

Nurturing Constitutionalism through the Courts: Constitutional Adjudication and Democracy In Nigeria

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INTRODUCTION

Nigeria commenced its third wave of constitutional democracy in 1999 with constitutional framework patterned after the American variety of presidential system with its fairly, clearly defined division of powers among the arms of government and the complex systems of checks and balances. The Presidential System was also foisted on an already existing federal structure which, ironically, was preserved, in legal and political terms, by the military despite the unified command and hierarchical structure of military governments. The 1999 Constitution was fashioned and imposed by the military despite the dubious claim in its preamble which says “*We the people of the Federal Republic of Nigeria: having firmly and solemnly resolved... do hereby make and give to ourselves the following constitution*”.¹

Due to many years of military governments, democratic culture and institutions remains under-developed. In fact, a great deal of militarised culture pervades governments and the society at large which politicians in particular find convenient and seem less inclined to unlearn. This pose fundamental challenges to the development and practice of constitutionalism and the rule of law precepts whose key underlying elements and advocacy rest on the pillars of supremacy of the constitution, separation of powers, and guarantee of fundamental rights and freedoms.² Adherence to these elements is what makes a government constitutional and democratic.

The Nigerian courts even under military dictatorship, were able to preserve constitutionalism to an extent³ and did not suffer the same fate that the legislature had during the military regimes.⁴

Since transition to civil rule in 1999 however, the courts have played a much more pronounced and critical role in settling varieties of disputes and becoming a bulwark for constitutional democracy and guarantee of fundamental rights – what Nigerians labelled as the “last hope of the common man”. In this regard, one can easily extend to Nigeria, Mendes observations in relation to Brazil that “...nowadays, constitutional adjudication is characterised by the

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1 Constitution of the Federal Republic of Nigeria, 1999. (Hereinafter referred to as the 1999 Constitution).

2 Mowoe K.M., *Constitutional Law in Nigeria*, Malthouse law books 2008, p.56

3 *Lakanmi and others v AG Western State (1971)*. U.I.L.R 201 S.C;

4 They were preserved by win some, loose some, cat and mouse relationship with the military in their adjudicatory roles.

originality and diversity of the proceedings aimed at reviewing the constitutionality of the government's actions and protection of fundamental rights".⁵

In broad terms, some of the provisions of the 1999 Constitution have generated intense, emotional debates on a wide spectrum of issues which range from control of natural resources between Federal and State governments, revenue sharing, power sharing between Federation and States; to States and Local government creation, tenure of office and perks for elected office holders among others. Many of these issues have been litigated upon ferociously in the courts to the extent that the last 10 years of democracy have infused more constitutional litigations in the system than any period in the history of Nigeria

THE COURT STRUCTURE/POWERS

The 1999 Constitution had secured to a substantial level judicial independence in Nigeria. By section 6 (1) & (2),⁶ the judicial powers of the federation and of the states are vested in a hierarchy of courts with the Supreme Court of Nigeria at the apex, to act as a check on the activities of the other organs of government so as to promote good governance and respect for individual rights and fundamental liberties.⁷

From the outset, the Supreme Court saw the responsibility of interpreting the constitution as something going beyond the black letter of the law so as to give effect to the intention of the legislature or the people.⁸ Thus, the supreme court cautioned that mere technical rules of interpretation of statutes are inadmissible to defeat the principles enshrined in the constitution and that the courts should whenever feasible and in response to the demands of justice, lean to the broader interpretation.⁹ This is perhaps, the reason for the conclusion by Benjamin Davies that "judges really cannot avoid making law"¹⁰ and indeed, the justification for judicial activism.¹¹

There is no doubt that the judicial approach to the interpretation of the 1999 constitution has been largely activist. The period of last 10 years of democracy in Nigeria has witnessed a revolution in the judicial sector, transforming it into, by far, the most credible arm of the government.

5 Mendes, G, "New Challenges of Constitutional Adjudication in Brazil", *Brazil Institute Special Report*, November, 2008.

6 1999 Constitution.

7 Uwais, M.L, "The Evolution of Constitutionalism in Nigeria: The Role of the Supreme Court Under the 1979 and 1999 Constitutions", Nigerian Institute of Advanced Legal Studies Inaugural Distinguished Fellows' Lecture, 2006

8 This, according to the supreme court ,is so because "the function of the constitution is merely to establish a framework and principles of government, broad and general in terms intended to apply to the varying conditions which the development of our general communities must involve..." Per Udo Udoma, JSC, in *Nafiu Rabiu v The State* (1981) 2 NCLR 293 at 326; See also *Agua Limited v Ondo State Sports Council* [1988] 4 NWLR (Pt. 91) 622; *Mohammed v Olawunmi* [1999] NWLR (Pt. 133) 459; *Chime v Ude* [1996] 7 NWLR (Pt. 461) 379

9 Per Udo Udoma, JSC, in *Nafiu Rabiu v The State* (supra).

10 Davies, B.T., "Constitutional Adjudication 1" *Utah Bar Journal*, August 2006.,

11 The theory of judicial activism assumes that every legislation has a purpose and that the constitution is a social charter of a dynamic society based on certain ideological or philosophical presuppositions. Consequently, in interpreting the constitution, it seeks to ascertain these underlying principles and give effect to them- Okere, B.O., "Judicial Activism or Passivity in Interpreting Nigerian Constitution", Unpublished Lecture.(In possession of the authors)

This has manifested in a number of landmark decisions of the courts in diverse areas¹² which no doubt have helped to reshape the nation for good. A few of these decisions are considered here.

THE COURTS AND THE 1999 CONSTITUTION

Political Party Registration and Intra Party Wrangles

The main vehicles for actualising constitutional democracy and democratic representation are the political parties and the electoral process. Specifically, the key stakeholders in the driver's seat in this regard are the political class/political parties, the election management agency and the electorate.

The Constitution¹³ and the Electoral Act¹⁴ made elaborate provisions for the registration of political parties and good democratic practices among politicians and political parties.

Initially, the national electoral body sought to carry out the party recognition such as to narrow down the number of parties in the country. This was resisted by some of the politicians who challenged it in the courts¹⁵ and an attempt by the Electoral Commission to impose further requirements outside the constitutional requirement was rebuffed by the Supreme Court in ***Independent National Electoral Commission(INEC) v Balarabe Musa.***¹⁶

This liberal interpretation enabled the widening of the political space through the eventual registration of 54 political parties. It also offered alternative platform for politicians who could not fit into existing parties or association to pitch tent with other parties or form new ones rather than seek to encourage military intervention or resort to violence.

Having secured registration, the internal workings of the parties became a major area of crisis in the constitutional experiment. Most of the political parties emerged from a merger of strange bedfellows and associations that were not anchored on ideological benchmarks, other than the desire to ascend to power by a few powerful individuals using any means. As a result, the parties were replete with splinters and factions. With this mindset, all the political parties showed no respect for internal democracy. In most of the parties, there were no democratic

¹² It is impossible, given our constraint in space, to discuss or even mention all such cases here. The following supreme court decisions and others mentioned elsewhere in this paper are all examples: Peter Obi v Independent National Electoral Commission(2007) 7 SC 268; Amaechi v Independent National Electoral Commission [2007]18 NWLR (Pt.1065)105; Peoples Democratic Party v Independent National Electoral Commission 92001) 1 FWLR (Pt. 31) 2735; Dapionlong v Dariye [2007] All FWLR (Pt.373) 81; Attorney-General of Federation v Abubakar [2007] All FWLR (Pt.375) 405;Ladoja v INEC [2007] All FWLR (Pt. 377) 934; Action Congress v INEC [2007] All FWLR (Pt. 378) 1012; Obi v INEC [2007] All FWLR (Pt. 378) 1116.

¹³ S.222,-229 1999 Constitution

¹⁴ The Nigerian Electoral Act 2006

¹⁵ ***National Conscience Party v Independent National Electoral Commission***(2005) All FWLR (Pt. 281) 325. INEC under Dr Abel Guobadia as chairman had registered 3 political parties in addition to 3 created by the military regime. It however refused to register Chief Gani Fawehinmi's National Conscience Party consequent upon which the action was instituted challenging the refusal.

¹⁶ (2003) 1 SC (Pt.1) 106 See also AG Federations and Abubakar (supra).

selections of the candidates while in others that attempted a fair level of primaries, the results were thrown overboard and party leaders arbitrarily picked candidates they preferred whether or not the candidates won the primaries.¹⁷

These arbitrariness led to a deluge of litigations in the courts largely over selection of candidates. The initial attitude of the courts was to hands-off intervention on the ground that the courts will not choose candidates for the political parties as it involves the internal affairs of the parties. However, following widespread abuse, and expression of concern nationally, the Courts modified their stand to decide that where the parties have set rules for the selection, the Courts will intervene to ensure compliance with those rules.¹⁸

Disqualification from Election

The constitution¹⁹ prescribes eligibility requirements for candidates seeking to vie for various offices ranging from Councillors at the local government level to the President of Nigeria. These requirements include *inter alia*, age,²⁰ educational qualification,²¹ non conviction or indictment even by administrative panels.²²

The whole idea is the election of people who are clean and stand on a high moral ground to provide exemplary leadership for the country. However, as feared, this became a major arena of controversy with opposition politicians charging the electoral body with partisanship against opponent candidates or candidates who although were in the ruling government, were perceived not to be supportive of the government.

The most celebrated of such cases²³, was the initial exclusion of the then Vice President Atiku Abubakar.²⁴ The Vice President had as a result of a major rift between himself and the President established another political party and sought to contest for the office of the President without resigning his position as Vice-President. The government had earlier set up an administrative panel of inquiry and issued a white paper on it containing a list of those indicted for sundry offences, who under the constitution are disqualified from contesting for election. Some of those affected including the Vice-President challenged the decision in the court.²⁵

17 Amachi v. Independent National Electoral Commission (Supra)

18 Per Tobi JSC in Inakoju v Adeleke (2007) FWLR (Pt.353) 3 p.119-120.

19 S.65&66(qualification and disqualification for election into the National Assembly); S.106&107 (qualification and disqualification for election into the State House of Assembly);S.131 &137 (qualification and disqualification for election as president); S.177&182 (qualification and disqualification for election as governor).

20 The age qualification into the National Assembly is at least thirty years S.65(1)(a), for presidential candidate is at least forty years S131(b).

21 Into the National Assembly(S.65(2)(a)) and presidency(S.131(c)) is at least school certificate or its equivalent

22 S.137(1)(d);S.182(1)(d)(e)

23 Abubakar v Attorney-General of Federation (2007) 6 NWLR(Pt.1031) p.626; (2009) All FWLR(Pt. 456) p.1

24 The vice president to president Olusegun Obasanjo

25 Abubakar v A.G Federation & Ors (Supra)

He lost in the Court of Appeal but barely five days to the Presidential election of 2007, the Supreme Court²⁶ overruled the judgement of the Appeal Court which cleared the Vice-President to contest for the Office of the President – 5 days to the elections.²⁷

The Impeachment Process

No democratic era in Nigeria had witnessed as many impeachments as have occurred in the last 10 years of Nigeria's democracy.²⁸ The indiscriminate manner in which this has been done and the illegalities that characterize most of the impeachments have tended to threaten the nascent democracy especially with the emasculation of the courts by the ouster provisions of section 188(10) of the 1999 constitution.²⁹

Despite this provision, the courts have intervened in cases where the legislature had failed to follow the procedure laid down in the constitution for the removal of the governor or the deputy governor³⁰ thereby averting political crisis in the country.

Immunity Clause

One of the most criticised provisions of the 1999 constitution is section 308 first introduced as section 267 of the 1979 constitution to provide for immunity of the president, vice-president, governor and deputy-governor from judicial processes. This insulation of the leadership of the executive from judicial process is generally believed to encourage executive lawlessness, engender abuse of power and shield corrupt practices by such leaders. Initially, the provision was understood and applied by a Federal High Court as a bar to investigation of such officers³¹. On appeal however, the Supreme Court reversed the decision³² to hold that the immunity clause did not prevent the investigation of the affected public office holders although they can neither be prosecuted nor arrested while in office. This decision has since offered the necessary impetus for law enforcement agencies to investigate allegations of crime against such officers while they are in office and build a file which could and indeed, have been used for prosecution on exit from office.

²⁶ *Abubakar v A.G Federation & Ors* (2007) 6 NW.L.R (Pt.1031) p.626

²⁷ *See also A.N.P.P v Usman* (2009) ALL FWLR (Pt. 463) p.1229

²⁸ Some of the impeachments include those of Governors Rashidi Ladoja(Oyo State), Joshua Dariye(Plateau State), Peter Obi (Anambra State), Diepreye Alameyeseigha (Bayelsa State), Ayodele Fayose (Ekiti State). Ladoja, Dariye and Obi successfully challenged their removal and were re-instated. Alameyeseigha and Fayose did not challenge theirs. Other impeachments include the following deputy governors: Abdullahi Arungunu (Kebbi State), Iyiola Omisore (Osun State), John Okpa (Cross Rivers State) and Enyinnaya Abaribe (Abia State).

²⁹ The position earlier taken by the courts on this as laid down in the Court of Appeal decision in *Balarabe Musa v Kaduna State House of Assembly* (1984) was that impeachment of a state governor was a purely legislative constitutional affair which was outside the jurisdiction of the courts. Consequently, the court in that case declined jurisdiction in the face of a clearly illegal and unconstitutional removal of Governor Balarabe Musa by the Kaduna State House of Assembly. Despite the intense criticism of this decision by eminent constitutional lawyers,(see for example Nwabueze, B.O., *Nigeria's Presidential Constitution 1979-1983*, Longman, 1985, p.339-340) it was followed in

Abaribe v Speaker of Abia State House of Assembly [2002] 14 NWLR (Pt.778) 46

³⁰ *See Inakoju v Adeleke* (Supra note 18)

³¹ Indeed, so did the Trial Judge, Egbo-Egbo, J, hold in *Fawehinmi v Inspector-General of Police* [2002] 7 NWLR (Pt.767) 606

³² (Supra). The court however refrained from ordering mandamus to compel investigation by the police being a question of discretion.

Anti- corruption war

The underlying attempt to frustrate the war against corruption under the guise of non interference in State matters by the Federal Government was resisted by the Supreme Court in **Attorney-General of Ondo State v Attorney-General of Federation**³³. Persuaded by the need to eradicate corrupt practice and abuse of power to ensure good governance in Nigeria, the supreme court shunned the invitation to declare the Corrupt Practices and Other Related Offences Act 2000 as unconstitutional on the ground that corruption was neither under the exclusive nor concurrent legislative list and therefore outside the competence of the National Assembly to legislate on. The court rather, on a liberal interpretation of relevant sections,³⁴ held that a legislation for the abolition of corrupt practices and abuse of power was within the competence of the National Assembly to enact.

Human Rights

Guaranty of human rights and fundamental freedoms is one constitutional limitation on legislative and executive powers without which a government cannot rightly be called a limited or constitutional government.³⁵ The importance of these rights is further bolstered by Fundamental Human Rights (Enforcement Procedure) Rules 1999, which introduced speedy process for dealing with cases on infringement on Fundamental human rights. The commitment is so strong as to have led the courts to enforce it even when knowing its decision would not have practical effect. In **Nasiru Bello v Attorney-General of Oyo State**,³⁶ the supreme court held that the execution by government of a death sentence on a person prior to the determination of his pending appeal on the conviction and sentence was illegal, and unconstitutional and an infraction of his right to life and the right to have his appeal heard as guaranteed by the constitution.

Procedurally, the courts have also in an effort to ensure unhindered access to the courts for enforcement of human rights, liberalised the jurisdiction of the high courts to entertain fundamental rights cases under the constitution,³⁷ as well as the methods of approaching the courts.³⁸ They have also extended the right of action for enforcement of rights to companies³⁹ and liability for violation to individuals⁴⁰ none of which is expressly provided for in the

33 [2002] 9 NWLR (Pt. 772) 222. The Supreme Court further approved of the decision in *Federal Republic of Nigeria v Alhaji Mika Anache, In Re Chief Adebisi Olafisoye* (2004) 1 SC (Pt.11) 27

344 (2), 15 (5) and items 60(a) and 67 of part 1 of the 2nd Schedule to the constitution

35 Nwabueze, B.O, *Judicialism and Good Governance in Africa*, op. cit. Page 91

36 [1986] 5 NWLR (Pt. 45) 828

37 *Grace Jack v University of Agriculture Makurdi* [2004] 5 NWLR (865) 208. The decision has been criticized though on the ground that it is inconsistent with the clear provisions of the constitution which does not favour such liberalization. Okorie, P.C., "The Extent of the Jurisdiction of the High Courts to Try Fundamental Human Rights Cases in Nigeria: A Review of the Supreme Court Decision in *Grace Jack v University of Agriculture Makurdi*", *Nigerian Bar Journal*, Vol. 1 . Indeed, the criticism itself is evidence of liberalism of the Supreme Court in its determination to enforce human rights.

38 *Federal Republic of Nigeria v Ifegwu* [2003] 15 NWLR (842) 113; *Abacha v Fawehinmi* [2000] 6 NWLR (Pt. 660) 228; *Saude v Abdullahi*[1989] 4 NWLR (Pt.116) 387.

39 *Onyekwuluje v Benue State Government* [2005] 8 NWLR (Pt. 928) 614

40 *Theresa Onwo v Nwafor Oko* [1996] 6 NWLR (Pt. 456) 584

constitution. They have however failed to be availed of the opportunity to enforce socio-economic rights.⁴¹

CONSTRAINTS IN CONSTITUTIONAL ADJUDICATION

The duty of the court is to adjudicate. The apparatus for execution remains with the executive. The ends of justice will truly be served and democracy sustained only when decisions of courts are respected and enforced, especially by the executive. This unfortunately, has not been so in Nigeria⁴² which was lamented by the former Chief Justice of Nigeria, the Honourable Justice M.L Uwais, who described disobedience to court orders as an invitation to anarchy and total breakdown of law and order-a resort to 'Thomas Hobbes' State of Nature.⁴³

Judicial self restraint is another constraint to constitutional adjudication. Ideally, judicial self restraint should be an expression of the need to allow a broad construction of constitutional grants of power and not a justification for abstention from intervention for the protection of the individual against violations of the law, especially of the prohibitions of the constitution.⁴⁴ It appears however, that the application of the concept of judicial self restraint in Nigeria has leaned more towards the latter which manifests as avoidance of political and constitutional questions finding best expression in the restrictions of *locus standi* and jurisdiction. The readiness of the courts to decline jurisdiction in the face of clear constitutional violations either for want of jurisdiction or absence of *locus standi* negates their activist orientation. For Professor Ben Nwabueze, the attitude of the courts has generally been one of declining judicial activism.⁴⁵

CONCLUSION

No doubt, the effective discharge of the responsibilities of the judiciary depends, inter alia, on the extent of the integrity and independence that the judiciary enjoys, the confidence of the citizens in and respect for the work of the court, and the understanding of the general

⁴¹ *Abacha v Fawehinmi* (supra)

⁴² See *Attorney-General of Lagos State v Ojukwu* (1980) 1 NWLR (Pt. 18) 621; *Attorney-General of Lagos State v Attorney-General of the Federation* (2004) 11-12SC, 85

⁴³ Uwais, M.L., "The Evolution of Constitutionalism in Nigeria: The Role of the Supreme Court Under the 1979 and 1999 Constitutions", op.cit.,p.54

⁴⁴ Nwabueze, B.O., *Judicial and Good Governance in African*, op. cit. page 127

⁴⁵ He relies on the following decisions of the Supreme Court in the last ten years in support of this contention: *Attorney-General of Federation v Attorney-General of Abia State* [2002] 6 NWLR (Pt. 764) 542; *Attorney-General of Ondo State v Attorney-General of Federation* [2002] 9NWLR (Pt. 722) 222; *Olafisoye v Federal Republic of Nigeria* [2004] 4NWLR (Pt. 864) 580; *Attorney-General of Abia State v Attorney-General of Federation* (2003) 1 SC (Pt. 11) 1; *National Assembly v President of Federal Republic of Nigeria* [2003] 9NWLR (Pt. 824) 104; *Plateau State of Nigeria v Attorney-General of Federation* [2006] 3NWLR (Pt. 966) 546; *Attorney-General of Anambra State v Attorney-General of Federation* [2005] 9NWLR (Pt. 931) 572; *Attorney-General of Lagos State v Attorney-General of Federation* [2004] 18NWLR (Pt. 904) 1; *Amaechi v Independent National Electoral Commission (INEC)* [2007] 18 NWLR (Pt. 1065) 105; *Buhari v INEC* (2008) 12SC (Pt. 1) 1; *Atiku Abubakar v Umaru Yar'Adua* (2008) 12 SC (Pt. 11) 1. Nwabueze, B.O., *Judicialism and Good Governance in Africa*, op. cit, p.132-133. On the contrary, however, Uwais has argued and we agree that the following decisions (also mentioned by Nwabueze) are activist and constitute a huge contribution to the development of democracy in Nigeria: *Peoples Democratic Party v Independent National Electoral Commission* (2001) 1FWLR 2735; *Independent National Electoral Commission v Balarabe Musa* (2003) 1 SC (Pt. 1) 106; *Attorney-General of Lagos State v Attorney-General of Federation* (2004) 11-12 SC 85; *Attorney-General of Ondo v Attorney-General of Federation* (2002) 9 NWLR (Pt. 772) 222, Uwais, M.L., "The Evolution of Constitutionalism in Nigeria: The Role of the Supreme Court Under the 1979 and 1999 Constitutions", op. cit

attributes of judicial powers.⁴⁶ Given all the circumstances, the Nigerian courts, through the constitutional adjudicatory process, have made enormous contribution in stabilizing the polity.

It should be noted that for constitutional democracy to deepen and thrive, the political class will have to demonstrate greater commitments to the rules and assumptions of democracy by changing their mindset. That is, the human element has to be operated alongside the spirit and letters of the Laws which the courts are constantly invited to enforce and thereby drag such courts avoidably into the political arena with the possibility of undermining the courts through a few unpopular judgments.

But by and large, the Courts have within their constitutional space facilitated the process of democratisation in Nigeria and in significant ways channelled redress of grievances to the Courts rather than the streets and the military. Overall, citizens and politicians now readily see the Courts as credible mediating institution in political wrangles whether between or within the political parties.

⁴⁶ Uwais, M.L., op.cit., p.10