

**THE LIMIT OF INEC AND THE NIGERIAN PUBLIC SERVICE RULES IN PROHIBITING A PUBLIC/CIVIL SERVANT FROM BEING A MEMBER OF A POLITICAL PARTY: COMMENTS ON INEC V. MUSA\***

**Abstract**

*Constitutional sovereignty is the supremacy of the Constitution, which is the express or written will of the people. This paper is aimed at bringing to the public the supremacy of the constitution over INEC guidelines and the public service rules, being enactments by the National Assembly. The specific objective of this paper is to strengthen the Constitution as the grundnorm over other laws and authorities in the country. No provision INEC guidelines and of the Public Service rules, 2009 including sections 4 Rule 030402(g) and 4 R 030422 can be made to be superior to any provision of the Constitution of the Federal Republic of Nigeria, 1999 as the Constitution is the superior law of the land. This paper made recommendations on why public servants or civil servants of the century should take part in the politics of how they are governed for better development of the society.*

**Keywords:** Limits of INEC, Constitution, Public Servants, eligibility and political party.

**1. Introduction**

Constitutional sovereignty or supremacy means the supremacy and bindingness of the constitution, which is the Will of the People, on all authorities and persons in the country.<sup>1</sup>In a constitutional democracy, the people are the sovereign, the final authority and power base of the county<sup>2</sup>.The entire plan or philosophy on which something is constructed. The fundamental and organic law of a country or state that establishes the institutions and apparatus of government, defines the scope of government, sovereign powers, and guarantees individual civil rights and civil liberties; a set of basic laws and principles that a country, state, or organization is governed by. It is also the written instrument embodying this fundamental law, together with any formal amendments.<sup>3</sup>Constitution is the *grundnorm*; hence, it is the highest norm in the hierarchy of norms.<sup>4</sup>The people make and own the constitution. The constitution recognizes the people as the sovereign and the will of the people as expressed in the constitution is supreme and sovereign.

Supremacy clause as the clause in the American constitution is the clause in Article VI of the U.S. Constitution declaring that the Constitution, all laws made in furtherance of the Constitution and all treaties made under the authority of the United States are the ‘Supreme laws of the land’ and enjoy legal superiority over any conflicting provision of a state Constitution or law.<sup>5</sup> It is usually practiced in countries with written or rigid constitutions. Examples of countries where the constitution is supreme over every other law and binding on all persons and authorities including the legislature or parliament are the United States of America, Canada, Nigeria, Ghana, South Africa and so forth.<sup>6</sup>

The Constitution is the grand or supreme law by which every other enactment and conduct are tested for Constitutionality and upheld on the hand, or are declared unconstitutional, on the other hand and are set aside as null and void.<sup>7</sup> The Constitution is supreme and its provision shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.<sup>8</sup> Whenever there is supremacy of the Constitution, the people are supreme and their will, which is the constitution, is supreme and binding on all authorities and persons. If any other

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<sup>1</sup>*A.G. Bendel State v. AG Federation & 22 Ors*(1982) All NLR 85SC; *National Assembly v. President* (2003) 9 NWLR (Pt 824) p. 104 CA

<sup>2</sup>Section 14(2) of the Constitution of the Federal Republic of Nigeria, 1999

<sup>3</sup> B.A. Garner, *Black's Law Dictionary* (10<sup>th</sup> edition, US. Thomson Reuters, 2014) 1869

<sup>4</sup>Nwokike, Livinus Ifeatu, *Principles of Nigerian Law* (General Approach, Enugu, Academic Publishing Company, (2015), 154.

<sup>5</sup>*Ibid*

<sup>6</sup>EseMalemi, *The Nigerian Constitutional Law* (Lagos, Princeton Publishing Co. 2006) 48

<sup>7</sup>*Doherty v. Belewa* (1961) All NLR 631; L I Nwokike, *Principles of Nigerian Law* (General Approach) (Enugu, Academic Printing Press 2015) 154

<sup>8</sup> Section 1(1) of the Constitution

law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void.<sup>9</sup> It is worthy to state that any other laws mentioned in the above section of the Constitution include the Electoral Act, 2010 and Public Service Rules 2009. On 24<sup>th</sup> January, 2003, the supreme court of Nigeria delivered or gave its judgement in this case.<sup>10</sup>

## **2. Facts of the Case**

The Respondents were Associations seeking Registration of political parties. The Plaintiffs each applied to the Independent National Electoral Commission ('INEC' or 'The Commission') for registration as a political party. INEC is one of the Federal Executive Bodies established by Section 153(1) of the Constitution of the Federal Republic of Nigeria 1999. Its composition and powers are by virtue of Section 153(2) contained in part 1 of the Third Schedule to the constitution, paragraph 15(b) of which empowers it to: 'register political parties in accordance with the provisions of the Constitution and an Act of the National Assembly,' while paragraph 15(c) and (d) respectively provided that the commission shall have power to 'monitor the organization and operation of the political parties, including their finances' and carry out such other functions as may be conferred upon it by an Act of the National Assembly.' Under Section 228 of the Constitution the National Assembly is empowered among other things to make Laws 'for the conferment on the commission of other powers as may appear to the National Assembly to be necessary or desirable for the purpose of enabling the commission more effectively to ensure that political parties observe the provisions of this chapter.'

In pursuance of its power under Section 228 of the Constitution, the National Assembly enacted the Electoral Act 2001. Part III of the Act made provisions for political parties. Section 24(1) of the Act provided that INEC shall have power to register political parties and regulate their activities from time to time. Section 74(2) went on to provide that no association by whatever name called shall function as a political party unless certain conditions are fulfilled. Some conditions identical to those stated in Section 222 of the Constitution were stated in Section 74(2) of the Act. However, there were some new conditions not outside Section 222 of the Constitution.

On 17th day of May, 2002 INEC released guidelines for the registration of political parties. The Respondents were of the view that some of the guidelines released by INEC were inconsistent with the Constitution. The Respondent commenced an action whereby they sought amongst other things declarations of the invalidity of those impugned guidelines and also some Sections of the Act. The Trial Court declared the invalidity of Section 74(2)(c) of the Act. He upheld the validity of other Sections. The Court of Appeal however held all the impugned provisions of the Act were unconstitutional and therefore null and void. The Appellants being dissatisfied with the Court of Appeal's decision appealed to the Supreme Court.

## **3. Importance of Political Parties in a Democratic System**

Political parties are essential organs of the democratic system. They are organs of political discussion and of formation of ideas policies and programmes. Plurality of parties widens the channel of political discussion and discourse, engenders plurality of political issues, promotes the formation of competing ideas policies and programmes and generally provides the citizen with a choice of forum for participation in governance, whether as a member of the party in government or of a party in opposition thereby ensuring the reality of government by discussion which democracy is all about in the final analysis.

## **4. Need for Balanced Regulation of Political Parties**

Unduly to restrict the formation of political parties or stifle their growth, ultimately weakens the democratic culture. However, to leave political parties completely unregulated and unmonitored eventually make democratic system so unmanageable as to become a hindrance to progress, national unity, good government and the growth of a healthy democratic culture. Between the two apparent extremes over regulation and complete absence of regulation is the need for balanced regulation. In interpreting the provisions of the Constitution and enactment relating to the formation regulation and monitoring of political parties the regulation and the need for balanced regulation is essential.

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<sup>9</sup> Section 1(3) Supra

<sup>10</sup> The matter has suit/appeal No: SC/228/2002

### **5. Methods of Regulating Political Parties**

There are two ways of regulating political parties. First is regulation directly by the constitution as in Section 222 and regulation authorized by the legislature or other agency of the state as may be permitted by the Constitution. An attempt to regulate political parties outside the Constitution or by its authority is invalid.

### **6. Supreme Status of the Constitution**

All powers legislature, executive and judicial must ultimately be traced to the Constitution. The legislature powers of the legislature cannot be exercised inconsistently with the Constitution and where it is so exercised it is invalid to the extent of such inconsistency. Where the Constitution has enacted exhaustively in respect of any situation, conduct or subject a body that claims to legislate in addition to what the Constitution had done must show that it derived the legislative authority from the Constitution. Where the Constitution sets the condition for doing a thing, no legislation of the National Assembly or of a State House of Assembly can alter those conditions in any way directly or indirectly, unless the Constitution issue as an attribute of its supremacy expressly so authorized.

### **7. Extent of the Legislative power of the National Assembly**

The National Assembly has power to make Laws for the peace order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive legislature list set out in part 1 of Second Schedule to the Constitution. The National Assembly is further empowered to make laws with respect to any matter in the concurrent legislature list as set out in the first column of part II of the Second Schedule to the Constitution to the extent prescribed in the Second Column and with respect to any other matters with respect to which it is empowered to make laws in accordance with the provisions of the Constitution.

### **8. Whether the National Assembly can still legislate on a subject exhaustively covered by the Constitution**

Where the Constitution has provided exhaustively for any situation and on any subject, a legislative authority that claims to legislate in addition to what the Constitution has enacted must show that, and how, it has derived its legislative authority to do so from the Constitution itself. Section 222 of the Constitution having set out the conditions upon which an association can function as a political party, the National Assembly could not validly by legislation after those conditions by addition or subtraction and could not by legislation authorize INEC to do so unless the Constitution by itself has so permitted.

### **9. Scope of power of National Assembly and INEC**

By virtue of Section 228(d) of the Constitution, the National Assembly can by law confer powers on INEC as may appear to it to be necessary or desirable for the purpose of enabling the Commission more effectively to ensure that political parties observe the provisions of Section 221-229 which deal with political parties; and by virtue of item 56 of the Exclusive Legislative List, to legislate for the regulation of political parties. INEC has direct power granted by the Constitution to register political parties. Any enactment of the National Assembly referable to this purpose cannot be held invalid. By the same reasoning any guideline or regulation made by the Commission that carries into execution the same purpose cannot be unconstitutional.

### **10. Limits of the Powers of National Assembly and INEC in Prescribing Conditions for Associations Seeking to Function as Political Parties**

INEC has power to register political parties and the National Assembly can legislate in regard to the exercise of those powers. Where however the exercise of legislative powers to make laws to provide for the registration, monitoring and regulation of political parties the National Assembly purports to decree conditions of eligibility of an association to function as a political party the National Assembly would have acted outside its legislative authority as stated in the Constitution. Similarly, INEC acting under such law to prescribe conditions of eligibility would have acted inconsistently with the Constitution.

### **11. Whether INEC can validly issue guidelines to prohibit a member of the public service or civil service of the Federation, a State or Local Government Area Council from eligibility to be registered as a member of a political party**

Section 79(2)(c) which disqualifies civil servants from being eligible for registration as members of political parties is invalid because it is inconsistent with the right of freedom of association guaranteed under Section 40 of the Constitution [P. 29] Para. E

Since Section 40 of the 1999 Constitution has specifically allowed every person the right to assemble and associate with any other persons in order to inter alia form or belong to any

political party for the protection of his interest. I hold that both the provisions of Section 79 subsection (2)(c) of the Electoral Act, 2001 and guideline No. 5(b) are inconsistent with the Constitution.

### **12. Federal Government Public Service Rules 2007**

It shall be the duty of every officer to acquaint himself/herself with the Public Service Rules, other regulations and extant circulars. These Public Service Rules apply to all officers except where they conflict with specific terms approved by the Federal Government and written into the contract of employment or letters of appointment<sup>10</sup> – *application to the rules.*

### **13. Serious Acts of Misconduct under the Federal Government Public Service Rules, 2007**

Serious misconduct is defined as a specific act of very serious wrong doing and improper behaviour which is inimical to the image of the service and which can be investigated and if proven, may lead to dismissal. An example of serious Acts of misconduct includes engaging in partisan political activities - Section 4R 030401 – 030402(g). No officer shall, without express permission of the Government, whether on duty or leave of absence – hold any office, paid or unpaid, permanent or temporary, in any political organization; offer himself/herself or nominate anyone else as a candidate for any elective public office including membership of a Local Government Council, State or National Assembly; indicate publicly his support of or opposition to any party, candidate or policy; engage in canvassing in support of political candidates; nothing in this rule shall be deemed to prevent an officer from voting at an election - Section 4 R 030422. On Invalidation of any Law Inconsistent with the Provisions of the Constitution, where Section 1(3) of the Constitution of the Federal Republic of Nigeria, 1999 Considered, it was stated that by the provisions of section 1(3) of the Constitution of the Federal Republic of Nigeria, 1999, if any law is inconsistent with the provisions of the Constitution, the Constitution shall prevail and that other law shall, to the extent of the inconsistency, be void.<sup>11</sup> On the Supremacy of the Constitution of the Federal Republic of Nigeria, 1999, It is trite law that under the consistency test that the validity of any law is determined by its consistency with the provisions of the Supreme Law, that is, the constitution. So that where any law is inconsistent with any provisions of the constitution, such other law shall to the extent of the inconsistency be void.<sup>12</sup>

### **14. Comments/Review**

INEC guideline cannot and should not run contrary to the Constitution of Federal Republic of Nigeria, 1999 (as amended). The Constitution being the *grundnorm* is superior to any other Acts, Laws, authorities, decisions and powers including the Federal Government Public Service Rules, 2007. There is nothing wrong from a body such as INEC and Federal Government Public Service Commission to have rules, regulations and guidelines in managing their affairs once they will not run contrary to the provisions of the Constitution of the Federal Republic of Nigeria. But once they run contrary to the Constitution, they become ultra-vires their authority and therefore null and void. This statement gains support from judiciary decisions in *Utih v. Onoyivwe*,<sup>13</sup> where Supreme Court stated: 'Every act done contrary to a constitutional provision is null and void and of no effect whatsoever.' It is the duty of all courts to give effect to the Constitution and parties in a suit cannot by consent or acquiescence or failure to object nullify the effect of a Constitution. In his words, ESO JSC affirmed in his dictum in *Kalu v. Odili*:

It is both a fundamental and elementary principle of our laws that the Constitution is the basic law of the land. It is the supreme law and its provisions have binding force on all authorities, institutions and persons throughout the country. All other laws derive their force and authority from the Constitution.<sup>14</sup>

<sup>11</sup>*Erumuchev. Amadi* (2016) All FWLR (Pt. 842) 1743 C.A. See Livinus I Nwokike, 'Civil and Criminal Litigation (Compendium of quick reference guide to substantive and adjectival laws with recent judicial authorities on NBA Stamp and Seal and others, in Honour of Hon. Justice Peter N.C. Umeadi' (Awka: Vol. I, Arise and Shine Press, 2017) p. 106

<sup>12</sup>*National Union of Electricity employees and Anor v. Bureau Public Enterprises* (2010) 41 (Pt 1) NSCQR 611 at p. 647; *Military Governor of Ondo State v. Adewunmi* (1988) 3 NWLR (Pt. 82); *S. 1(3) of the 1999 Constitution*; *A. G. Abia State v. A. G of Federation* (2002) 6 NWLR (Pt. 821) 1; *A.G. Abia State .v. A.G. Federation* (2003) 13 NSCQR 373 or (2003) FWLR (PL 152)131 and *A.G. of Ondo State v. A.G. of the Federation &Ors* (2002) 9 NWLR (Pt. 772) 222 Per Uwaifo, JSC

<sup>13</sup> (1991) 1 NWLR Pt. 166 SC. *A.G. Abia State v. A.G. Fed.* (2002) 5 NWLR Pt. 763, p. 264 SC

<sup>14</sup> (1992) 5 NWLR Pt. 240, p. 130 at p. 188 SC

**15. Conclusion**

Therefore, I agree with the Learned Justices in the above two judicial decisions in *INEC v. Musa* and on likely conflict between the Constitution and the Federal Government Public Service Policy as regards participation of engaging in political activities by public / civil servants, I beg to state that the supremacy of the Constitution shall also be made to stand and any other act taken against the public or civil servant should also be held same.