the law's attempt to deny this by disenfranchising them reveals its ambivalent commitment to the political equality ideal. Not all forms of punishment which the state might wish to impose are open to it, and disenfranchisement ought to be regarded as one of those proscribed penalties. It is a fundamental denial of the inherent and irrevocable political equality of prisoners. Prisoners are still deeply affected by the operation and outcomes of the processes of electoral democracy in a wide range of areas which extend beyond the creation of law and policy governing their imprisonment. It is strongly arguable, therefore, that they are entitled to an equal electoral voice with which to express their views on such matters.[19] Disenfranchisement is no doubt an important symbolic device, but the social exclusion and stigmatisation which accompany the experience of imprisonment are surely sufficient to mark society's disapproval without the need to employ disenfranchisement as a further punishment.

Forfeiture

Closely related to the idea of disenfranchisement as part of the punishment for the crime, the notion of forfeiture differs in that it describes the loss of the vote as a distinct civil penalty accompanying the conviction. The forfeiture of the vote follows from the offender's failure to obey the general conditions governing conduct which are prescribed by the criminal law. On this view, disenfranchisement is a penalty, not for specific acts of criminal wrongdoing as such, but for breaching a general duty to obey laws passed by elected legislators whom the offender

[30] Prisoners may vote in 16 countries: Albania, Bosnia and Herzegovina (unless serving a sentence imposed by the International Tribunal for the former Yugoslavia), Cyprus (though they not be in prison on the day of the election) Croatia, the Czech Republic, Denmark, Finland, the former Yugoslav Republic of Macedonia, Iceland, Lithuania, Portugal, Slovenia, Spain, Sweden, Switzerland and Ukraine. Some prisoners may vote in 13 countries: Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Norway, Poland, Romania and Turkey. In the United States of America felon disenfranchisement exists.

[31] Above fn 27.

was entitled to participate in choosing; it represents a loss of privilege, that is, for failing to observe the terms of the imagined social contract.[32] Forfeiture has a punitive element, but it is not the criminal conduct itself that is being punished by denial of the vote; rather, the misdeed is taken to represent the offender's lack of commitment to the processes of representative democracy, and to the laws which those processes generate. By contrast, the notion of disenfranchisement as pure punishment implies a direct correlation between the criminal conduct and the loss of the vote: it is the nature of the conduct itself, rather than what it represents about the offender's commitment to the structures of representative democracy, which is deemed to justify the penalty. The forfeiture theory provides a convincing account of the laws which disenfranchise those guilty of election offences. Such wrongdoing strikes at the core of the processes of electoral democracy and may be taken to represent a breach of the agreement to abide by the most basic rules governing the practice of voting. The forfeiture theory cannot, therefore, adequately explain the disenfranchisement of prisoners.

Moral unfitness

This notion, which expresses one of the ways in which prisoners are considered incompetent to be electors, pertains to the idea that the franchise should be restricted to 'good citizens', who possess the proper moral qualifications to vote.[33] Permitting prisoners to vote would, on this view, taint the purity of the ballots cast at elections by those who are not incarcerated. The civil penalty which the loss of the vote represents is a consequence of the offender falling below the standards of moral responsibility demanded of the good citizen, and expressed in the rules of criminal law.[34] It is unclear however, why the particular form of lapse into moral unfitness attributed to imprisonment should be the only sort to carry the penalty of disenfranchisement. Why, for example, do those who breach civil law obligations escape disenfranchisement, along with those who commit minor crimes which carry no custodial sentence? What is it about the fact of being imprisoned which is thought to reflect a sufficiently high level of moral unfitness to justify disenfranchisement? It cannot be the fact of breach of an obligation to obey the law because, as discussed above, that breach connotes the same type of moral failing regardless of the specific nature of the wrongdoing. Offenders who are not imprisoned are therefore equally morally culpable on that count. Incarceration may raise a presumption that the offending behaviour reflects a lack of the particular moral qualities demanded of voters. Singling out prisoners and sanctioning them, as a group, as morally unfit also results in a law which is *over* -inclusive: it is probable that some (or even many) prisoners may possess the positive qualities desired of voters. Assuming moral unfitness to be an acceptable criterion, the law which applies it is flawed by its lack of specificity. A more fundamental problem with the moral unfitness argument is that, generally speaking, the law is entirely unconcerned with the moral integrity of those to whom it distributes the right to vote. It follows that the assumption that moral fitness is a legitimate principle governing the distribution of electoral rights is flawed. The notion that only the morally fit are entitled to vote is at odds with the idea of universal suffrage so favoured in the political--and related legal--discourse of modern democracies.[35] Moral unfitness is an indefensible criterion, which has lost credibility in suffrage law generally, and is founded on hazy and unquantifiable concerns about the consequences of enfranchising offenders.[28] It cannot serve to justify prisoner disenfranchisement.

Incompetence

The moral unfitness argument is a prominent variant of a more general argument that prisoners are unfit to vote because they lack the competence to do so. This incompetence may take various forms, ranging from the moral disqualification implied in the unfitness argument, to arguments that prisoners are uninformed about electoral politics and therefore unable to cast votes competently.[36] The argument about the socially deviant nature of offending conduct is equally flawed. It effectively rehearses again the notion that disenfranchisement is a punitive measure, punishing the offender for a failure to conform to socially prescribed standards of behaviour. It might also be read as suggesting that the loss of the vote is aimed at encouraging the offender to adopt behaviour which conforms to the social norm. How disenfranchisement could do this is however unclear: it provides little incentive to prisoners to rethink their civic commitments from an electoral exile. In sum, the idea of incompetence as a justification for prisoner disenfranchisement is unconvincing.

[32] J. Fitzgerald & G. Zdenkowski, 'The Voting Rights of Convicted Persons' (1987) 11 *Criminal L.J.* (Australia) 11, at 12,
[33] Final Report of the Working Party on Electoral Procedures (Howarth Report), (United Kingdom Home Office, 1999), para. 2.3.8.
[34] Heather Lardy, 'Prisoner Disenfranchisement: Constitutional Rights and Wrongs' (2002) PL 523.
[35] Ibid p 533.
[36] *Sauve v Attorney-General for Canada (1993) 2SCR 438.*

Administrative and Logistic Issues

In addition to the arguments of principle discussed above, arguments about administrative practice are also used to oppose the claims of prisoners to vote. Thus it is sometimes claimed that the logistical difficulties of permitting registration and voting are too great. Where, for example, should prisoners be registered to vote: in their home constituency or in the district in which the prison is sited? All of these concerns are surmountable. Such issues have been addressed recently by courts in Ireland, Canada, and South Africa, all of which have had little difficulty in declaring that the state has an obligation to find solutions to the administrative and procedural obstacles surrounding prisoner voting. In *Breathnach v. Ireland*[37] a prisoner challenged the failure of the state to provide him with absent voting facilities. Although the Irish constitution does not expressly disenfranchise prisoners, it impliedly permits the passage of legislation having that effect. At present, no such legislation has been passed. The High Court held that, in light of the absence of a provision expressly disenfranchising prisoners, the state's failure to provide voting facilities to the inmate constituted a breach of his constitutional right to be held equal before the law. The South African Constitutional Court considered much the same issue in *August v. Electoral Commission.*[38] The 1996 South African Constitution guarantees to every adult citizen the right to vote, and contains no provision allowing for disqualification from voting to be prescribed by law. No such statutory disqualification of prisoners had been enacted. The applicants, one a convicted prisoner and the other in custody awaiting trial, sought an undertaking from the Electoral Commission that prisoners would be able to take part in the forthcoming general election. The Commission refused to grant the undertaking. The Transvaal High Court found that there had been no violation of the constitutional right to vote because the prisoners' predicament was of their own making. The Constitutional Court, however, disagreed and held that Universal adult suffrage on a common voters roll is one of the foundational values of the entire constitutional order. The court went on to note that administrative and procedural arrangements might easily be made for registration and voting by prisoners.

A similar line had been taken some years earlier by the U.S. Supreme Court in *O'Brien v. Skinner,* in which prisoners challenged the failure of the state of New York to make provision for prisoner registration and voting. The U.S. Constitution permits states to enact laws disenfranchising prisoners, although not all states have done so. New York permitted prisoner voting, but made no specific provision for detainees to exercise their franchise. Those whose state of residence was outside New York could in fact obtain absentee registration and ballots. Prisoners who were ordinarily New York residents could not. This was held by the Supreme Court to be a violation of the equal protection clause of the Fourteenth Amendment, because it deprived prisoners of the right to vote on an equal basis. The New York law was arbitrary and its effect unequal. These cases illustrate how the failure of electoral law to make special provision for prisoner voting, where that is tolerated by the law, can be as effective as an explicit disqualification from voting. In sum, there are practicable and effective administrative and procedural processes available by which prisoners might be included in the electorate. Objections to their inclusion which found on the alleged difficulties posed by the mechanics of permitting them to vote are insubstantial. More fundamentally, the franchise is a right which inheres in the individual voter. It is wrong to withhold the right on the basis of untested suspicions about the possible electoral effects of its exercise by a particular section of the electorate.

Institutional Disenfranchisement

Institutional disenfranchisement refers to denial of the rights of some voters that arises from the activities of the Electoral Management Bodies (EMBs) and security agencies and not by operation of the electoral laws. The EMB in Nigeria is the Independent National Election Commission (INEC), whose duty is to educate and register voters, conduct and declare results of elections. In performing these functions, INEC is authorized to issue Guidelines for elections. The Guidelines which are issued by INEC for every election contain information on dates, method and procedures for particular elections. In the performance of these functions, cases of disenfranchisement arise directly or indirectly, from the activities of the officials of INEC, its ad-hoc officers or the security and other agencies whose services are engaged during registration or elections.

Restriction of Movement

Traditionally, the Police restrict personal and vehicular movements during elections. This restriction is not required by the Constitution, the Electoral Act or the INEC Guidelines to Elections. The restriction confines voters to their immediate vicinity so that access to voting centres not within trekking distance would be denied. The restriction not being backed by any law amounts to violation of the freedom of movement which is a pre-

[37] 1999 No. 1127 SS, June 23, 2000.
[38] Case CCT 8/99.

requisite to right to, and opportunity to vote. Restriction of movement also disenfranchises the INEC officials who by law are not barred from voting. The ad-hoc INEC staff which most often includes serving National Youth Service Corp members are disenfranchised because the election duty takes them to places outside and far from the polling units where they registered. The security agents who perform election duties are equally disenfranchised unless the work in or near the polling units where they registered.

Physically Challenged and Illiterate Persons

The Electoral Act provides that the Presiding Officer shall assist physically disabled and the visually impaired persons in casting their votes by providing suitable means of communication, large embossed print or electronic devices or sign language interpretation or off-site voting.[39] There is no record of where INEC made such provisions. The illiterates are also institutionally disenfranchised. Because the emphasis is on political parties and not on the individual candidates,[40] the ballot papers are identified in party names and symbols. Though the Electoral Act provides for assistance to blind and incapacitated voters,[41] it did not make any provision for illiterate voters who constitute significant portion of the voting public, if not the majority. Even if *incapacitated voters* are interpreted to include the illiterate voters, the INEC has not been providing the assistance as prescribed by the Electoral Act. Even if the assistance is provided to the physically challenged and illiterate voters, they are denied the rights and protections associated with the secret ballot. In addition, many voters feel that being forced to tell someone else their vote is degrading and violates the spirit of the secret ballot. Blind, limited arm movement and illiterate voters are reminded again of their dependency by being forced to rely on others, in effect, to vote for them.[42]

Registration Processes

Some citizens are also disenfranchised by not providing adequate opportunity and facilities for them to register even when they are within the country and had made themselves available for registration. Poor and lopsided distribution of Permanent Voters Cards (PVCs) disenfranchised registered voters who could not take possession of the cards before the election. Some otherwise eligible voters could also be disenfranchised if, due to negligence or dereliction of the INEC staff, their names are omitted from the voters' register or where the card readers failed to authenticate or validate their registration.

Judicial Disenfranchisement

Judicial disenfranchisement represents a situation where in exercise of its judicial power, the Court through interpretation and application of the Constitution and Electoral laws, disenfranchises a person or a group of persons by denying them the right or opportunity to vote or not allowing their votes to count in determining the winner of an election.

Judicial Power and Disenfranchisement

This Constitution defines the extent of the powers of the general government. Unfortunately, the constitution of the Federal Republic of Nigeria, 1999, expressly described legislative and executive powers but said nothing about what judicial powers should be.[43] Section 6 of the constitution merely provides that:

> [T]he judicial power vested in accordance with the foregoing provisions of this section;
>
> a. Shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law.
> b. Shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings related thereto, for the determination of any question as to civil rights and obligations of that person.

If the constitution was bold to say that the legislative power means '*making laws*'[44] and executive power means 'execution of the constitution and all laws'[45] made by the National Assembly and Houses of Assembly of the

[39] s 56(2).
[40] *Amaechi v INEC (2008) 10 WRN 265; Wada v Bello (2017) 3 WRN 36.*
[41] s 56(1).
[42] Byan Afercurio 'Discrimination in electoral law; Using Technology to Extend the Secret Ballot to Disabled and Illiterate Voters' (2003) 28 *Alternative Law Journal* 272.

[43] Constitution of Nigeria, 1999 ss. 4 and 5.
[44] *ibid*.s.4.
[45] *ibid*.s.5.

states, it is curious why it shied away from saying what judicial power means. However, the Black's Law Dictionary provides succour by defining judicial power to mean: '[T]he authority vested in courts and judges to hear and decide cases and to make binding judgments on them; the power to construe and apply the law when controversies arise over what has done or not done under it'.[46] Judicial power had earlier been described in the United States of America as 'the right to determine actual controversies arising between diverse litigants duly instituted in courts of proper jurisdiction.'[47] A judicial reprieve came locally in *Abraham Adesanya v. President of the Federal Republic of Nigeria*[48] where the Supreme Court defined 'judicial power' to mean:

> [T]he power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subject; whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding authoritative decision (whether subject to appeal or not) is called upon to do so.

The courts have in their hands, a considerable measure of power. What becomes 'law' is the interpretation given to it by the courts. According to Lord Delvin: 'The law is what the judges say it is. If the House of Lords were to give an Act of Parliament a meaning which no one else thought it could reasonably be, it is their construction of the words used in preference to the words themselves that would become the law'. The legendary Lord Denning articulated this power in his famous dictum in *Magor v. Newport' Corporation*[49] where he said: We sit here to find out the intention of parliament and of ministers and carry it out, and do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis'. Judicial powers can fall into several different categories: original jurisdiction, appellate jurisdiction, redress jurisdiction, diversity jurisdiction and subject matter jurisdiction. Original Jurisdiction arises when a court is first hearing a case. This court is then said to have original jurisdiction. Appellate Jurisdiction is literally a review of an earlier decision arising from an original jurisdiction.. A court has a Redress jurisdiction when it dealing with damages and relief. The ability of federal courts to hear cases involving people from different states invokes the Diversity Jurisdiction while. Subject Matter Jurisdiction is activated when the Federal courts exercise jurisdiction over cases involving federal law but outside the geographical location of the court. Judicial powers are subject to the limitations of judicial precedents and *stare decisis.*

Whose Views do the Courts adopt in exercise of Judicial Powers?

It does not matter which of the canons of interpretation the courts adopt at any point in time. More important is the fact that any rule adopted in interpreting the constitution or indeed any law is an attempt to discern the intention of the legislature.[50] The courts have laid down, not rigid rules but, principles which have been found to afford some guidance when it is sought to ascertain the intention of the legislature. This exercise of discernment is very elusive. In a situation for instance when the legislature makes an enactment on a mistaken view of the law, in what sense will the court give value to the intention of the legislature; the mistaken view or the correct view of the law? The court will give effect to it according to the view of the court on the correct meaning of the enactment.[51]

Whose Intention is of Interest to the Courts?

Another question is as to whose intention the courts should explore; that of the sponsor of the bill to the legislature, the legislature or the draftsman? An individual, a group of persons or an institution, which sponsors a bill will not participate in debates or vote on it if such a person group or institution is not a member of the legislature. At maturity, the statute may have a meaning different from the intention of the sponsors of the bill. The intention of the legislature can also be nebulous because many of the legislators may, either not be conversant with the subject matter or be uninterested in it. Some legislators may also be opposed to the subject matter but cannot garner enough votes to stop the passage into law. Moreover, in the case of old enactments by a legislature whose members have disbanded, the current members of the legislative house may not even be sure of what was intended by their predecessors. The real job of the courts therefore boils down to finding the meaning of the words used i.e. the intent of the enactment and not that of the legislature.[52] The draftsman may also alter the meaning or the intention of the legislature by his choice of words.

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[46] Bryan A. Garner, *Black's Law Dictionary* (ed) ((8th edn Thomson West 2004) 864.
[47] *Musrat v. United States* (1911) 219 U.S. 346@361
[48] (1981) 5 S.C. 112 or (1981) 2 NCLR 358
[49] (1950) 2 ALL ER. 1226@1236.
[50] P.O. Okonkwo, 'Judicial Attitude to Political Controversies', *Legislative Practice Review* 2009, vol. 1 No. 2 p. 18.
[51] *Birmingham City Corporation v. West Midland Baptist Trust Association Incorporated* (1969) 3 ALL ER. 172@179-180
[52] P.O Okonkwo, Above fn 51.

Effect of the Exercise of Judicial Power on Policies and Politics

An important aspect of this research is the focus on the judicialisation of politics wherein the courts review political processes and outcomes. In judicialising politics, the courts embark on conceptualising constitutional review and rights adjudication as an extension of the policy process. In furtherance of the judicialisation process of political issues, they observe and evaluate the impact of the review on the political outcomes and subsequent policy decisions in the areas considered. This approach has been adopted in various countries including Europe and the Americas.[53] '*Judicialisation of Politics'* may therefore refer to the process through which the influence of the courts on legislative and administrative powers develops over time in certain spheres of the life of the society. Some of the most controversial examples of highly judicialised politics can be found in the area of determining the outcome of elections. It may be an extreme view to simply describe judges as politicians or policy makers in robes. Nevertheless, the policy making role of the judiciary gets it involved in overt political manoeuvres at which they are more deft and swift. It will take a decision of seven unelected justices of Supreme Court[54] to give an interpretation of a section of the constitution or the Electoral Act which could in effect disenfranchise an otherwise enfranchised person or group of persons. This is a feat that would require the participation of the Houses of Assembly of the states and the National Assembly made up of about two thousand persons elected from various backgrounds. These institutional forces make the Supreme Court so much more than a mere group of '*legaltricians'.* It can assert itself against the executive and legislative branches, and at times ignite public uproar in determining an outcome of an election. The only restriction is that courts do not initiate action and would remain silent if issues of interpretation of the constitution or any law are not brought before them. They do not have the resources and are not allowed to gather and assess information on what transpired during elections that is available to the electorates and even member of the legislature and the executive who actively participate in elections. They must depend on the briefs as formulated by the parties before them.

The greatest advantage of the judicial process as a decision making mechanism in a pluralistic political system like Nigeria, is that although the courts may become the centre of great political controversy, the way in which they do their work gives their decisions a prestige and disinterested quality very different from that of the other arms of government. The prestige and belief of the citizens in the disinterestedness of the judiciary on election-related matters is hardly on the positive side. Elections demand passionate public interest, partisanship and participation. The public may be intrigued by the intricacies and complexities of court proceedings but feel much at home with trials on electoral matters. Citizen A, who had never been to Court before, may not even know that Citizen B living next to him is in court against Citizen C in the next street over ownership of the land near a church where both of them worship. On matters of land law then, Citizen A cannot hazard a guess as to who will win. But citizens feel that they can hazard guesses as to decisions on electoral matters, making discussions on such cases interesting to the public at large. The Supreme Court does not obviously feel that concern. In *Amaechi v. INEC*[55] the court in an obvious defiance of the feelings and enfranchisement rights of the electorate held that it is the party that the electorates voted for in the gubernatorial election in Rivers State. It said: 'In mundane or colloquial terms we say that a candidate has won an election in a particular constituency but in reality and in consonance with section 221 of the constitution, it is his party that has won the election'.[56]

This finding is, with due respect, patently incorrect and a wrong interpretation of section 221 of the constitution. Section 221 provides that *'no association other than a political party shall canvass for votes for any candidate (emphasis added) at any election ....'* Literally this section means that it is only a political party that can canvass for votes in an election not for the party but for a candidate. The votes being canvassed for are for the candidate. That is why it is the candidate that is screened by the relevant authorities and security agencies. Moreover, the candidate who wins an election represents his entire constituency and not his party. In the event of vacancy in his seat due to death, resignation, removal etc, a bye election is held for all parties and not only within the party of the person. The decision in *Amaechi's case* was at best, a political decision and at worst a decision given *per incuriam.* The interest or enfranchisement rights of the electorates in Rivers State were not considered. The relevant question should be whether the electorates in the state had in mind that they were voting for Amaechi or Omehia as at the date of the election. On the day of the election, Amaechi was disqualified and not a candidate. The electorates were aware of that and had it in their minds when they were casting their votes. The court nullified the disqualification after the electorates had cast their votes and judicially disenfranchised the voters by ignoring the votes they cast for

[53] Shappiro Martin M & Alec Stone (1994) 'The New *Constitution*al Politics of Europe', Comparative Political Studies, 26, pp. 397-419.
[54] Constitution of Nigeria, 1999 (as amended) s 234.
[55] (2008) 10 W.R.N. 1.
[56] *ibid*. p. 117, lines 45-49.

Omehia who they knew was the person contesting on the platform of the Peoples Democratic Party. It could be argued that Amaechi would have won if he was a candidate but that is hypothetical and academic. Fortunately, the National Assembly rose to the occasion and amended the Electoral Act with the inclusion of Section 141 of the Electoral Act, 2010 which requires participation in all the stages of the electoral process before being declared a winner by any Court or Tribunal. In *CPC v Ombugadu*[57] the Supreme Court affirmed this view. After setting out the provisions of section 141 of the Electoral Act, it held through Ngwuta JSC that:

> By the above provision, the National Assembly has set aside the decision of this Court in Amaechi v INEC (2008) 10 WRN 164; (2008) SCNJ 1; (2008) MJSC; (2008) All FWLR (pt. 407) p. 1; (2008) 1 SCM 26; (2008) 33 NSCQR (pt. 1) 136; (2008) 5 NWLR (pt. 1080) 227 at 296. Contrary to the decision of this Court in Amaechi's case, the implication of section 141 of the Electoral Act, 2010 (as amended) is that while a candidate at an election must be sponsored by a political party, the candidate who stands to win or lose election is the candidate and not the political party that sponsored him. 'In other words, parties do not contest, win or lose election directly, they do so by the candidates they sponsored and before a person can be returned as elected by a tribunal or court, that person must have fully participated in all the stages of the election starting from nomination to the actual voting.

In a country like Nigeria where there is no difference between the programmes of the parties whose members freely crisscross among the parties depending on where a contesting ticket is available, the voters do not vote for the parties as the difference between party A and party B is the persons contesting elections therein. So, the provisions of section 141 of the Electoral Act (as amended) and the pronouncement of the Supreme Court in *Ombugadu case* properly protects the sacredness of the enfranchisement rights of the voters. Few years later the Nigerian voters were judicially disrobed of the sacredness of their voting rights by the same Supreme Court. In *Wada v Bello*[58], the same Supreme Court through the same Ngwuta JSC made a somersault. In a judgment that shook the rubrics of Nigerian Electoral Law, the Supreme Court judicially discountenanced the voting voices of the people of Kogi State by allocating the voted cast by the electorates for a dead person to another living person. In interpreting section 141 of the Electoral Act, Ngwuta JSC said;[59] It is my humble view that the declaration contemplated in section 141 of the Act is a declaration of a petitioner who has successfully challenged the declaration of the Electoral Umpire in favour of his opponent, the respondent. The expression 'any person' in the context of section 141 of the Act is synonymous with 'any petitioner.'

It is curious how the above finding can change the clear meaning of section 141 which the Court even admitted was enacted to cure the mischief occasioned by its judgment in Amaechi's case, which was to ensure that before emerging as a winner in an election a person seeking to be declared as such must have participated in all the stages of an election. A person seeking to take credit of the votes cast for a dead person who did not have a joint ticket with him obviously did not participate in that stage of the electoral process. More worrisome is the fact that the Supreme Court, to ensure that section 141 of the Act is rendered meaningless or interpreted outside the intention of the lawmakers, held itself bound by the decision of a Federal high Court. The respondents argued that section 141 of the Electoral Act was no longer extant having been struck down by a Federal High Court in *Labour Party v INEC and anor.*[60] The Supreme Court held that:

> If a court of competent jurisdiction in which the validity vel non of a piece of legislation is in issue, strikes out that piece of legislation, then as long as that order has not been set aside by a court that has jurisdiction to do so that order binds all courts, whether below or above the court that made the order in the hierarchy of courts. There is no indication that the order of the Federal High Court made on 29th July 2011 has been set aside by a court of competent jurisdiction or at all. This is not a derogation from the fact that judgments of courts below the Supreme Court … have only persuasive value before the Supreme Court of Nigeria. It means that section 141 of the Electoral Act has ceased from the date of the judgment of the Federal High Court, to be part of our law.

Many cases of judicial disenfranchisement abound in this country particularly because the Courts keep giving divergent decisions on same or similar electoral issues. It may be understandable, though not defensible, when

[57] 53 (2013) 44 WRN 1 at p 50.; see also *Jev & anor v Iyortyom & ors* (2014) LPELR 23000 (SC), SC.164/2012 of 30/5/2014.
[58] (2017) 3 WRN 36.
[59] Ibid p. 68, lines 35-40.
[60] FHC/ABJ/CS/399/2011 unreported.

different Federal High Courts and Court of Appeal of different divisions give conflicting judgments but unimaginable that the Supreme Court can keep contradicting itself on the interpretation and application of the provisions of a section of the law. This does not only result to a failure to give judicial guide in the form of *stare decisis* but enhances judicial assistance to disenfranchising the electorates.

3. Conclusion

Democracy is an ideal, whose level and quality is mostly gauged by the method of participation by the majority of people within a given society. So many reasons have been adduced by early political theorists on the essence of trusting and protecting the enfranchisement rights of the people. Rousseau was probably the most optimistic in his assessment of popular competence. Under suitable conditions, he believed that 'the general will is always right and tends to the public advantage.'[61] Another benefit of securing voting rights is to accord legitimacy to government. The legitimacy of elective government has been grounded on a moral premise. Locke declared that 'the liberty of man in society is to be under no other legislative power but that established by consent in the commonwealth.' He also deferred to legitimacy when he said that the consent of the public should not be under the 'dominion of any will, or restraint of any law, but what the legislature shall enact according to the trust put in it.'[62] Participation in government, of which voting is the most common means, contributes to the personal development of the electors. To participate in government by voting is an exercise of self-determination which is essential to human development. That was why Locke said that '*he who would get me into his power without my consent would use me as he pleased when he had got me there, and destroy me too when he had a fancy to it.'*[63] Probably the most important virtue of elections is protection, or a check on power. The ballot is the only weapon the electorates have as a method of self defence. Mill summarized this when he said that '*men, as well as women do not need political rights in order that they may govern, but in order that they not be misgoverned.'*[64]

The various international, regional and sub-regional legal instruments discussed earlier in this paper sought to propagate, enthrone and protect the voting rights of the citizens of this country. Any refraction from these standards either through domestic laws, activities of the Election Management Bodies or through judicial interventions or interpretations amount to disenfranchisement and should be discouraged. If an individual is to be disenfranchised, it must be in pursuit of a legitimate aim. In the case of a convicted prisoner serving his sentence the aim may not be easy to articulate. In *Regina (Pearson Martinez and Hirst) v Secretary of State for the Home Department and Others,*[65] the United Kingdom Court while applying the Representation of the People Act 1983 3 (1), European Convention on Human Rights held that:

> [L]aw which removed a prisoner's right to vote whilst in prison was not incompatible with his human rights. The implied right to vote under article 3 was not absolute, and states had a wide margin of appreciation as to how and to what extent the right should be limited, provided that the conditions should not curtail the rights to such an extent as to remove their effectiveness, and should only be imposed in pursuit of a legitimate aim, and should not be disproportionate.

On appeal[66] the decision was reversed to the effect that the denial of a right to vote was in infringement of the right of a prisoner who was sentenced to life imprisonment on a charge of manslaughter. Generally, disenfranchising a citizen is as condemnable as the denial of the other rights that are fundamental to the existence of persons in any civilized society.

[61] J J. Rousseau, *The Social Contract and Discourses* (Everyman ed., New York: Dutton, 1950), p. 27
[62] John Locke, *Of Civil Government* (Everyman ed., New York, 1943), Book II, p. 127. 478
[63] Ibid, p 125.
[64] John Stuart Mill, 'Considerations on Representative Government' (New York, 1958), p. 144.
[65] [2001] EWHC Admin 239.
[66] *Hirst v The United Kingdom* (No. 2): ECHR 30.