

# CHAPTER 9

## TOWARDS THE SUSTENANCE OF DEMOCRACY IN NIGERIA: THE ROLE OF AN INDEPENDENT JUDICIARY IN ELECTIONS

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### 1 Introduction

Democracy is a governance style which involves every citizen and which is run for the benefit of all, as the people's representatives form the government, and they in turn work for the collective interests.<sup>1</sup> Nigeria became an independent country within the Commonwealth on 1 October 1960. The operating Constitution from then to 30 September 1963 empowered the parliamentary federal legislature to make laws for the country on exclusive legislative matters. To the extent that the members of the legislature were elected by eligible voters in Nigeria, the country passed through democratic governance.<sup>2</sup> Under the 1963 Constitution Nigeria continued its democratic experiences except that the Queen of England ceased to be the head of state in Nigeria.<sup>3</sup> Taiwo captures the political transition from 1966 to 1979 as follows:<sup>4</sup>

The constitutional and political order introduced into the country at independence came to an abrupt end on 15 January 1966 following a military *coup*. The existing democratic structure was replaced by a military order, and this scenario prevailed until 1979 when the country returned to civil rule. In 1979, a new system of government, the presidential system, replaced the parliamentary system of governance that existed under the 1963 Republican Constitution.

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1 Indirect democracy is the preferred option as every citizen may not be able to gather together under a direct democracy. See also N Sultany 'The state of progressive constitutional theory: The paradox of constitutional democracy and the project of political justification' (2012) 47 *Harvard Civil Rights-Civil Liberties Law Review* 382 383.

2 AO Obilade *The Nigerian legal system* (2001) 37.

3 Obilade (n 2) 39.

4 EA Taiwo 'Judicial review of the impeachment procedure in Nigeria' (2009) 3 *Malawi Law Journal* 244.

The 1979 Constitution ushered in democratic governance, which lasted until 31 December 1983, when the military once again seized power.<sup>5</sup> Consequently, the free participation of all in governance, an essential right under democratic governance could no longer be enjoyed under the military autocratic rule. As a result, no other citizen had any role in the emergence of the military government, aside from the *coup* plotters, and little or no role was reserved for any other citizen in the running of the government, which remained autocratic.<sup>6</sup> Military governments generally maintain a political structure allowing a fusion of the executive and legislature, with the judiciary saddled with the responsibility of protecting the state against the victims of the abuse of state powers.<sup>7</sup>

Democratic governance resumed on 29 May 1999, with the deeply-entrenched autocratic features of the military rule resisting democratic norms. One of the manifestations of autocracy in the course of civil rule was the violation of political parties' internal democracy and the consequent imposition of candidates by political party oligarchy.<sup>8</sup> Another was the incessant removal of the chief executive in violation of the provisions of the law.<sup>9</sup> This chapter investigates the impact of judicial review on the consolidation of democratic process in Nigeria.<sup>10</sup> The role of the courts is made possible through the independence of the judiciary in terms of appointment, discipline of judicial officers,<sup>11</sup> and in creating its own procedural rules,<sup>12</sup> which eventually facilitate judicial impartiality.<sup>13</sup>

Under a participatory democracy, voting at elections is an essential practical demonstration of a person's confidence and endorsement of a democratic process.<sup>14</sup> The chapter then considers whether free participation is not hindered, where the processes towards obtaining the permanent voter's card (PVC) is cumbersome,<sup>15</sup> thus paving the way for

5 As above.

6 The military rules through decrees, which constitute the supreme law of a country. See Nigerian Constitution (Basic Provisions) Decree 32 of 1975; Obilade (n 2) 65 68.

7 HO Yusuf 'Calling the judiciary to account for the past: Transitional justice and judicial accountability in Nigeria' (2008) 30 *Journal of Law and Policy* 196 212.

8 *Amaechi v INEC & Others* (2008) 1 MJSC1.

9 *Inakoju & Others v Adeleke & Others* (2007) 1 SCM 1 188.

10 See EO Ayoola 'The importance of the rule of law in sustaining democracy and ensuring good governance' National Judicial Institute, All Nigeria Judges' Conference 5-9 November 2001 47 58.

11 Sec 153(1)(i) of the 1999 Constitution of the Federal Republic of Nigeria (CFRN).

12 *Marbury v Madison* 5 US (1 Cranch) 137 (1803). See L Madhuku 'Constitutional protection of the independence of the judiciary: A survey of the position in Southern Africa' (2002) 46 *Journal of African Law* 233.

13 JA Ferejohn & LD Kramer 'Independent judges, dependent judiciary: Institutionalising judicial restraint' (2002) 77 *New York University Law Review* 962 965.

14 See NS Amanye et al 'Electoral violence and political apathy in Nigeria: Issues and challenges' (2015) 13 *British Journal of Humanities and Social Sciences* 155.

15 Banjo Damilola 'Investigation: How INEC officials extort money from Nigerians seeking PVC registration', <http://saharareporters.com/2018/07/06/investigation-how-inec-officials-extort-money-nigerians-seeking-pvc-registration> (accessed 21 August 2018).

political parties to buy the few PVCs on the day of the election.<sup>16</sup> This development in Nigeria reveals that the electorate experiences such forces seeking to disenfranchise and make him politically inactive as he was under the military rule.<sup>17</sup> The chapter examines as a further challenge to the independence of the judiciary in Nigeria, namely, the inability of the courts to compel the executive to enforce orders and decisions meant to promote human rights and democracy, even when such adversely affect the executive.<sup>18</sup> The chapter is divided into four parts with the first section giving the background. Part 2 examines the right to participate in the government of one's country. Part 3 investigates the role of judicial review in the attainment of democratic integrity. Part 4 gives a general review of the work.

## 2 Democracy

This part examines the provisions enshrined in several international instruments, allowing everyone to take part in the government of his country, directly or through freely chosen representatives as they apply in Nigeria.

### 2.1 Participatory democracy

Democracy is a process by which the people's representatives form a government, and for the government to operate under the rule of the people, devoid of the imposition of private ends on the citizenry.<sup>19</sup> Article 21(3) of the Universal Declaration of Human Rights, 1948 (Universal Declaration) provides on democracy:<sup>20</sup>

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

The preference for representative government as against direct government is attributed to the fact that everybody cannot always gather in a particular place to determine what the best policies would be for all.<sup>21</sup> In the representative democracy, therefore, there are a represented people, and

16 D Johnson et al 'Ekiti election: Fayemi, Eleka in tight race amid ballot-snatching, vote-buying', <https://www.vanguardngr.com/2018/07/fayemi-eleka-in-tight-race-amid-ballot-snatching-vote-buying/> (accessed 25 July 2018).

17 JF Benson 'Voter fraud or voter defrauded? Highlighting an inconsistent consideration of election fraud' (2009) 44 *Harvard Civil Rights-Civil Liberties Law Review* 6.

18 C Hoexter *Administrative law in South Africa* (2012) 168. See also on the impunity of government on court orders without consequences, I Anaba et al 'Outcry as lawyers, others blast Buhari on rule of law remarks' *Vanguard News Nigeria* 28 August 2018.

19 Sultany (n 1) 382 383.

20 The Declaration was adopted by the United Nations General Assembly on 10 December 1948. The Declaration applies in Nigeria as domesticated law.

21 J Ferejohn & P Pasquino 'The countermajoritarian opportunity' (2010) 13 *Journal of Constitutional Law* 363.

the elected officials that represent the popular will.<sup>22</sup>

Participatory democracy entails having a genuine public involvement in government, which is crucial to both the proper functioning and the legitimacy of democratic institutions.<sup>23</sup> Participatory democracy is attained when a variety of interest groups and the public are involved in the electoral processes. Ferejohn and Pasquino give a practical illustration of democracy as they adopt the concept in its competitive, representative and indirect form.<sup>24</sup> To the writers, representatives are chosen at a scheduled time, to deal with issues that are outstanding on election day and those envisaged to arise after the election.<sup>25</sup> Voting at elections is one of the easiest ways for citizens to participate in the democratic processes.<sup>26</sup> Political participation is a vital ingredient of democracy and is desired if democracy is to be sustained.<sup>27</sup> The right of all citizens to political participation as a fundamental human right is enshrined in several international instruments.<sup>28</sup> Article 21(1) of the Declaration of the United Nations General Assembly<sup>29</sup> allows everyone to take part in the government of his country, directly or through freely-chosen representatives.

The people choose their government through an election, which comes by a procedural mechanism.<sup>30</sup> Voting at elections in a democracy enables citizens to make direct or indirect contributions to governance; and political authority is conferred on government for a term certain.<sup>31</sup> The right to vote is contained in section 132 of the 1999 Constitution of Nigeria. Sub-section (5) provides that every person who is registered to vote shall exercise such right in respect of every elective office.<sup>32</sup> An aggregation of votes constitutes the will of the people, which manifests after every election. In the circumstances, Sultany argues that every citizen

22 Ferejohn & Pasquino (n 21) 364.

23 JA Benjamin 'Pushing democracy: Content-based regulations of the press in campaign finance law' (2007) 2 *New York University Journal of Law and Liberty* 610.

24 Ferejohn and Pasquino (n 21) 363.

25 As above.

26 Amanyie et al (n 14) 155.

27 As above.

28 See art 25 of the International Covenant on Civil and Political Rights; art 13(1)(2) of the African Charter on Human and Peoples' Rights, entered into force 21 October 1986, [http://www.achpr.org/english/\\_info/charter\\_en.html](http://www.achpr.org/english/_info/charter_en.html) (accessed 21 August 2018); MS Campbell 'The right of indigenous peoples to political participation and the case of *Yatama v. Nicaragua*' (2007) 24 *Arizona Journal of International and Comparative Law* 499, 518; arts 25(a) and (b) of ICCPR. Nigeria ratified ICCPR on 29 July 1993. See OHCHR 'Status of ratification by treaty and by country', [http://tbin.tnernet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=127&Lang=EN](http://tbin.tnernet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=127&Lang=EN) (accessed 21 August 2018).

29 10 December 1948.

30 X Mangu 'Election and political culture: Issues and trends' (2011) 46 *Journal of Public Administration* 1154; FO Olayinka 'The impact of parties' internal democracy on Nigeria's development' (2016) 4 *Akungba Law Journal* 87.

31 Ferejohn & Pasquino (n 21) 363.

32 The elective offices which run from ward level to the local government council, to the state's house of assembly, up to the office of the President are contained in secs 65, 106, 117, 131 and 132(1)(4) and (5) of the Nigerian Constitution of 1999. See B Ugochukwu 'Ballot or bullet: Protecting the right to vote in Nigeria' (2012) 12 *African Human Rights Law Journal* 539 549 550.

reposes his confidence in the democratic self-government, which he sees as acting on his behalf.<sup>33</sup> Active participation by qualified adults is thus a manifestation of the people's confidence in the democratic governance.<sup>34</sup> With the expiration of a term of office, at the next election the electorates may vote against continuity in office of the representatives who refused to give dividends of democracy.<sup>35</sup>

The chapter observes that the majority of the electorates in Nigeria do not belong to any political party, and the very few that belong are just passive members.<sup>36</sup> This creates the room for 'political merchants' to influence the processes leading to the emergence of a party candidate and how he wins in a general election.<sup>37</sup> This development then confirms the position of Katz and Mair on the declining level of participation and involvement in party activity, when citizens opt for other ventures that can bring good returns.<sup>38</sup> Apathy in the electoral process manifested as unclaimed voter's cards for the general elections of 2019 reached millions.<sup>39</sup>

## 2.2 Democracy and democratic integrity

Voting during periodic elections is by universal and equal suffrage and the voting exercise is held through a secret ballot, and this promotes a free expression of the will of the electorates.<sup>40</sup> To be eligible to vote, every citizen of Nigeria who has attained the age of 18 years and who resides in Nigeria at the time of registration of voters is entitled to be registered to vote in general elections.<sup>41</sup> The registration of voters and the conduct of general elections are under the control of the Independent National Electoral Commission (INEC).<sup>42</sup> Huntington defines democracy in terms of democratic integrity in the mode of selecting representatives through a fair, honest and periodic election in which candidates freely compete for votes, and in which virtually all the adult population are eligible to vote.<sup>43</sup> The aggregation of freely-given votes in the circumstances should determine who occupies an elective post.

33 Sultany (n 1) 393.

34 See YT Fessha 'Judicial review and democracy: A normative discourse on the (novel) Ethiopian approach to constitutional review' (2006) 14 *African Journal of International and Comparative Law* 60.

35 See also Ferejohn & Pasquino (n 21) 365.

36 See also TK Kuhner 'The democracy to which we are entitled: Human rights and the problem of money in politics' (2013) 26 *Harvard Human Rights Journal* 43.

37 As above.

38 RS Katz & P Mair 'Changing models of party organisation and party democracy: The emergence of the cartel party' (1995) 1 *Party Politics* 15; Olayinka (n 30) 88.

39 NAN 'Over 7 million voter cards not yet collected nationwide', <https://www.premiumtimesng.com/news/more-news/259915-7-million-voter-cards-not-yet-collected-nationwide-inec.html> (accessed 23 April 2018).

40 See arts 25(a) and (b) of ICCPR; African Charter; Campbell (n 28) 518.

41 See sec 77(2) CFRN (n 11).

42 Sec 78 CFRN.

43 JC Mubangizi 'Democracy and development in the age of globalisation: Tensions and contradictions in the context of specific African challenges' (2010) 14 *Law, Democracy and Development* 4.

Benson gives two reasons why people's votes may not always count.<sup>44</sup> To the writer, under a 'voter-initiated fraud' a voter registers many times; registers while being under age or otherwise ineligible to register. A voter impersonates others, as he casts votes in the name of others, and votes multiple times.<sup>45</sup> The chapter aligns with the writer to the effect that any vote coming from wrong and unlawful direction is void, and that a single vote that is void corrupts the sanctity of an electoral process. Benson further submits that 'voter-targeted fraud' incorporates deceptive acts that others commit and that are aimed at defrauding voters.<sup>46</sup> Voter-targeted fraud denies an electorate the right to vote, or that even if he does, his vote does not count.

Agbaje and Adejumbi capture the conspiracy of the political class to corrupt the electoral processes and to rig election to political offices, just as the innocent voter wishes that his vote should count in determining who wins.<sup>47</sup> In that light, the chapter observes the corruption of electoral mechanism coming by the way of making the voters registration cards scarce in zones where a ruling party is not popular.<sup>48</sup> Excessive deployment of the armed forces and arms corrupts the electoral processes as the electorates are scared of 'an army of occupation', and as such stay away from the polling booths on an election day.<sup>49</sup> It is also an abuse of the electoral system to present a very clumsy ballot paper to the electorates, which is beyond the comprehension of the semi-illiterate electorates, with an ulterior motive of having ballot paper invalidated because of irregular thumb printing.<sup>50</sup> Nueborne further identifies the financial inducement of the electorates as a fraud, which nullifies the electorate's intention or freewill.<sup>51</sup> It is one of the factors, which make the electorate to vote not by his convictions but by financial inducement. The fraud factor gives the general impression in the country that winners emerge before elections are conducted and that votes do not count; this explains why substantial percentage of the people choose to stay away from the electoral processes.<sup>52</sup>

44 JF Benson 'Voter fraud or voter defrauded? Highlighting an inconsistent consideration of election fraud' (2009) 44 *Harvard Civil Rights-Civil Liberties Law Review* 6.

45 Benson (n 17) 6.

46 As above.

47 A Agbaje & S Adejumbi 'Do votes count? The travails of electoral politics in Nigeria' (2006) 31 *Africa Development* 39.

48 Utodio 'Difficulty in obtaining PVC in Southern Nigeria is a deliberate ploy by politicians', <https://dailytimes.ng/difficulty-obtaining-pvc-southern-nigeria-deliberate-ploy-politicians-utodio/> (accessed 21 August 2018).

49 Ekiti polls attracted the mobilisation of 30 000 policemen and 4 000 soldiers for the less than 3 000 electoral wards. See K Ogundele 'Ekiti poll: Tension rises as security deployment worries residents', <https://punchng.com> (accessed 21 August 2018).

50 'The registration of 23 new political parties brings the total figure to 91. See QE Iroanusi 'Updated: INEC registers 23 new parties', [www.premiumtimesng.com](http://www.premiumtimesng.com) (accessed 21 August 2018).

51 B Nueborne 'One dollar – one vote: A preface to debating campaign finance reform' (1997) 37 *Washburn Law Journal* 1.

52 In the 2007 general election voter turnout stood at 32%; in the April 2011 general election it was 35% and 44% in 2015. See Amanye et al (n 14) 162 164; TC Fagunwa 'Voter apathy and Nigeria's electioneering process: A synopsis on the 2015 general elections' 19.

### 3 Judicial review and the attainment of democratic integrity

This part considers the level of independence and impartiality that the judicial organ is required to have to check anti-democratic practices, to enforce political rights.

#### 3.1 Judicial review and democratic integrity

Judicial review is an instrument for the promotion of democracy and human rights, as the courts breathe life into the provisions of the Constitution.<sup>53</sup> The exercise of judicial review by the courts is a major aspect of judicial power, and it applies in providing remedy for wrongs.<sup>54</sup> Kuhner submits that the political rights that are contained in the domestic and international instruments would be meaningless, if the rights are not interpreted in line with the demands of justice.<sup>55</sup> Judicial review thus regulates the political space in such a way that the minority are not denied a say, while the majority have their ways in a democracy.<sup>56</sup>

Under a democracy the judiciary has a huge constitutional responsibility to secure the integrity of democracy as it harmonises the enjoyment of human rights with electoral rules.<sup>57</sup> The judiciary ensures that the rule by the majority operates, subject to the provisions of the law, failing which democracy in a country ceases to run for the benefit of all.<sup>58</sup> Human rights abuses are largely traceable to government officials, but with the application of judicial review, the violation of human rights is put under control.<sup>59</sup> A fair, efficient and accessible judicial system thus is necessary not just to protect citizens' rights, but also to consolidate and deepen the democratic processes.<sup>60</sup>

The judiciary in its review of democratic breaches is guided by the principles of supremacy of the Constitution.<sup>61</sup> Sections 6(1) and (2) of the CFRN grant authority to the courts to adjudicate on any dispute that can be resolved by application of the law.<sup>62</sup> By necessary implication, the section vests in the courts broad remedial powers to provide appropriate relief when an infringement or threatened violation of a right is established. In

53 BK Twinomugisha 'The role of judiciary in the protection of democracy in Uganda' (2009) 9 *African Human Rights Law Journal* 20.

54 *Ubi jus, ibi remedium*.

55 Kuhner (n 36) 83.

56 See also MW Mhlaba 'The operation of democracy and the role of the judiciary in a constitutional state' (2010) 1 *Speculum Juris* 43.

57 Twinomugisha (n 53) 3.

58 See also Sultany (n 1) 382 383.

59 A Rotman 'Benin's Constitutional Court: An institutional model for guaranteeing human rights' (2004) 17 *Harvard Human Rights Journal* 289.

60 Ayoola (n 10) 47 58.

61 *Marbury v Madison* (n 12) 137.

62 Secs 6(6)(a) and (b) CFRN (n 11).

that regard the Constitution of Nigeria considers judicial review as very useful in the attainment of constitutionalism and the advancement of democracy.<sup>63</sup>

The conduct of judicial review and the organ responsible vary from one jurisdiction to the other.<sup>64</sup> In Nigeria the law courts exercising judicial review in line with the United Nations' (UN) Guide to the effect that the judiciary shall have exclusive authority over all issues of a judicial nature.<sup>65</sup> Remedies in terms of electoral matters allow election tribunal or courts to nullify an election and to order a fresh one where the person who obtained the highest votes was not qualified to contest in the election.<sup>66</sup> It also allows a declaration of a candidate who had highest valid votes, as against highest total vote.<sup>67</sup> Eskridge and Ferejohn liken the position of judges to that of horticulturists who guide the work of gardeners in a national garden.<sup>68</sup> If judges disallow judicialisation, it is similar to the horticulturist failing to supervise the gardeners, and the garden becoming weedy.<sup>69</sup> Consequently, the judges have to interpret the Constitution and other relevant laws to regulate political activities, thus promoting political rights and democracy.<sup>70</sup>

Sometimes in the political history of Nigeria there were recurring gross violations of political parties' internal democracy, and the consequent imposition of candidates taking the place of party primary elections.<sup>71</sup> The legislature rose to the occasion by its regular review of Electoral Acts,<sup>72</sup> which was complemented by judicial pragmatism in the enforcement of democratic values. In the case of *Amaechi v Independent National Electoral Commission & Others*<sup>73</sup> the provisions of section 34 of the Electoral Act, 2006 which set a limit of 'time and reason' to be observed for substitution of a candidate were considered. The party sought to substitute the name of second respondent with the appellant, on the excuse of having erroneously submitted the name of the appellant in the first instance.

The Supreme Court set aside the party's contention that there was

63 Sec 6 CFRN.

64 Some jurisdictions have considered the exercise of judicial review as very undemocratic and unacceptable. To Fessha 'it makes unelected judges, who are accountable to nobody to nullify the acts of democratically elected legislatures who are accountable to the public'. Fessha (n 34) 59.

65 See the United Nations Basic Principles on the Independence of the Judiciary endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, in the International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors Practitioners Guide 1 82.

66 Sect 140(2) of the Electoral Act 2010.

67 As above.

68 WN Eskridge & J Ferejohn 'Constitutional horticulture: Deliberation-respecting judicial review' (2008/2009) 87 *Texas Law Review* 1275.

69 As above.

70 Twinomugisha (n 53) 7.

71 See *Amaechi v INEC & Others* (2008) 1 MJSC1; *Ugwu & Another v Senator Araraume & Another* (2007) 7 MJSC 1.

72 Sec 34 of the 2006 Act allows substitution of candidates upon adducing reasons. Sec 33 of the 2010 Act disallows substitution except on account of death of a candidate.

73 As above.

an error in forwarding the name of a candidate who won clearly in the primary election. The Court held that the appellant was deemed to remain the authentic candidate of the political party. The chapter submits that where the candidate of a political party does not emerge under a free and fair primary election, this stands to truncate the general will, which is assumed in a general election. It otherwise amounts to voters in a general election having to build on a faulty foundation laid for selfish ends.

The unlawful removal of the chief executive as a political exercise was considered in *Abaribe v The Speaker Abia State House of Assembly*.<sup>74</sup> The case opened a floodgate of impeachment proceedings that heightened legislative and the executive discord at the federal, states and local government levels across the country.<sup>75</sup> In *Inakoju & Others v Adeleke & Others*,<sup>76</sup> for instance, the Supreme Court invalidated the impeachment of Senator Rashidi Ladoja as governor of Oyo State. The Court nullified the initial removal of the Speaker of House of Assembly because of procedural irregularities. The Court promoted democratic tenets as it held that the impeachment of the governor in the absence of the Speaker, who should have played a prominent role in the impeachment exercise was unlawful. The chapter submits that if not for the continuous pragmatic review of the Electoral Act,<sup>77</sup> and for judicial activism in the interpretation of the same, the nascent democracy could have ended abruptly. The courts thus are indispensable to a vibrant democracy as it checks the excesses of majoritarian democracy.<sup>78</sup>

Judicial activism, however, ceased in *Atiku Abubakar & Others v Umaru Musa Yar Adua & Others*,<sup>79</sup> whereby the merits of a case gave way to procedural technicalities over the 21 April 2007 presidential election. The Independent Electoral Commission of Nigeria (INEC) had erroneously disqualified the petitioner Atiku Abubakar from the election and his name had been excluded from the ballot papers. However, the name was restored four days to the election. The Court declined to admit that the petitioner's initial disqualification was an infringement on his right to be voted for, because he eventually took part in the election, his petition on that ground collapsed.

The court is not usually at its best in cases where order or decision that is made is against the executive, particularly, where the executive organ

74 (2002)14 NWLR (Pt 788) 466.

75 See MOA Alabi & Imam 'Law and the politics of impeachment in Nigeria: Interrogating the basis of judicial control of a political process' (17) 2 *Unilorin E-Journals* 19, <http://www.unilorin.edu.ng/ejournals/index.php/cp/article/download/970/528> (accessed 12 November 2016).

76 n 9 above, 188.

77 The 2010 Electoral Act does not recognise substitution, except on account of death of a candidate.

78 T Regassa 'Making legal sense of human rights: The judicial role in protecting human rights in Ethiopia' (2009) 3 *Mizan Law Review* 325.

79 SC 72/2008 Supreme Court of Nigeria Judgment of 12 December 2008. See O'B Kaaba 'The challenges of adjudicating presidential election disputes in domestic courts in Africa' (2015) 15 *African Human Rights Law Journal* 341 342.

fails to enforce such. In *Muhammadu Buhari & Others v Olusegun Obasanjo & Others*,<sup>80</sup> the petitioner sought and was granted an injunction by the court, restraining Obasanjo and his running mate from presenting themselves for swearing-in into office, pending the determination of the main election petition. They went ahead and were contemptuously sworn in without any sanction. The chapter observes that as the judiciary is expected to sustain democracy in Nigeria, it has to enjoy a high level of independence with which it can have its decisions enforced.

Notwithstanding the seeming helplessness of the courts on the last two cases, the judiciary has made positive impact in sustaining democracy and human rights, but it can do better so that the people's confidence in the judicial system and in the democratic processes can increase. In that way the judiciary will continue to play its constitutional responsibility to secure the integrity of democracy as it interprets the law to protect political rights.<sup>81</sup> The judiciary is striving to ensure that the people's votes and mandate are neither lost at the polling booth nor at the court or tribunal levels. The chapter subsequently investigates more comprehensively whether the judiciary may dispense justice if it does not enjoy due independence to decide on a matter before it.

### 3.2 Independence of the judiciary

Independence of the judiciary is attained where there is no restriction, improper influence, inducement, pressure, threat or interference, directly or indirectly, either from any quarter or for any reason.<sup>82</sup> The UN in 1985 admonished states to ensure that matters before the judiciary in each state are decided impartially, on the basis of facts and in accordance with the law.<sup>83</sup> Consequently, every state within the UN is expected to enshrine in its constitution provisions on the independence of the judiciary, with a view of respecting and observing the independence of that organ of government.<sup>84</sup>

To effect independent status for the judiciary in Nigeria, section 153(1) (i) of the 1999 Constitution of the Federal Republic of Nigeria (CFRN) creates the National Judicial Council (NJC) to anchor the independence of the judiciary. The Council is responsible for the appointment and discipline of judicial officers,<sup>85</sup> and for the regulation of operations of the judiciary.<sup>86</sup> The independence of courts is required for an impartial review of sensational cases, particularly touching on political activities

80 *Muhammadu Buhari & Others v Olusegun Obasanjo & Others* SC 133/2003 17 NWLR (2003); see also Kaaba (n 79) 352.

81 *Twinomugisha* (n 53) 3.

82 *Ferejohn & Kramer* (n 13) 965.

83 UN Guide (n 65).

84 As above.

85 Sec 153(1)(i) CFRN.

86 As above.

of government. It takes an independent judiciary to enjoy 'decisional independence', by which decisions made can be enforced without fear or favour.<sup>87</sup> The independence of the judiciary shelters the institution from interference by the political organs in the process of adjudication.<sup>88</sup> Nwabueze observes that the political organs influence courts' decisions when they become desperate to hold public offices. The writer submits that '(b)ecause success in an election carries such high stakes, politicians in this country are strongly inclined and prepared to use pressure of various kinds to influence judge's decision in their favour'.<sup>89</sup>

Judicial independence in the circumstances works to attain a decision-making process in which cases are decided on the basis of reasons, and on an existing legal culture.<sup>90</sup> The independence of the judiciary ultimately works to effect good governance.<sup>91</sup>

The chapter observes that when the judiciary has to lobby the executive for the payment of its budgetary allocations, the system makes the judiciary to 'show its gratitude to the political organs'. This position aligns with Sagay's assertion that for the judiciary to act as an unbiased umpire in cases involving the government, the judiciary should be financially independent of the executive.<sup>92</sup> It is thus a welcome development that President Buhari assented to the Financial Autonomy and Independence of the Judiciary and Houses of Assembly of a State Bill, under the Constitution Fourth Alteration Bill.<sup>93</sup> By implication, however, the budgetary allocation to a state's judiciary and a house of assembly shall be paid directly to each, and no longer through or from the governor of such a state.<sup>94</sup> The chapter highlights what role the independence of the judiciary is expected to play in the quality of courts' decisions.

### 3.3 Judiciary and impartiality

The law courts are vested with the powers of judicial review in line with the provisions of the Constitution of Nigeria.<sup>95</sup> Impartiality entails an 'impersonal detachment' and 'an exercise of compassion and empathy' to enable a judge to understand the assertions of parties, and to be able

87 In *Muhammadu Buhari & Others v Olusegun Obasanjo & Others* (n 80) the injunction restraining the respondent and chief executive and his running mate from presenting themselves for swearing-in into office pending the determination of the main election petition was not complied with. The Supreme Court had no means of enforcing its decision as it rather looked ahead to determine the main election petition objectively and on its merits. See also *Twinomugisha* (n 53) 7; *Kaaba* (n 79) 352.

88 *Ferejohn & Kramer* (n 13) 967.

89 BO Nwabueze *Nigeria's Presidential Constitution 1979–83: The second experiment in constitutional democracy* (1985) 443.

90 *Ferejohn & Kramer* (n 13) 972.

91 n 13, 966.

92 IE Sagay *Legacy for posterity: The work of the Supreme Court 1980–1988* (1998) 340 355.

93 J Agbakwuru 'Buhari grants financial autonomy to state judiciary, assemblies', [www.vanguardngr.com](http://www.vanguardngr.com) (accessed 12 June 2018).

94 As above.

95 Sec 6 CFRN; *Regassa* (n 78) 325.

to maintain a middle position, on the two extreme positions, and thus altering the beliefs the judge brings to a case.<sup>96</sup> Impartiality is an essential quality of a judge, who hopes to attain justice, particularly in identifying political rights and in protecting the same. Thus, in the context of this work, impartiality affords the judge the opportunity to uphold political rights without fear or favour.

Impartiality flows from the level of independence of the judiciary. It is a fundamental qualification of a judge, as it is presumed on his part, and it is the core attribute of the judiciary; it is the key to the common law judicial process.<sup>97</sup> The courts have the authority to adjudicate on every dispute, which may be resolved by application of the law.<sup>98</sup> The courts are as such vested with the powers to provide appropriate relief for every violation of right without any encumbrance in accessing the court. The chapter submits that when a case of bias or partiality is established against a judicial officer on a matter before him, access to justice of the litigant in the circumstances is curtailed. The state of impartiality is consequently compromised and this in turn destroys the people's confidence in both the judicial and the electoral system.

The independence and impartiality of the judiciary are compromised where the political organs make the judiciary function under political influence and manipulation.<sup>99</sup> Oko argues that the essence of the fusion of the executive and legislative organs under military governance is to saddle the judiciary with the responsibility of protecting the government in its human right abuses.<sup>100</sup> The judiciary under the military as such had its jurisdiction to determine the validity of a decree that violates human right of citizens ousted; the rights violation continues under the civil and democratic governance as the government places national interests above the rule of law.<sup>101</sup> The government rather expects the judiciary to protect the interest of the government against victims of its right abuses. However, this is not peculiar to Nigeria but extends to other African countries, such that a sitting president or a candidate of a transiting president in Africa usually enjoys supportive legal reasoning to emerge victorious in presidential election petitions.<sup>102</sup>

96 P Lenta 'Democracy rights, disagreements and judicial review' (2004) 20 *South Africa Journal on Human Rights* 20 21.

97 UN Guide (n 65).

98 Secs 6(6)(a) & (b) CFRN.

99 O Oko 'Seeking justice in transitional societies: An analysis of the problems and failures of the judiciary in Nigeria' (2005) 31 *Brooklyn Journal of International Law* 73.

100 Yusuf (n 7) 196 212.

101 T Omilana 'Why Nigerian government cannot release Dasuki – Malami' *The Guardian* (Nigeria) 20 July 2018; Anaba et al (n 18) 65 66. Ouster clause provisions in legislation also hinder the judiciary from curtailing the arbitrariness in government activities. OF Olayinka 'Judicial review of ouster clause provisions in the Nigeria's 1999 Constitution: Lessons for the country' (2018) 9 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 140.

102 *Awolowo v Shagari* (1979) 6 9 SC 51; *Buhari v Obasanjo & Others* (2005) 19 WRN 1; Kaaba (n 79 above) 329 335; M Azu 'Lessons from Ghana and Kenya on why presidential election petitions usually fail' (2015) 15 *African Human Rights Law Journal* 157.

In *Buhari & Another v Obasanjo & Others*,<sup>103</sup> at the general election of 19 March 2003, the first respondent was the incumbent President, and was the presidential candidate of the People's Democratic Party. He was declared the winner and as such returned as President of the Federal Republic of Nigeria. Muhammadu Buhari and the All Nigerian Peoples Party (ANPP) argued that the first respondent was not validly elected by a majority of lawful votes cast in the election and did not receive 25 per cent of votes cast in two-thirds of the states of Federation and Federal Capital Territory. The Supreme Court upheld the decision of the Court of Appeal; it upheld the election of the first respondent on the basis that presidential elections involved substantial planning and required much funds. The Court as such interpreted the requirement of section 135(1) of the Electoral Act, 2002 in favour of the first respondent, who was also the President. The Court held that the petitioner who made the assertion failed to establish the alleged non-compliance with the electoral law. The election of the respondent was upheld contrary to the 'general legislative intent'.<sup>104</sup> It is submitted that if the courts were adequately independent, it would not give a decision which was unjustly prepared to suit the government.

The Nigerian Supreme Court also interpreted the requirement of substantial compliance of election with the requirement of sections 145(1) and 146(1) of the Electoral Act, 2006 in *Odumegwu Ojukwu v Musa Yar'Adua & 4 Others*.<sup>105</sup> In that case the petitioner contested in the 21 April 2007 presidential election under the All Progressives Grand Alliance (APGA). He contested the declaration of the first and second respondents as winners in the election. The petition was struck out by the Court of Appeal and the Supreme Court held that the striking out did not occasion a miscarriage of justice. The Court interpreted section 146 of the Electoral Act to protect the presidential mandate given to the first respondent. It held that there were no sufficient facts to establish the non-compliance and that the electoral complaints were unduly restricted to the south east zone of the country, whereas the presidential election was held all over Nigeria as a single constituency.

Consequently, the Constitutional Court in *S v Zuma*<sup>106</sup> warned that courts should interpret legislation on the basis of the words chosen by the legislature,<sup>107</sup> and not from the pressures from the political organs. The chapter submits that justice is dispensed where the court is impartial by virtue of the independence it enjoys. The state of impartiality makes for the protection of political rights and it enhances the people's confidence in the judicial system, and in the democratic processes. However, with the desperation of the political class at grabbing political power, it becomes

103 *Buhari & Another v Obasanjo & Others* (2005) 9 SCM 1 101 102 203.

104 See also PP Craig *Administrative law* (2008) 18; W Wade & C Forsyth *Administrative law* (2009) 30 35.

105 *Odumegwu Ojukwu v Musa Yar'Adua & 4 Others* (2009) 6 SCM 126 205.

106 *S v Zuma* (1995) (2) SA 642 (CC) paras 17-18. The South African case is very relevant, though of a persuasive influence in Nigeria.

107 As above.

apparent that the judiciary has more grounds to cover.

## 4 Conclusion

The political class becomes more desperate at getting to elective offices; it conceives new political frauds from time to time. While the judiciary is trying to overcome the challenges of the independence and judicial impartiality,<sup>108</sup> it is further confronted with democratic violations such as vote buying and selling,<sup>109</sup> which is built on restricted registration of eligible voter.<sup>110</sup> The democratic breaches thrive as the judiciary lacks the power to decide on a case that is not before it.<sup>111</sup> The enthusiasm with which Nigerians received democratic governance in 1999 has surely waned as the political class continues to violate democratic integrity for private gains.<sup>112</sup>

The judiciary and the adoption of judicial activism courageously stemmed the tide of democratic breaches such as the impeachment of the executive<sup>113</sup> and the violation of internal party democracy, but many more are unfolding.<sup>114</sup> The judiciary has to jettison 'its assigned role' of protecting the state at the expense of victims of the abuse of state powers and has to dispense substantial justice.<sup>115</sup> The chapter establishes that the legislature and the judiciary are expected to be up and doing if the electoral integrity and democratic governance are to be sustained in Nigeria.<sup>116</sup> The judiciary should be independent of the political organs, to the extent that it can have its decisions enforced where political rights are violated.<sup>117</sup>

108 Ferejohn & Kramer (n 13) 965.

109 Johnson (n 16).

110 Damilola (n 15).

111 Hoexter (n 18) 168.

112 Sultany (n 1) 382 383.

113 *Inakoju v Adeleke* (n 9).

114 *Amechi v INEC* (n 8).

115 Yusuf (n 7) 196 212.

116 See Ayoola (n 10) 47 58.

117 See Rotman (n 59) 292.