JUDICIAL ACTIVISM AND INTERVENTION IN THE ELECTORAL PROCESS: ARE OR SHOULD COURTS BE AN ALTERNATIVE?

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I. INTRODUCTORY

The outcome of the 2019 general elections still remains largely unsettled, the contests having shifted to election petition tribunals and the Court of Appeal (in the case of the presidential election petition[1]). Nonetheless, a review at this point is necessary in order to begin the process of understanding the multifarious issues surrounding the elections, and to chart a new way forward in stabilizing Nigeria's electoral process. This conference is coming on the heels of comprehensive reports on the elections released this month by the European Union (EU) and the International Republic Institute/National Democratic Institutes (IRI/NDI), detailing many shortfalls in the elections and offering several recommendations on improving future ones. Later in this

[1] Pursuant to the constitutional provisions which grant the Court of Appeal original jurisdiction over presidential election petition, His Excellency, former Vice President of Nigeria, Alhaji Atiku Abubakar, who was the candidate of the Peoples Democratic Party (PDP) in the 2019 presidential election, has since filed his petition in the Court of Appeal against the return of President Mohammadu Buhari as winner of the poll. For the full text of the petition, see https://media.premiumtimesng.com/wp-content/files/2019/03/Atikus-election-petition-against-Buhari's-victory.pdf

presentation, I shall draw attention to specific details of the reports which bear directly on the topic of my presentation.

I must commend the organizers for not focusing only on the actual conduct of the elections and the impact it has had on the outcome. The emerging trend of increased judicial role in the electoral process forms a defining part of the elections. My paper will directly focus on this role. The paper is discussed in five parts. After this introduction, I try to establish the conceptual framework of the paper, by renewing insights into some normative issues such as the electoral process itself, electoral justice system and judicial activism within the broad context of the democratic system. In part three, I highlight the essential pathologies of the electoral process in Nigeria which provokes judicial activism or intervention. In part four, I offer a critique of Nigeria's electoral justice system and the advent of increased judicial activism in the electoral process. In part five, I conclude.

II. CONCEPTUAL CLARIFICATIONS

Electoral Process

What constitutes the electoral process is often confused with the electoral system. Yet, these are two different concepts even as they both relate to elections and electioneering. The electoral process is said to refer to the entire cycle of election[2]; or simply put, it concerns all activities and procedures in the election of persons to various elective positions in government. On a larger normative scale, the electoral process is all pre-election and post-election activities in an election cycle, including but not limited to registration of political parties, registration of voters and

[2] N. Elekwa (2008) "The Electoral Process in Nigeria: How to make INEC succeed" *The Nigerian Electoral Journal,* 2 (1), p. 30.

delineation of voting constituencies, resolution of electoral disputes, election/return of elected candidates, and the actual swearing-in of the elected.[3] On its part, the electoral system is also said to refer to "the manner in which votes cast in a general election are translated into seats in the legislature"[4], or "…the method by which voters make a choice between different options."[5] In this regard, matters such as the electoral formula (plurality/majority, proportional, mixed, or other forms of electoral formula); the ballot structure (whether the voter votes for a candidate or a party, and whether the voter makes a single choice or expresses a series of preferences); and the district magnitude (number of representatives to the legislature that a particular district elects, etc.), all constitute the essential elements of an electoral system.[6]

In this paper, I focus on the normative conception of the electoral process which has been well endorsed by a number of judicial decisions[7] in the absence of a definitive interpretation of the concept in the Constitution[8] (and all its Alteration Acts[9]), the extant Electoral Act, 2010[10] and the Regulations and Guidelines for the Conduct of the 2019 Elections issued by the Independent

[3]See, Desmond Okechukwu Nnamani (2014) "Electoral Process and Challenges of Good Governance in the Nigerian State (1999-2011)", *Journal of Good Governance and Sustainable Development in Africa*, Vol. 2, No. 3, p. 80.

[4] Alina Rocha Menochal (2011) "Why Electoral System matter: an analysis of their incentives and effects on key areas of governance", being a research report submitted to Overseas Development Institute (ODI), available at https://www.odi.org/publications/6057-why-electoral-systems-matter-analysis-their-incentives-and-effects-key-areas-governance at p. 2 (accessed 24 April, 2019).

[5]John T. Ishiyama (2012) *Comparative Politics: Principles of Democracy and Democratization* (first ed.), New Jersey, Blackwell Publishing, p. 157 at 158.

[6] Menochal, note 8, p. 3.

[7] See *National Democratic Party (NDP) v. INEC* (2013) 6 NWLR (Pt. 1350) 392, at 419; *Ojukwu v. Obasanjo* (2004) 1 EPR 626 at 653.

[8] Section 318 is the interpretation section of the Constitution. The section does not interpret what "electoral process" means. It also does not interpret what an "election" means.

[9] There have been seven Alteration Acts to the Constitution since 2010. Three were assented into law in 2010, four in 2018. None of these contain an interpretation of "electoral process" or "election".

[10] The extant Electoral Act, 2010 (as amended) has no provision interpreting "electoral process" or "election".

National Electoral Commission (INEC).[11] I take my bearings from the remark of Ariwoola JSC in *National Democratic Party (NDP) v. INEC,* where he said "There is no doubt that the issue in the instant appeal involves electoral process ***which is the method by which a person is elected to public office in a democratic society****"*(emphasis supplied).[12]

Although this dictum appears similar to Professor Ishiyama's conception of the electoral system, the subtle difference is that whereas Justice Ariwoola was quite definitive that electoral process entails ***method*** of ***electing a person to public office*** **in a** ***democratic system,*** Professor Ishiyama writes about electoral system as the ***method*** by which ***voters choose*** from different electoral ***options*** distinct from ***electing or choosing a person to public office***. Salami JCA appears to have been clearer on what electoral process means to lawyers when he said in *Ojukwu v. Obasanjo* (supra) that "The issue of election goes beyond merely voting, as it is a ***process inclusive of delimitation of constituency, nomination, accreditation, voting itself, counting, collation and return; or declaration of result.***"[13]

Electoral Justice

The notion of electoral justice travels a wide field of meaning. Arising from long-standing empirical studies to support and strengthen democratic processes, for the International Institute for Democratic and Electoral Assistance (International IDEA), electoral justice includes "… all aspects of the electoral process including the quality of electoral, civil and other political rights

[11] INEC is permitted by the Constitution to issue regulations and guidelines for election. The latest was issued on 12 January, 2019. It does not contain any provision interpreting what "electoral process" or "election" means. See https://www.inecnigeria.org/wp-content/uploads/2019/01/Regulations-and-Guidelines-2019.pdf
[12] See note 11, at 419.
[13] See note 11 at 653

integral to the electoral process; the resolution of disputes related to elections; the identification and punishment of electoral-related wrongdoings; the identification and correction of irregularities related to the electoral process; in all possible cases, the provision of remedies to restore the integrity of the electoral process…"[14] Electoral justice encompasses several specific components beyond the well-known forms of electoral malfeasance including ballot box snatching, vote buying, falsification of results, to include protection of political rights crucial for democratic robustness such as the right to vote and be voted for, the equal voting right of men and women, freedom of association and affiliation, the right to security of the person, the right to take part in the conduct of public affairs and the right to petition for redress![15] Electoral justice essentially places an obligation on all stakeholders to adhere to the rule of law and its dues processes, including guarantees of effective remedy, judicial independence, institutional accountability, integrity and impartiality of state apparatuses especially the electoral management body (EMB) and security agencies directly associated with elections, and upholding of fundamental freedoms, particularly those with direct bearing on justice (such as fair hearing and the rule against bias).[16]

Electoral justice must therefore be seen as an indispensable element of the electoral process because it plays a decisive part in ensuring the stability and consolidation of democratic governance through free, fair and credible elections. Given increased competition for political

[14] See Frank McLoughlin (2016) "Prioritizing Justice: Electoral Justice in Conflict-Affected Countries and Countries in Political Transition", *International IDEA Policy Paper No. 12.* Available at https://www.idea.int/sites/default/files/publications/prioritizing-justice.pdf

[15] See *Towards an International Statement of the Principles of Electoral Justice (The Accra Guiding Principles) (2011).* These are a set of guiding principles of electoral justice developed by the *Electoral Integrity Action Group* comprising senior judicial figures and experienced election commissioners across the globe. The principles are non-hierarchical and interdependent essential framework for electoral justice categorized as Integrity, Participation, Lawfulness (Rule of Law), Impartiality and Fairness, Independence, Transparency, Timeliness, Non-violence (freedom from threats and violence), Regularity and Acceptance. Available at https://integrityaction.org/sites/default/files/publication/files/Accra%20Guiding%20Principles.pdf

[16] See note 14 at p.10.

power in not only transitional democracies such as Nigeria's and even in long-standing democracies, electoral justice constitutes a key concern for all democracies. While election disputes are very common in emerging democracies, there are clear indications that the trend has also become associated with long-standing democracy such as the United States, especially since the US Supreme Court decision in *Bush v. Gore*[17] in 2000.[18]

In fact, from the standpoint of democratic consolidation, electoral justice is considered an intrinsic part of ***electoral governance*** which comprises the processes of rule-making, rule application and rule adjudication necessary to avoid compromising the electoral process and avoiding electoral conflicts.[19] The link between electoral justice and democracy is therefore easy to draw. Since elections are essential feature of democracy, well run elections which pass the test of electoral justice are considered vital for ensuring popular control of government.[20] Invariably, it is popular control based on voluntary, non-violent or non-coercive control of government that vests such government with legitimacy, compared with other de facto means of assuming political control such as coups d'état.[21]

Judicial Activism or Intervention

[17] 531 U.S. 98 (2000).
[18] See Jessica Becerra (2018) "Possibility of Using Alternative Dispute Resolution for Election Law Disputes", *Pepperdine Dispute Resolution Law Journal*, vol. 18, issue 1, p. 1.
[19] See Toby S. James "Electoral Governance and the Quality of Democracy in the United Kingdom", paper delivered at the *International Symposium on Elections, Civic Education and the Quality of Democracy,* at Korean Civic Institute for Democracy, Seoul, South Korea, September 3-4, 2014.
[20] See David Beetham (1994) "Key Principles and Indices for a Democracy Audit", in Beetham, D. (ed) *Defining Democracy*, London, Sage.
[21] "Why Democratization does not Solve the Coup Problem", *a One Earth Future Foundation Policy Brief,* available at https://oefresearch.org/sites/default/files/documents/publications/democratization-coups.pdf . See also Robert Mattes (2014) "Electoral Integrity and Legitimacy in Africa" in Pipa Norris, Richard W. Frank and Farren Martinez I Coma (eds) *Advancing Electoral Integrity,* Oxford University Press

The idea of judicial activism is an issue beyond electoral matters. It generally implies the tendency of courts to adopt a liberal approach which favours upholding the "essence of due process and equal protection under the law" in adjudication.[22] As a rule, courts have a duty to uphold the law. However, because what constitutes the ***law*** in deciding a dispute may not be quite as clear as it seems, judges are left with the challenging task of interpreting what the ***law*** is. However, where the law, if pronounced ***as it is*** (either in legislations or constitutional texts) may lead to unsavory consequences, or consequences which may trump ***"due process and equal protection under the law"***, a number of judges have been known to depart from *stating the law as it is*. Instead, they may interpret the letters of the law liberally. It is in this context that such judges are aversely cited for ***judicial activism*** or intervention.

In the legal academy, two schools of thoughts have emerged in support or against judges' resort to judicial activism. In the last few decades when this trend began to be subjected to serious academic inquiry, the two schools have been fitted into the so-called "Hart-Dworkin debate"[23] The debate, sparked by Professors Ronald Dworkin and H.L.A. Hart polemical disquisitions on the concept of law, has since been joined by hundreds of legal scholars, traversing issues of existence of judicial discretion, the role of policy in adjudication, the ontological foundations of rules, the possibility of descriptive jurisprudence, the function of law (in society), the objectivity of value, the vagueness of concepts and the nature of legal inference.[24]

[22] Luther M. Swygert (1982) "In Defense of Judicial Activism", *Valparaiso University Law Review,* vol. 16, no. 3, p. 439.
[23] See Tommaso Pavone (2014) "A Critical Adjudication of Hart-Dworkin Debate". Available at https://scholar.princeton.edu/sites/default/files/tpavone/files/hart-dworkin_debate_critical_review.pdf . See also, Scott J. Shapiro (2007) "The "Hart-Dworkin" Debate: A Short Guide to the Perplexed", *University of Michigan Law School Public Law and Legal Working Paper Series, no. 77*. Available at https://law.yale.edu/system/files/documents/pdf/Faculty/Shapiro_Hart_Dworkin_Debate.pdf
[24] Shapiro, ibid.

Among the major concerns of the debate, two have direct bearing on the idea of judicial activism, namely, the existence of judicial discretion and the role of policy in adjudication. Whereas pro-activists/anti-positivists of the Dworkin School of Thoughts believes that judges must be willing to exercise judicial discretion where they consider it necessary, the Hart School or the anti-activists/positivists, believe that judges must stick to the black letter law, and refrain from exercising discretions; enacting rule where none hitherto existed. They are argue that the province of the judiciary and the judge must remain to state the law, not to make it! Connected to the debate on judicial discretion is the role of policy in adjudication. Again, the two schools take divergent positions. The Dworkin School believes that apex courts have an obligation not just to state the law, but also to affirm public policy through their decisions. On the contrary, the Hart School believes that law and policy are two different propositions; and that role of the apex court is to pronounce law, while leaving policy to the political branches - the legislature and the executive/administration.

Judicial Activism or Intervention in the Electoral Process

The role of the courts in the electoral process may be understood in the context of the Hart-Dworkin Debate. However, to have a complete understanding, it is important to factor in the democratic element. Reading from the theme of this conference and the question my paper is asked to resolve, I suspect that the organizers are concerned that the courts may have gone too far into the democratic arena with regard to election matters. I believe my task is to determine whether or not court decisions should be a substitute for the democratic choice as expressed by the electorate and declared by the electoral management board.

If we go back to the original notion of judicial activism and connect it with the fact that an election is not just a matter of choosing who governs, but a right-based normative matter (electoral justice), it will be difficult to argue against judicial activism in the electoral process, as all right-based claims include the right to seek redress when aggrieved. To this extent, the active involvement and intervention of the courts may be inevitable and unavoidable since judicial activism implies upholding the "essence of due process and equal protection under the law"[25] However, the issues take a different turn when there are no clear standards for judicial determination, or where the electoral dispute is strictly political, with no clear legal rules to resolve them. Where the latter is the case, opponents of judicial activism may not be entirely misplaced in their opposition. Good examples are intra-party disputes involving nomination of candidates for election, which have been adjudged often very intractable to resolve because of their intensely political nature, leaving the courts with no clear standards for meaningful adjudication.[26]

Related directly to elections in Nigeria, the question whether or not judicial activism or intervention is tolerable can best be discussed in the context of the electoral issue. Whether, for instance, the dispute for which judicial intervention is necessary is pre-election or post-election; or whether they are intra-party or inter-party. Where it concerns inter-party contests for political power and there are clear rules of contest, "judicial activism or intervention", maybe inevitable, even as they ought not to be alternative to the declared verdict of the election management body (INEC). Judicial activism or intervention becomes an alternative or an option, to provide aggrieved candidates the legal platform to seek judicial enforcement of the normative requirement of free,

[25] Swygert, note 22.
[26] See *Onuoha v. Okafor* (1983) NLR 224.

fair and credible election (or the upholding of due process and equal protection under the law), which they believe have been denied through electoral malfeasance. This explains conferment of specific adjudicatory roles on the court in the electoral process. The Constitution of Nigeria, 1999 (as altered) makes very extensive provisions conferring jurisdictional powers on election petition tribunals, the Court of Appeal and the Supreme Court on electoral disputes, whether pre-election, or post-election.[27] These provisions are complimented by relevant provisions of the extant Electoral Act[28] and by applicable Guidelines and Regulations governing actual conduct of elections.[29]

Nonetheless, specific queries have raised about the role of courts in election and the desirability of judicial review of elections. Judicial review, as opposed to judicial activism, is the legal powers conferred on the courts,[30] or claimed by them,[31] to adjudicate on any matter brought to their dockets, involving a determination of the exercise of legislative and executive (administrative powers).[32] It has been argued that elections "are part of political discourse and actions by citizens to decide who exercises political authority in the commonwealth."[33] To that extent, elections are

[27] See Constitution of the Federal Republic of Nigeria, 1999 (Fourth Alteration, No. 9) Act, 2017, available at http://placng.org/wp/wp-content/uploads/2018/06/Political-Parties-and-Electoral-Matters-Fourth-Alteration-No.-9-Act.pdf and Constitution of the Federal Republic of Nigeria, 1999 (Fourth Alteration, No. 21) Act, 2017, available at http://placng.org/wp/wp-content/uploads/2018/06/Determination-of-Pre-Election-MattersFourth-Alteration-No.-21Act.pdf

[28] Electoral Act, 2010, available at https://nai.uu.se/library/resources/thematicresources/elections-in-nigeria-2011/2010_Electoral_Act.pdf

[29] INEC Regulations and Guidelines for the Conduct of Elections, 2019, available at https://www.inecnigeria.org/wp-content/uploads/2019/01/Regulations-and-Guidelines-2019.pdf

[30] See section 6 (6) (a) and (b), Constitution of Nigeria, 1999.

[31] See *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803), where this was first done by the United States Supreme Court even as there is no explicit grant of the power on the court to do so. Notwithstanding, the decision has established an enduring principle, which has since been codified in other jurisdictions, including here in Nigeria, as a constitutional norm.

[32] See Daniel P. Tokaji "Judicial Review of Election Administration" (2008) *University of Pennsylvania Law Review*, vol. 156: 376, pp. 379-390.

[33]Sam Amadi, "2019 Election and Judicial Activism", *This Day*, March 20, 2019. Available at http://www.opinionnigeria.com/nigeria-2019-election-and-judicial-activism-by-sam-amadi/

political.[34] It is further argued that conception of judicial action which considers it as both principled and apolitical, and confined to resolution of private rights as opposed to the public/political interests, of which election forms a part, is false and exaggerated because consistent with the conception, it also considers election disputes as polycentric and thus inherently non-justiciable.[35] Lon Fuller, chief proponent of this conception of judicial action, argues that the judiciary should not insert itself too deep in the political battlefield which includes electoral disputes, because such disputes being polycentric, defies effective resolution consistent with the typical analytical resources of the adjudicatory process.[36]

These arguments are countered by the view that the imperative notion of ***public interest litigation***[37] has defined the role of the courts beyond merely declaring the rights of contestants to "judicially legislating" rules that should guide social interaction and distributive justice in society.[38] Therefore, the institutional place of the court has come to be political as well, even as it must remain impartial, principled and reasoned in its deliberations.[39] By extension, in matters of election, the courts must embrace this responsibility as a non-partisan political arbitrator. A similarity between this expectation of the court and the role which the US Supreme Court plays as a "National Policymaker", has been drawn by Amadi, citing Robert Dahl in which the latter

[34] Ibid.
[35] Ibid.
[36] See Lon L. Fuller and Kenneth I. Winston (1978) "The Forms and Limits of Adjudication" *Harvard Law Review*, vol. 92, no. 2, pp. 353-409. Available at https://people.rit.edu/wlrgsh/Fuller.pdf
[37]See generally, Zachary Holladay (2012) "Public Interest Litigation in India as a Paradigm for Developing Nations", *Indiana Journal of Global Legal Studies,* vol. 19, issu. 2, pp. 555-573 https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1492&context=ijgls . See also Katherine Ellena, Chad Vickery and Lisa Reppel, *Elections on Trial: The Effective Management of Election Disputes and Violence,* Arlington, International Foundations for Electoral Systems, 2018.
[38] Amadi, note 33.
[39] Ibid.

describes the court as political institution.[40] According to Dahl "To consider the Supreme Court of the United States strictly as a legal institution is to underestimate its significance in the American political system, an institution, that is to say, for arriving at decision on controversial questions of national policy".[41] The Supreme Court of Nigeria has repeatedly affirmed that its role is not only to pronounce on the law, but also to adjudicate as a court of policy.[42] Thus, the court has gone to decide matters of pre-election and post-election disputes with significant impact on the electoral process of the country. A major policy justification for this judicial exertion is again provided by Amadi when he argues that "…there cannot be a democratic polity without free and fair elections. Where elections are abrogated or cynically reduced to competitive oligarchy, then democracy has died."[43]

Therefore, without judicial intervention to curb electoral malfeasance, the gravitational pull of elections that are not free and fair can only attract criminal elements who alone can optimize the criminal environment it offers.[44] By a natural selection, ethical and competent persons will shun the electoral process because they are not competitive in exploiting the criminality and violence of the electoral system.[45] The judiciary must act as a countervailing bulwark in order to blunt the possibility of democratic attrition resulting from institutionalizing bad elections which go

[40] Ibid
[41] Robert Dahl (1957) "Decision-Making in Democracy: Supreme Court as a National Policy-Maker", *Journal of Public Law*. Available at http://epstein.wustl.edu/research/courses.judpol.Dahl.pdf
[42] Solomon Ukhuegbe (2011) "Jurisdictional Reforms and the Role of the Supreme Court of Nigeria – the Path to a Policy Court", in *SSRN Electronic Journal*, available at https://www.researchgate.net/publication/256011646_Jurisdictional_Reform_and_the_Role_of_the_Supreme_Court_of_Nigeria_-_The_Path_to_a_Policy_Court
[43] Note 33.
[44] See, J. Shola Omotola (2007) "Godfathers and 2007 Nigeria Election", *Journal of African Elections*, vol. 6, no. 2, pp. 134-154. See also Basil Ugochukwu "Ballot or Bullet: Protecting the Right to Vote in Nigeria", (2012) *African Human Rights Journal*, vol. 12, pp. 539-563
[45] Amadin, note 33.

unchallenged. Whether or not this paradigm should shift to avoid "judicialization"[46] of elections, depends on the quality of elections. In the next part, I address the known pathologies of the electoral process in Nigeria which often provoke judicial intervention.

III. PATHOLOGIES OF ELECTORAL PROCESS IN NIGERIA

The pathologies of elections in Nigeria and the electoral process as a whole are well documented. What is clear is that elections have hardly been peaceful, free, fair and credible for many reasons ranging from subtle manipulations to outright violence, falsification of results, allocation of votes, ballot box snatching, ballot box stuffing, unlawful exclusion of political parties and their candidates, lack of transparency of the election management body and increased resort to vote-buying, among several other malfeasances. The history of elections in Nigeria shows that these electoral vices have been a permanent feature and have been direct triggers of democratic attrition. For reasons which are traceable to electoral frauds, the country has witnessed a dizzying 33-year period of coups; a counter-coup, an avoidable civil war which claimed millions of lives; another coup, a failed; short-lived period of civil rule; another coup; a counter coup and failed coup(s) together with a long-drawn, phantom democratic transition programme (and a diarchy) ending with a cancelled election acclaimed as free, fair and credible; another coup, a contrived transition to civil rule programme; deaths of an incumbent military dictator (and death of the winner of the cancelled election), and eventual restoration of civil rule in May, 1999.[47]

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[46] See Ran Hirschl (2011) "Thee Judicialization of Politics" in Robert E. Goodin (ed.) *The Oxford Handbook of Political Science*. Available at Oxford handbooks online https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-013

[47] Isaac Adegboyega Ajayi (2013) "Military Regime and Nation Building in Nigeria, 1966-1999", *African Journal of History and Culture*, vol. 5 (7), pp. 138-142. Available at http://www.academicjournals.org/app/webroot/article/article1381857366_Ajayi.pdf

Despite this sobering history, elections continue to be serious cause of political schism in Nigeria, not because of political competition for power which they engender, but because of the intense disputes associated with them, casting a pall of discredit over the electoral process. By several accounts the just-concluded 2019 general elections have proven no better than previous elections, and may yet take the leading position as the worst since the discredited 2007 general elections.[48] Notably, the Final Report issued by the European Union Election Observation Mission (EU-EOM) on the 2019 elections contains damning indictment of their parlous. The report identifies several episodic indicators of a highly flawed electoral process before, during and after the elections leading to the inexorable conclusion that the elections fell far short of minimum standards of a free, fair, credible and peaceful polls. The report came to these unflattering conclusions, among others:

> Nigeria's 2019 general elections were marked by severe operational and transparency shortcomings, electoral security problems, and low turnout. Positively, the elections were competitive, parties were overall able to campaign and civil society enhanced accountability. However, the last-minute postponement of the elections put an undue burden on voters, results' collation procedures were not sufficiently robust, and inadequate information was provided to the public. Fatalities escalated and the role of security agencies became increasingly contentious. The leading political parties were at fault in not reining in acts of violence and intimidation by supporters, and in abusing incumbency at federal and state levels. Except for federal radio, state media primarily served the interests of the president or the governor at state level. Journalists were subjected to harassment, and scrutiny of the electoral process was at times compromised with some independent observers obstructed in their work, including by security agencies. The suspension of the chief justice of Nigeria by the president a few weeks before the elections was seen to lack due process and reportedly undermined judicial independence….[49]

[48] The 2007 general elections were thought to be so flawed that the main beneficiary, President Umaru Musa Yar'Adua, in a moment of rare candour, admitted that much and promptly instituted a panel of eminent persons to examine the various complaints and make appropriate recommendation for improvement in the electoral process. The Report of the panel, headed by the Hon. Justice Lawal Uwais (Rtd), remains a watershed. Sadly, many of its recommendations have since not been implemented.

[49] See *Nigeria General Elections 2019, Final Report,* issued by European Union Election Observation Mission (EU EOM). Available at https://eeas.europa.eu/sites/eeas/files/nigeria_2019_eu_eom_final_report-web.pdf at p. 3.

The credibility of the report seems unassailable. It is no surprise that the Federal Government has officially welcomed it as a credible reflection of what transpired in 2019 general elections cycle.[50] The report is not only an independent account, but is the outcome of a solicited observatory carried out by the EU-EOM at the instance of Nigeria's electoral management body, the Independent National Electoral Commission (INEC), and based on direct monitoring exercise by the group from 5 January to 7 April, 2019.[51] The report makes 30 recommendations to improve Nigeria's electoral process, and prioritizes 7: i) that INEC should strengthen its procedures for collation of results in order to improve integrity and confidence in electoral outcomes; ii) establishment of legal framework for full transparency, with data easily accessible to the public; iii) considerable strengthening of INEC's organizational and operational capacity, as well as its internal communications; iv) inter-agency body responsible for electoral security must work more transparently and inclusively, with regular consultations with political parties and civil society; v) introduction of legal requirement for political parties to have a minimum representation of women among candidates; vi) need for electoral tribunals to also cover pre-election cases in order to improve access to remedy and avoid petitions being taken to different courts at the same time; vii) and reform of licensing system for broadcast media to provide for media pluralism and diversity in all states across the country.[52]

[50] "Presidency reacts to EU report on Nigeria's 2019 elections", *Premium Times*, June 2019. Available at https://www.premiumtimesng.com/news/top-news/335270-presidency-reacts-to-eu-report-on-nigerias-2019-elections.html
[51] See statement issued by Maria Arena on behalf of EU EOM. Available at https://www.pmnewsnigeria.com/2019/06/16/full-report-of-eu-election-observation-mission-on-2019-election/
[52] Ibid

Another independent findings on the elections released by the International Republic Institute (IRI)/National Democratic Institute (NDI) in their joint *Election Observation Mission Final Report* published on 18 June, 2019 paints a very dismal portrait of the 2019 general elections. The report concludes that the elections did not meet the expectations of many Nigerians. It identifies some of the flaws of the process to include the last-minute postponement of the presidential and National Assembly elections, delays in opening of polls and other administrative challenges, all of which undermined public confidence in INEC. The report further identified what it describes as serious irregularities with the process including vote-buying, intimidation of voters and election officers, and election-related violence. The report compares the 2019 general elections with the 2015 version and reason that the "2019 general elections fell significantly short of standards set in 2015"[53]

According to the President of IRI, Dr. David Twining, "Election stakeholders should take concrete steps to address the concerns of citizens with regards to the polls in order to rekindle their faith in the power and possibility of credible elections"[54] On his part, Ambassador Derek Mitchell, President of NDI also said "The 2019 elections highlighted for many Nigerians the need for a national conversation about the country's democratization since the 1999 transition to civilian rule", hoping that the report may both spur and enrich that national conversation[55] Significantly, the report provides recommendations to enhance the credibility of elections in Nigeria, going forward, including areas of improvement for political party conduct, civic engagement, election security, and legal frameworks around election disputes.

[53] See "IRI/NDI Release Nigeria International Election Observation Mission Final Report." Available at https://www.iri.org/resource/irindi-release-nigeria-international-election-observation-mission-final-report
[54] Ibid
[55] Ibid

The report notes that previous suggestions for improvements put forward by credible individuals and international observers went unheeded, and urged Nigerian stakeholders to seriously consider those suggestions along with the recommendations contained in the reports to improve the country's electoral process[56]

For the purpose of our disquisition, we can notice that the two independent reports identified credible election dispute resolution mechanisms as part of the improvement to be brought to bear on the electoral process. This suggests that electoral justice is now globally accepted as an intrinsic part of the electoral process. In the next part, I shall examine whether this should take the place of conclusive electoral outcomes, as declared by the election management body. In other words, whether electoral justice necessarily requires judicial intervention at every turn or whenever complaints are raised in the electoral process.

IV. WHITHER JUDICIAL ACTIVISM OR INTERVENTION IN NIGERIA'S ELECTORAL PROCESS?

The question posed above is not radically different from the question which the organizers of this conference have asked me to tackle, namely, are or should the courts be an alternative in the quest to resolve election contestations? However, I suspect that the organizers are more concerned about the degree of judicial intervention in electoral process rather than whether or not the courts should be an alternative to the conclusion of the election process. Of course, without a shade of doubt, it is not difficult to affirm that indeed, the courts ought not to be an alternative to undisputed declaration of election results. Elections ought to end with declaration of the winner by the EMB. In other words, since the voter choice remains the primary prerequisite for declaration of winner of an election, it is always to be preferred to any other process, including judicial intervention.

[56] Ibid

However, we have since established that by the dictate of electoral justice every aggrieved with a standing to sue should be afforded opportunity for peaceful judicial resolution of the electoral dispute. But to what degree should this avenue be available to the disputants, especially the declared loser? This is as well an important question, because, being a deeply political process involving several players, elections do not fit nicely into the typical turf of litigation for which judicial standards can be set and are readily available with which to determine the many difficult adjudicatory questions raised. For instance, in the case of intra-party disputes over the candidate who emerges from a primary election process, how should the courts come to a conclusion which trumps the decision of the party leadership? Should their preference be brushed aside, in deference for the choice of majority of party members even as he is considered unpopular when pitched against candidate of the opposing party? Or how would the courts expeditiously resolve a petition against outcome of a presidential election, the results of which were tabulated and transmitted manually, where the primary challenge is that there had been falsification of results obtained in significant number of polling units?

Those two scenario are what the courts have mainly had to deal with over the years in pre-election and post-election litigations in Nigeria. In this part, I shall discuss the question of the extent to which the courts should or should not intervene in the electoral process by extrapolating the current legal perspectives in pre-election and post-election litigations, and offer my thoughts on what I consider the proper limits of the courts' role.

Pre-Election Disputes: what role for the courts?

Pre-election litigation generally refers to suits instituted prior to the actual conduct of elections.[57] Nonetheless, in the electoral process of Nigeria, the precise normative meaning of pre-election litigation can now be found in the Constitution of the Federal Republic of Nigeria, 1999 (Fourth Alteration, No. 21) Act, 2017[58], the Electoral Act, 2010 and from judicial interpretation of the constitutional alteration.[59] Following the constitutional alteration, a new section 285 (14) of the Constitution elaborately defines pre-election matter (for the purpose of the section) to mean any suit by –

(a) an aspirant who complains that any of the provisions of the Electoral Act or any Act of the National Assembly regulating the conduct of primaries of political parties and the provisions of the guidelines of a political party for conduct of party primaries has not been complied with by a political party in respect of selection or nomination of candidates for an election;

(b) an aspirant challenging the actions, decisions or activities of the Independent National Electoral Commission in respect of his participation in an election or who complains that the provisions of the Electoral Act or any Act of the National Assembly regulating elections in Nigeria has not been complied with by the Independent National Electoral Commission in respect of selection or nomination of candidates and participation in an election; and

(c) a political party challenging the actions, decisions or activities of the Independent National Electoral Commission disqualifying its candidates from participating in an election or a complaint that the provisions of the Electoral Act or any other applicable law has not been complied with by the Independent National Electoral Commission in respect of the nomination of candidates of political parties for an election, timetable for an election, registration of voters and other activities of the Commission in respect of preparation for an election.

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[57] See generally, Justin Levitt (2009) "Long Lines at the Courthouse: Pre-Election Litigation of Election Day Burdens", *Election Law Journal*, pp. 1-65, available at https://www.researchgate.net/publication/228129316_Long_Lines_at_the_Courthouse_Pre-Election_Litigation_of_Election_Day_Burdens.

[58] Assented to by President Mohammadu Buhari on 7th June, 2018.

[59] See Suit no. CA/A/698/2018 - *Itanyi & Anor. v. Bagudu & ors.* Delivered on 17th December, 2018 at pp. 32-33. Per P.O. Ige, JCA cited in P.O. Ige (2019) "The Structure of Judicial System in Election Dispute and in the Electoral Process", being a paper presented at *National Judicial Institute 2019 Annual Refresher Course for Judges and Kadis*, 11-15 March, 2019 at NJI, Jabi, Abuja, available at http://nji.gov.ng/demo/wp-content/uploads/2019/03/TOTAL-SEMINAR-AS-ARRANGED.pdf.

The constitutional alteration also introduces new dimensions to pre-election litigation by limiting time within which such disputes are to be commenced and concluded, in addition to other related matters. These are contained in the new subsections 8, 9, 10, 11, 12 and 13 of section 285 of the Constitution as follows:

> (8) Where a preliminary objection or any other interlocutory issue touching on the jurisdiction of the (election) tribunal or court in any pre-election matter or on the competence of the petition itself is raised by a party, the tribunal or court shall suspend its ruling and deliver it at the stage of final judgment; and
>
> (9) Notwithstanding anything to the contrary in this Constitution, every pre-election matter shall be filed not later than 14 days from the date of the occurrence of the event, decision or action complained of in the suit.
>
> (10) A Court in every pre-election matter shall deliver its judgment in writing within 180 days from the date of filing of the suit.
>
> (11) An appeal from a decision in a pre-election matter shall be filed within 14 days from the date of the delivery of the judgment appealed against.
>
> (12) An appeal from a decision of a Court in a pre-election matter shall be heard and disposed of within 60 days from the date of filing of the appeal.
>
> (13) An election tribunal or court shall not declare any person a winner of an election in which such a person has not fully participated in all stages of the election.[60]

What constitutes pre-election litigation or matter has also been set-out in the Electoral Act, 2010, though by inference. For instance, section 87 (9) of the Act confers jurisdiction on the Federal High Court or High Court of a State or the High Court of the Federal Capital Territory to entertain matters in which an aspirant "complains that any provisions of the Act and the guidelines of a political party has not been complied with in the selection or nomination of a candidate of a

[60] The meaning of "stages of the election" is not defined by the Constitution. However, in *Yar'Adua & Ors. v. Yandoma & ors* (2015) 4 NWLR (Pt. 1448) 123 at 177, Muhammad JSC provided an interpretation of what constitutes stages of election thus "Certainly, as asserted by the appellant, an election is along drawn process with distinct stages ending in the declaration of a winner by the returning officer. It entails one's membership of a political party, his indication or desire to be the party's candidate at the election, primaries for the nomination of the party's candidate, presentation of the party's candidate to INEC, the event of election, return of the successful candidate at the election after declaration of scores, and ends with the issuance of certificate of return to the successful candidate."

political party for election…" Section 31 (5) of the same Act also confers jurisdiction on the same courts to entertain a suit filed by *any person* challenging the candidacy of a person contesting an election on the platform of any political party in a general election or bye-election. The courts have held in a line of cases that both scenario constitute pre-election litigations; meaning that they must be instituted before the actual event or day of voting in an election.[61] Pre-election litigation disputes raise several concerns for the country's electoral process and invariably, its democratic stability. Of particular note are the problems associated with intra-party conflicts and internal democracy in the party system, many of which ultimately end up in the courts. The role which the courts are expected to play can only be best appreciated upon an understanding of the nature of such disputes.

Intra-party Conflicts and Challenges of Formalizing Internal Democracy

What is clear is that conflicts leading to pre-election litigations often emanate from internal management crisis of political parties, and disputes over nomination of party members or aspirants to be fielded as candidates for elections. Since the restoration of democracy in 1999, these conflicts have continued to exacerbate.[62] Many times, they result in violence, bloodshed and even fatalities.[63] In fact, there are statistical evidence showing increased violence and deaths resulting

[61]See generally, *All Progressive Congress & Ors. v. Independent National Electoral Commission & Ors.* (2018) LPELR – 44286; *Ayogu Eze v. Peoples Democratic Party & Ors.* (2019) 1 NWLR (Pt. 1652) 1; *Boko v. Nungwa* (2019) 1 NWLR (Pt. 1654) 395; *Bassey Etim v. Akpan & Ors.* (2019) 1 NWLR (Pt. 1654) 451.

[62] Muinat Adetayo Adekeye (2017) "Party Primaries, Candidates Selection and Intra-Party Conflict in Nigeria: PDP in Perspective", *Covenant University Journal of Politics and International Affairs,* vol. 5, no. 1, pp 22-39; Omoruyi Austin Aigbe "Internal Party Conflicts: The Effect of Lack of Internal Democracy in Nigeria's Political Parties – the way forward", available at https://www.academia.edu/24594263/Internal_Party_Conflicts_The_Effect_of_Lack_of_Internal_Party_Democracy_in_Nigeria_s_Political_Parties_-_The_Way_Forward

[63] See, Aly Verjee, Chris Kwaja, and Oge Onubugu (2018) "Nigeria's 2019 Elections: Change, Continuity, and the Risks to Peace", *United States Institute of Peace Special Report No. 429,* available at https://www.usip.org/sites/default/files/2018-09/sr_429_verjee_et_al_final.pdf

from intra-party conflicts.[64] Intra-party conflicts could also negatively affect the fortunes of political parties in their primary quests to gain political power in government; as happened to the All Progressed Congress APC with the total exclusion of the party from fielding candidates in Rivers State and nullification of votes casts for candidates of the party in Zamfara State in the elections. Apparently to develop a culture of democratic ethics which can minimize and manage conflicts arising from intra-party contestations and infuse a system of internal democracy in political parties, the framers of the Constitution had inserted clauses requiring political parties to adopt democratic methods in the internal management of their affairs.[65] These are further reaffirmed in the Electoral Act. This requirement is to apply not only in elections into party executive positions, but also in nomination of candidates to be fielded by political parties in any election.[66] The INEC is exclusively saddled with the task of administratively monitoring strict compliance with these mandatory constitutional and statutory requirements.[67]

However, virtually all political parties have proved unable to meet with this objective. This is obvious from the persistence of conflicts in the process of electing their executive members and in nominating candidates for elections. A common fallout of such conflicts is the filing of pre-election litigations by aggrieved members. This has dragged the courts into determining matters of internal management of political parties with far reaching consequences for Nigeria's electoral process. In order to make meaning of this recurrent challenge, it is necessary to re-appraise the objective of *formalizing* internal democracy in the country's electoral process and the resultant involvement of

[64] See, Coretin Cohen (2015) "Violence between and within Political Parties in Nigeria: Statistics, Structure and Patterns (2006-2014)", *IFRA-Nigeria Working Series, No. 50,* available at http://www.nigeriawatch.org/media/html/WP11Cohen.pdf
[65] See section 223 (1) (a) (2) (a) of the Constitution.
[66] See section 87 of the Electoral Act, 2010.
[67] See sections 85 and 86, ibid. See also section 225 of the Constitution.

INEC and the courts in enforcing the objective. This review is important because it provides the tool with which to understand the dimension of intra-party conflicts and the resultant negative impact on political party management and the stability of Nigeria's electoral process.

The objective of formally instituting internal democracy in Nigeria's political parties system is closely tied to the current jurisprudence on pre-election disputes involving members of the same political parties. The idea of internal democracy or "intra-party democracy, refers to the level and methods of including party members in the decision making and deliberation within the party structure."[68] The contentious belief is that intra-party democracy nurtures citizens' political competence and may produce more qualified representatives leading to formulation of better political programmes which can be of beneficial effect to citizens and the political environment.[69] Opposed to the idea of internal democracy is the argument that "too much democratization may hinder parties to keep their electoral promises and also dilute the power of a party's inner leadership."[70] The cross country evidence is that internal management of political parties is regulated in many countries.[71] However, the nature of regulation varies from country to country. These range from "candidate selection rules; internal election for leadership positions; or women's and minorities' representation in the party leadership."[72] The Nigerian legal framework seems to adopt most of these regulations.

However, it appears that in the nomination process or selection of candidates for elections, only a few countries set legally binding regulations.[73] In most legal systems, parties are given the latitude

[68] See, "Methods of Promoting Internal Democracy in Political Parties", available at http://aceproject.org/electoral-advice/archive/questions/replies/110615365/mobile_conversation_view.
[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Ibid.

to determine the most appropriate processes and internal regulations suitable to them.[74] This is in consonance with the liberal traditions by which many matured democracies refrain from imposing external regulations on political associations or parties in the belief that they are voluntary bodies for which strict formal regulations are difficult if not unnecessary to regulate. The remedy for breach of internal rules of membership and management are often left to be determined by their internal constitutions. The courts are also reluctant to interfere in decisions taken internally, including those relating to sponsorship as candidates for elections. Whenever such disputes are brought before courts, they decline jurisdiction as they consider such matters political questions for which there can be no precise judicial rule to come to a clear determination.[75]

This liberal tradition was affirmed in Nigeria by the Supreme Court of Nigeria in the 1983 landmark decision of *Onuoha v. Okafor*.[76] This decision was reached even when the operative Constitution of 1979 and the then applicable Electoral Act of 1982 appear to institute a system of internal democracy in intra-party management and in the nomination of candidates for elective positions. The Supreme Court held at the time that what political parties owed to their members seeking nomination was the right to seek nomination under the platform of the party, not the right to be sponsored by the party![77] In that case, the appellant won the primary election to be fielded as a candidate of the Nigeria Peoples' Party (NPP) in the 1983 general elections for Owerri Senatorial District of Imo State. Subsequently, the party constituted a panel to resolve the dispute which arose from the exercise. The party, without conducting a fresh primary election, dropped the appellant as its candidate and replaced him with his defeated opponent at the primary election. The appellant

[74] Ibid.
[75] See *Onuoha v. Okafor & Ors* (1983) 2 SCNLR 244 or (1983) 14 NSCC 494, *Per* Obaseki JSC, available at http://ilaw.com.ng/hon-patrick-c-onuoha-v-chief-r-b-k-okafor-chairman-n-p-p-ors-2/ (accessed 26 April, 2019).
[76] Ibid
[77] Ibid

challenged the decision of the party and was successful at the High Court. The party appealed against the decision to the Court of Appeal which held in the party's favour. On appeal to the Supreme Court, the court held that the complaint of the appellant is a political question which is not justiciable; and dismissed the appeal. In the lead judgment, Obaseki JSC said emphatically:

> It is clear to me that … the expressed intention of the Constitution of the Federal Republic 1979 and the Electoral Act 1982 is to give a political party, in the instant appeal the N.P.P. (Nigerian Peoples' Party), the right freely to choose the candidate it will sponsor for election to any elective office or seat in the legislature and in this appeal a seat in the House of Senate of the National Assembly. The exercise of this right is the domestic affairs of the N.P.P. guided by its constitution. There are no judicial criteria or yardstick to determine which candidate a political party ought to choose and the judiciary is therefore unable to exercise any judicial power in the matter. It is a matter over which it has no jurisdiction. The question of the candidate a political party will sponsor is more in the nature of a political question which the courts are not qualified to deliberate upon and answer. The judiciary has been relieved of the task of answering the question by the Electoral Act when it gave the power to the leader of the political party to answer the question. It is therefore my view that the matter in dispute brought before the Court is not justiciable.

The relevant portion of the Electoral Act, 1982 upon which His Lordship came to this significant conclusion was section 83 (2), which provided thus "S. 83 (2) Where there is doubt as to whether a candidate is sponsored by a political party, the commission (i.e. the Federal Electoral Commission) shall resolve same by consulting the leader of the political party." In the view of Obaseki, JSC, which was unanimously endorsed by the entire court, based on the provision, the "real power to make a choice is, in my view, in the political party through its leader."[78] This was the state of the law which was reaffirmed in *Dalhatu v. Turaki*,[79] until a 2006 amendment to the Electoral Act, by which political parties were

[78] Ibid.
[79] (2003) 15 NWLR (Pt. 843) 310

required to give "cogent and verifiable reasons" for substituting a candidate whose name had been submitted to INEC as a candidate for an election.[80] The section provided:

> (1) A political party intending to change any of its candidates for any election shall inform the Commission of such change in writing not later than 60 days to the election.
>
> (2) An application made pursuant to subsection (1) of this section shall give cogent and verifiable reasons.

The Supreme Court subsequently endorsed this amendment, holding that it created a different context for which its earlier decisions in *Onuoha v. Okafor* and *Dalhatu v. Turaki* were inapplicable in so far as the issue of the power of political parties to freely determine candidates to sponsor. The first case in which the court came to this conclusion is *Ugwu v. Ararume*.[81] The other is the more celebrated case of *Ameachi v. INEC & Ano.,*[82] perhaps more celebrated because by the latter decision, a sitting Governor of a state was removed from office on ground that the substitution of the appellant by his political party, the PDP, was in contravention of the provision of section 34 (1) (2) of the Electoral Act, 2006 (as amended).

From the foregoing, it would appear that if the state of the law had remained as provided in the pre-2006 Electoral Act, the situation in Rivers State pre-election disputes would probably have been avoided as the INEC would have had no say in the matter of who was sponsored by the APC into all the disputed positions. This would also have been the scenario in the conflict in Zamfara State as the court would have declined jurisdiction on the matter in consonance with the *Onuoha* jurisprudence. As to whether this is healthy for the objective

[80]See section 34 (1) (2) of the Electoral Act 2006 (as amended).
[81] (2007) 12 NWLR (Pt. 1048) 365.
[82] (2008) 5 NWLR (Pt. 1080) 227.

of infusing the ethic of internal democracy in intra-party management of political parties, it is clear from the cross country evidence of even advanced democracies that there is really no hard and fast rule on internal democracy. The accustomed practice is to provide as much leeway as possible for political parties to manage their intra-party processes including choosing their leadership and nominating who they wish to sponsor as candidates for elections. There is no plausible reason why this cannot be the case in Nigeria as well.

In any event, countries which have legally formalized intra-party democracy regulations did so not necessarily to promote democratic values but due to several other factors including international political pressure;[83] for fear of what was considered negative economic ideology;[84] to compel inclusion of disadvantaged segments such as women[85] and mainly to compel new political parties to gain formal registration.[86] Nigeria has also instituted similar non-majoritarian or consociational policy in the intra-party affairs of political parties first in the Constitution of 1979[87] and subsequently in the extant Constitution of 1999.[88] Therefore, there seems to be nothing entirely sacrosanct in the apparent fixation on instituting the objective of internal democracy through formal, normative rules of control of the intra-party management processes of political parties. As we have witnessed especially since 2006 with the amendment of the Electoral Act in that year, this objective has proved to be counter-productive not only to internal cohesion of political parties, but also to the stability of the

[83] As in the case of Germany where regulations on intra-party "democracy were originally enacted to respond to international political pressure to convince the world of the country's objection to fascism and totalitarianism of all sorts". See note 68.
[84] As in the case of Finland, where "due to fear of soviet communism all political organizations were regulated by law and communist organizations were banned through the 1917 Constitution." See note 68.
[85] As in the cases of Venezuela, Nepal, Belgium and France. See note 68.
[86] As in the case of India. See note 68.
[87] See section 203 (2) (b) which requires that members of the executive committee or other governing body of the political party shall reflect the federal character of the country by belonging to different states of not less than two-thirds of the states of the federation.
[88] See section 223 (2) (b) which reproduces the entire provisions of section 203 (2) (b) of the Constitution, 1979.

electoral process of the country with the rather un-abating spate of pre-election litigations in every election cycle since then.

Post-election Disputes – what role for the courts?

Unlike pre-election litigations involving intra-party schisms, post-election disputes are in a different class. For one, they are not constrained by the fact that they are essentially intra-party disputes. Post-electoral conflicts which provoke the urge to approach the judiciary are inter-party in nature and affect the entire democratic space. Fundamentally, they have impact on the question of *de jure* legitimacy of the declared winner of an election. Except there is opportunity guaranteed to the aggrieved to seek lawful redress, the legitimacy question remains and can torpedo the democratic system in many ways. A number of justifications have been offered to support the courts' intervention:

First is the argument earlier made that bad electoral system acts as a gravitational force to attract criminal elements who alone can optimize the criminal environment it offers. As a result, many ethical and competent persons will shun the electoral process since they may not be competitive in the criminality and violence foisted on the electoral system.[89] Abandoned by ethical, competent but non-criminally minded potential political leaders, the electoral system would breed even more desperate elements who would exacerbate the criminal condition of the system in the quest to out-compete equally desperate elements.[90]

Second, it is argued that saddled with such ethically-deficient class of political leadership who emerged through violence and corruption of the electoral process, the hope for

[89] Paul Collier (2010) *War, Guns and Votes: Democracy in Dangerous Places,* London, the Bodley Head.
[90] Amadi, note 33. See also Adigun Agbaje & Said Adejumobi (2006) "Do Votes Count? The Travail of Electoral Politics in Nigeria", *Africa Development,* vol. xxx, no. 31, pp. 25-44.

commitment to good governance becomes forlorn, as those who emerge have no incentive to perform since they owe their emergence not through popular votes but through brigandage and criminal capture of the electoral process. Amadi has suggested that this may account for the apparent incremental deterioration in the quality of those elected into political offices since 1999.[91]

Third, it is would appear that any hope of broad, accelerated electoral reforms to eliminate many of the pathologies of the electoral process has been met with political resistance. As noted by the IRI/NDI Election Report for the 2019 general elections, previous recommendations for improving the electoral process, including those calling for strengthening of actual independence of the election management body, transparency in collation of result using information technology, etc have remained largely unimplemented by way of legislative intervention. The needless politicization of reform process reached a high-water mark in the last effort at amending the Electoral Act, with series of steps, including presidential vetoes, taken to block attempt by the National Assembly to introduce some innovative improvement to the extant Electoral Act of 2010. All these because targeted legislative reforms were considered not in the interest of certain actors in the political arena.[92] Even the National Assembly efforts in this regard could not be said to pass the test of vested political interest.[93] The result is that significant improvements in the substantive legal framework for conduct of elections have remain stuck in 2010.

[91] Ibid. See generally, Kunle Animashaun (2010) "Regime Character, Electoral Crisis and Prospect of Electoral Reform in Nigeria" *Journal of Nigerian Studies*, vol. 1, no. 1, pp. 1-33.
[92] "Electoral Act and the Presidential Veto", *The Citizen online*. Available at https://thecitizenng.com/electoral-act-and-the-presidential-veto-thisday/
[93] Ebuka Onyeji "Electoral Bill: Executive, National Assembly 'irresponsible' – Presidential Candidate", *Premium Times*, December 11, 2018. Available at https://www.premiumtimesng.com/news/more-news/300458-electoral-bill-executive-national-assembly-irresponsible-presidential-candidate.html

Thus, the current reality is that the two political branches cannot be left alone to sort out the pathologies of Nigeria's electoral process, because their members seem to price their individual political interests more than the democratic goal of instituting a regime of free, fair and credible elections. When it is considered that the "legitimacy and legality of the legislative and executive exercise of power in a democracy rests on the fact that the people actually chose their leaders", continuing with a regime of dubious elections which defeats this truism is perilous to democratic sustainability, and may invite unpleasant consequences including truncating the democratic system altogether.[94]

To avoid this possibility, it is important that the conditions for it do not fester. By its vantage institutional position as arbitrators, the courts are well equipped to protect the democratic system more than the two political branches can. Therefore, in addition to the formal constitutional powers vested on the courts to settle disputes arising from post-election outcomes, the ***governance theory of judicial functions*** can be correctly cited as justification for judicial activism in such litigations. The theory postulates "that whenever the prospects of democratic change of leadership is made impossible through the capture of the electoral process, the judiciary should 'politically' intervene through public law adjudication to free the polity from the 'procedural freeze' and restore electoral process to its democratic character"!

Even as it may be correctly argued that judges are no "Platonic Guardian", as they can be corrupted too;[95] yet, they remain the only constitutionally legitimatized authority conferred with the independent powers to settle disputes, not only in the private realm but also in the

[94] Amadi, note 33. See generally, Luis Eduardo Medina Torres and Edwin Cuitlahuac Ramifrez Diaz (2015) "Electoral Governance: More than just Electoral Administration", *Mexican Law Review*, vol. 8, pp. 33-46
[95] Amadi, ibid.

public domain. Election matters form a very good example of such as disputes. They are not conferred this unique authority as a substitute for the vote, but to affirm the vote. Thus, if the legacy of *Marbury v. Madison* is to survive, the courts must not shy away from playing its rightful role as an arbitrator in post-election disputes. If nothing else, the court should feel justified because their actions are constitute powerful and stabilizing exercise of their 'right to govern', albeit as an 'unusual political institution'.[96]

V. CONCLUSION

The discussion of the role which courts should play in the electoral process involves not just legalistic answer, but a philosophical one as well; not discounting the empirical dimensions to it. My effort may be viewed as an attempt to fuse these three separate methodological paradigms to find wade through the labyrinth of the inquiry. I must say, however that as a lawyer, I am definitely persuaded by the argument which project the courts as no longer a passive component in the settlement of electoral disputes. But which electoral dispute? I have argued that there are essentially two aspects to electoral disputes in which the Nigerian courts have been quite active (to return to the theme of activism). Lately, our courts have been quite active in intra-party disputes, far more than was the case before 2006. Our courts have always been active in post-election dispute involving members of different political parties.

So, to answer the question, "which dispute?", I have taken the view that the courts should minimize their activism or involvement in pre-election litigations involving members of the same political parties. Although recent constitutional alteration appears to have tied the

[96] Amadin. See generally, Samuel Freeman (1990-1991) "Constitutional Democracy and the legitimacy of Judicial Review", *Law and Philosophy*, vol. 9, no. 4, pp. 327-370

hands of the court in this regard, pending further review of both the constitution and the Electoral Act to blunt such matters from judicial intervention, I believe the court can adopt the prudential jurisprudential approach adopted by the Supreme Court in the *Onuoha v. Okafor* decision, declining judicial intervention in internal political schisms, especially those involving the rightful candidate to fly the flag of a political party in any election. However, for post-election disputes, I believe the question should be the degree of court's involvement, rather than whether the courts should intervene at all. If there are good grounds to intervene and save our nascent democracy from premature collapse because of fraudulent elections, courts must intervene using the adjudicatory tools. This is a positive exercise of the court's 'right to govern', a right which is inherent in the judiciary, even as a passive, political branch.[97]

[97] See Nathan J. Brown and Julian G. Waller (2016) "Constitutional Courts and Political Uncertainty: Constitutional Ruptures and the Rule of Judges", *International Journal of Constitutional Law*, vol. 14, no. 4, pp. 817-850.