THE ROLE OF TRIBUNALS AND DISPUTE RESOLUTION CENTRES IN THE ADMINISTRATION OF JUSTICE IN NIGERIA

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APRIL, 2012

DECLARATION

I hereby declare that this work is original. It has not been presented in any previous application for a higher degree in this or any other University. All published and unpublished materials works cited have been duly acknowledged.

....

Hussein MUKHTAR Date

CERTIFICATION

The Dissertation titled "THE ROLE OF TRIBUNALS AND DISPUTE RESOLUTION CENTRES IN THE ADMINISTRATION OF JUSTICE IN NIGERIA" by Hussein MUKHTAR meets the regulations governing the award of the Degree of Doctor of Philosophy in Law - PhD of Ahmadu Bello University, Zaria, Nigeria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This work is dedicated to the Holy Messenger of Allah Muhammad P.B.U.H the most perfect crusader of justice, who has never uttered anything else other than the whole truth. It is also dedicated to everyone who loves him and stands firmly by the whole truth, for truth is the key word to the attainment of justice and sustenance of the rule of law and the best service to humanity. It resolves every dispute instantly and is devoid of all forms of miscarriages in the administration of justice in Nigeria and elsewhere.

ABSTRACT

The judicial powers of the Federation and of States are vested in courts established by section 6 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and other courts established for the Federation by an Act of the National Assembly or in case of states, law made by the relevant State House of Assembly. The judicial powers gradually, due influx and consequential protraction of cases, had to be shared with emerging tribunals established for particular purposes. This development consequently brought about a dual parallel system of adjudicating institutions operating side by side.

Multiplicity and increase in litigations which generated into incessant undue protraction of cases in courts has posed an imminent threat to breakdown of law and order that may ultimately lead to anarchy in the society. Under this compelling situation, an alternative means to decongest the courts became absolutely inevitable. Nigeria resorted to, *inter alia*, benchmarking the British experience to establish tribunals to handle some specific cases requiring more expeditious determination like election petitions, breach of code of conduct by public office holders, capital market cases, etc.

Election tribunals stand unique in the administration of justice in Nigeria. Both the Constitution of the Federal Republic of Nigeria (as amended) and the successive Electoral Acts 2002, 2006 and 2010 have all provided for a fast tracking procedure to ensure prompt disposal of election petitions and appeals due to their *sui generis* nature. A thorough appraisal of election cases has been done right from first instance tribunals to appellate tribunals.

The time-honoured tradition of the Nigerian people of dispute resolution also enjoys formal patronage by establishing dispute resolution centres like the Lagos Multi-door Court House and the Abuja Multi-door Court House by the Negotiation and Conflict Management Group (NCMG), etc. All hands have, since the formal establishment of various resolution centres, been on deck to resolve most disputes by providing the much needed prompt, easy and friendly resolution of disputes. The various aspects of alternative dispute resolution have been examined and the several advantages of the alternative system of administration of justice identified. The problems and difficulties that cause hiccups have been discussed and solutions proffered.

The common problem running through the operation of every tribunal is delay in the trial proceedings. This work aims principally at evolving ways of minimising delays in disposal of cases in tribunals and dispute resolution centres and at the same time enhancing the quality of adjudication as a tool for decongesting the courts in order to promote peaceful and more harmonious co-existence amongst the Nigerian people.

TABLE OF CONTENTS

TITLE PAGE …… i

DECLARATION …… ii

CERTIFICATION …… iii

ACKNOWLEDGEMENT …….... iv--vi

DEDICATION ……..…vii

ABSTRACT …… viii

TABLE OF CONTENTS ……..…ix--xvii

TABLE OF CASES …… xviii--xxii

TABLE OF STATUTES …… xxiii--xxiv

LIST OF ABBREVIATIONS …….. xxv--xxvi

CHAPTER ONE: GENERAL INTRODUCTION 1

1.1 Introduction …….. 1

1.2 Statement of Problem…….. 5

1.3 Objectives of the Research ……..…12

1.4 Scope of the Research …….. 15

1.5 Methodology …….. 16

1.6 Literature Review ……..…….. 17

1.7 Justification ……..…….. 20

1.8 Organisational Layout ……..…….. 22

CHAPTER TWO: SPECIAL MILITARY TRIBUNALS 26

2.1 Introduction ……..…… 26

2.2 Military Court ……..…….. 28

2.2.1 General Over View ……..…….. 28

2.2.2 Composition ……..…… 33

2.2.3 Judge Advocate ……..…….. 36

2.2.4 Pre-trial Procedure ……,…….. 39

2.2.5 Taking of Abstract of Evidence……..…….. 44

2.3 Special Military Tribunal ……..…… 46

2.3.1 Composition ……..…….. 47

2.3.2 Jurisdiction ……..…… 47

2.3.3 Right of Appeal ……..…… 48

2.4 The Court Martial ……..…….. 52

2.4.1 Composition of Court Martial ……. 53

2.4.2 Jurisdiction ……. 53

2.4.3 Convention of Court Martial ……. 55

2.4.4 Disqualification ……. 67

2.4.5 Venue ……. 73

2.4.6 Dissolution of Courts Martial ……. 75

2.4.7 Right of an Accused to Object to Membership of Court Martial .. 79

2.4.8 Proceedings of the Court Martial ……. 80

CHAPTER THREE: ELECTION TRIBUNALS ……. 83

3.1 Introduction ……. 83

3.2 Governorship and Legislative Houses Election Tribunal ……. 102

3.2.1 Composition ……103

3.2.2 Presentation of Election Petition ……. 106

3.2.3 Qualification for Election Candidates ……. 113

3.3 The National and States Houses of Assembly Election Tribunal…… 123

3.3.1 Composition…… 124

3.3.2 Candidate in an Election ……..…….…….. 125

3.4 Local Government/Area Council Election Tribunals ……..……..…… 133

3.4.1 Area Council Election Tribunal ……..…….…… 134

3.4.1.1 Jurisdiction ……..…….…… 134

3.4.1.2 Composition ……..…….…… 135

3.5 Area Council Election Appeal Tribunal ……..…….. 136

3.6 Election Petitions ……..…….…… 137

3.6.1 Presentation of an Election Petition ……..…….. 140

3.6.1.1 Proper Respondent to an Election Petition ……..…… 143

CHAPTER FOUR: THE APPELLATE COURTS AS ELECTION TRIBUNALS 145

4.1 The Court of Appeal as the Presidential Election Tribunal ……. 145

4.1.1 Jurisdiction ……..…….…… 147

4.2 Qualification ……..…….. 148

4.3 Procedure for Election ……..…….. 155

4.3.1 Preconditions for Winning a Presidential Election ……..…… 157

4.3.2 Irregularities in the Conduct of Election ……..…….. 164

4.4 The Supreme Court as an Election Appeal Tribunal ……..…… 181

CHAPTER FIVE: CODE OF CONDUCT TRIBUNAL 183

5.1 Establishment and Composition …… 183

5.2 Right of Appeal…….. 190

5.3 Prosecution for Criminal Offence…….. 191

5.4 Jurisdiction …….. 194

5.4.1 Public Officer …… 194

5.4.2 Subject Matter …… 196

CHAPTER SIX: CAPITAL MARKET AND REVENUE TRIBUNALS 203

6.1 Introduction …….. 203

6.2 Investment and Securities Tribunal (IST) …… 204

6.2.1 Tenure and Disqualification of The Chairman and Members 209

6.2.2 Jurisdiction …….. 212

6.2.2.1 Jurisdiction Over Matters Relating to The CAMA …….. 226

6.2.2.2 Appellate Jurisdiction of The Tribunal (I.S.T.) …… 226

6.2.2.3 The Two Fold Jurisdiction …… 228

6.2.3 Capital Market Disputes …….. 228

6.2.4 Pensions Disputes ……..…… 230

6.2.5 Operational Distinctiveness of the I.S.T ……..…….. 231

6.2.6 Legal Representation ……..... 232

6.2.7 Right of Appeal …… 233

6.2.8 Procedure …… 236

6.2.9 Time Frame ……..…….. 237

6.2.9.1 Preliminaries to Trial …….. 238

6.2.9.2 Trial Proceedings ……..…….. 239

6.3 Value Added Tax Tribunal …… 241

6.3.1 Membership of Zonal Vat Tribunal ……..…… 242

6.3.2 Jurisdiction ……..…….. 247

6.3.2.1 Enforcement and Conflict of Jurisdiction ……..…… 249

6.3.3 Notice of Appeal ……..…… 250

6.3.4. Hearing Proceedings …… 251

6.3.5 Right of Appeal ……..…….. 252

6.4 Tax Appeal Tribunal 254

6.4.1 Composition.....256

6.4.2 Jurisdiction.....257

6.4.3 Conflict in Jurisdiction.....257

6.4.4 Procedure.....259

6.4.5 Right of Appeal 265

CHAPTER SEVEN: MULTI-DOOR COURT HOUSES AND OTHER DISPUTE RESOLUTION CENTRES 266

7.1 The Imperatives For an Alternative Avenue of Dispute Resolution 266

7.2 The Genesis of the ADR Process 273

7.3 Forms of Alternative Dispute Resolution 276

7.4 Mediation 277

7.4.1 The Mediation Procedure 277

7.4.1.1 Request For Mediation 277

7.4.1.2 Selection of a Mediator 278

7.4.1.3 Preliminaries of Mediation 278

7.4.1.4 The Mediation Session ……..…….. 279

7.4.1.5 The Settlement ……..... 280

7.4.1.6 Follow Up ……..…….. 280

7.5. Conciliation ……..…….. 281

7.6 Early Neutral Evaluation ……..…….. 281

7.7 Facilitation ……..…….. 281

7.8 Med-Arb ……..…….. 282

7.9 Arbitration ……..…….. 282

7.9.1 Composition of Arbitral Tribunal ……..…….. 285

7.9.2 Termination of Arbitrator's Appointment ……..…….. 288

7.9.3 Jurisdiction of Arbitral Tribunal ……..…….. 289

7.9.4 Arbitral Proceedings ……..…….. 290

7.9.5 Making of Award and Termination of Proceedings ……..... 294

7.9.6 Recourse against Award ……..…….. 297

7.9.7 Recognition and Enforcement of Awards ……..…….. 298

7.10 Conciliation ……..……..……..…….. 299

CHAPTER EIGHT: SUMMARY AND CONCLUSION 302

8.1. Summary ……..……..……..…… 302

8.2 Observations and Findings ……..……..……. 305

8.3 Recommendations ……..……..……..……. 333

8.4 Conclusion ……..……..……. 357

Bibliography 366

TABLE OF CASES

A. C. v INEC (2007) 12 NWLR (pt. 1048) 220 122

A. G. Abia State v A. G of the Federation &Ors (2002) 3 S.C 106. 320

A. G. Ondo State v A. G. Fed & Ors (2002) 6 S.C. (pt. 1) 1 at 32 320

A.J. Lawal & Anor v Santos suit N... LD/469/77 270

A.N.P.P v Bony Haruna & Ors(2003) 15 N.W.L.R. (pt. 841) 546 316

Abdulkarim v Shinkafi 121, 122

Abdullahi Diso v. Kano N.A. (1968) S.C.O.P.E. 19 37

Abubakar & ors. V. Nasamu & ors. No. SC/14/2012 345

Aforlete v The State (2000) 7 S.C. (Pt. I) 80 at 94 – 95 43

Agbi v Ogbeh (2006) 11 N.W.L.R. (pt. 990) 65 ..... 40,41, 88,89, 90

Agomo v Aroakazi (1998) 10 NWLR (pt 568) 173 at 176, paras D-E 42

Akinwale v Nigerian Army (2001) 16 N.W.L.R. (Pt. 738) at 120 112

Alataha v Asi (1999) 5 NWLR (pt. 601) 32 at pp. 40-41 paras. F-A 108, 113

Amaechi v. INEC (2008) 5 NWLR (Pt. 1080) 227 at 317-318 129,131,343,344

Attorney General Lagos State v. Attorney General of the Federation .. 318, 321, 359

Awolowo v Shagari (1979) 6-9 S.C. 51..... 101, 162, 163

Awuse v Odili (2004) 8 NWLR (Pt.876) 481 ..... 97, 123

Bakoshi v. Chief of Naval Staff at p.192 paras A-D 73

Balewa v Mu'azu(1999) 5 N.W.L.R. (pt. 604) 636 at 644-645..... 114

Balogun v A.G. of Ogun State(2002) 2 S.C. (Pt. II) 89 at 98 42

Buhari v Obasanjo (2006) 11 NWLR (pt.990) 65..... 88, 92,98,147,151,152,162, 164, 166,167, 175, 177, 179, 180, 314,317

Cadbury (Nigeria) Plc v SEC Appeal No CA/A/105/M/08 ..... 328, 354

Chibok v Mohammed Bello *(1*993) 1N.W.L.R. (pt 267) 109 at 117 338

D.N.P. v U.N.C.P. (1998) 8 NWLR (pt. 563) 644 at 648, paras C-D 338

Dalhatu v Turaki (2003) 15 NWLR (Pt 843) 310 ..... 130, 342

Delta Steel (Nig) Ltd v A.C.T. Inc.(1999) 4 NWLR (pt 597) 53 236

Doherty v BGL Securities Ltd Unreported case No. APC/4/2002 324

Doukplolagha v Alamieyesigha (1999) 6 N.W.L.R. (pt. 607) 502. 119

Eboni Fin & Secu v Wole Ojo Tech Services **(**1996) 7 NWLR (pt. 461) 464 225

Egolum v Obasanjo (1999) 7 NWLR (pt. 611) 355 at p. 385, paras A-B 142

Ella v Agbo (1999) 8 NWLR (Pt. 613) 139 at 150, paras A-B 125

Emesim v Nwachukwu (1999) 6 N.W.L.R. (pt. 605) 154..... 111

Ex-Wing Commander James v NAF (2000) 13 N.W.L.R (Pt. 684) 406 57

F.I.S. Securities Ltd v SEC (2004) 1 165NISLR 223, 224, 226

Hon Aminu Sule Garo v Sen Bello Hayatu Gwarzo (No.CA/K/EP/NA/1/08)... 112

Hon Sani Sha'aban v Alh Namadi Sambo (No CA/K/EP/GOV/22/2008) 107

Ibrahim v INEC(1999) 8 NWLR (Pt 614) 334 AT P. 350, Paras D-H 126

Idakula v Adamu (2001) 1 NWLR (Pt. 694) 322 at 339 30

Ifeajuna v Ifeajuna & anor (1999) 1 NWLR (Pt. 587) 492 at 502 29

Ikuomola v Ige (1992) 4 N.W.L.R. (pt. 236) 511 at 532 338

Lakanmi v Adene(2003) 4 S.C (Pt II) 92 at 96 77

Lamido v Turaki (1999) 4 NWLR (pt 600) 578 at 586 paras B-C 112

M. Yahaya Abdulkarim v Mahmuda Aliyu Shinkafi (CA/K/EP/GOV/30/07)....121

Madukolu v Nkemdilim (1962) 2 SCNLR 341 at 358 211

Maska v Ibrahim (1999) 4 NWLR (pt 599) 415 at 423 143

Modukolu v Nkemdilim (1962) 2 SCNLR 314; 142

Mrs. S. A. Abudu v Alhaja T. Ogunbambi & Anor Suit No. LD/89/7..... 270

N.B.C.I. v Alfijir (Mining) Nig Ltd (1999) 14 NWLR (pt 638) 176..... 235

Ngige v Obi (2006) 14 N.W.L.R. (Pt 999) 1 at 95..... 94, 95, 97, 101, 316

Nigerian Army v Col. Umar Mohammed (2002) FWLR (part 129) 1555 310

Nigerian Army v. Lt. Col. A. Akinwale (2001)16 NWLR (Pt. 738) 109.. 34, 68, 305

Obasanya v Babafemi (2000) 15 NWLR (Pt. 689) 1at 17 paras A-C 139

Obiosa v Nigerian Air Force (2000) 12 N.W.L.R. (Pt 680) 112 .....53, 58

Oceanic Int'l Bank v Victor Odili & Ors Appeal No CA/L/171M/..... 352, 355

Ogunmokun v Mil Adm of Osun St(1999) 3 NWLR (pt. 594) 261 ..... 141, 211

Ojukwu v Obasanjo (2004) 12 NWLR (pt. 886) 169 ..... 147, 151, 153, 154

Okoroafor v Miscellaneous Offences Tribunal (1995) 4 N.W.L.R (Pt. 387) 59 6

Okpoido v Udoikpong(1999) 5 N.W.L.R. (PT. 604) 595 at 605 paras. C-D 109

Onuoha v Okafor(1983) 2 SCNLR 244 ..... 130, 342

Orianwo v Okene... (2002) 14 N.W.L.R (Pt 786) 157 41

Orubu v NEC (1988) 5 NWLR (PT 94) 323 139

Oshoboja v Amuda (1992) 6 N.W.L.R. (Pt 250) 690 at 709 paras. E – G 7

Osigwe v B. P. E. (2007) 2 NISLR 201 ..... 211, 215

Proctor Gamble UK v Rev & Customs Comm (2007) ECWA civ.407 356

Rabiu & Anor v Jibo & Ors (Unreported Appeal No. CA/A/EPT/640/2011) ... 348

Rotimi Chibuike Amaechi v INEC (2008) 5 NWLR (Pt 1080) 227 129

Sagay v Sajere (2000) 6 N.W.L.R (661) 360 para. H 32

Shekete v N.A.F (2007) 14 N.W.L.R (Pt 1053) 159 70

Sipeolu & Anor v AIICO Eng. Group Nig. Ltd suit No. LD/4/78 270

U. B. N. PLC v S.E.C. (2004) 1 ISLR 1; (2004) INISLR 115..... 220

Ubaka Ifeajuna v Charles Ifeajuna & anor (1999) 1 NWLR (Pt. 587) 492 29

Ugwu v Ararume(2007) 12 NWLR (pt.1048) 364 341

Ugwu v the State (1998) 7 N.W.L.R 397 ……. 29

Unongo v. Aku (1983) 2 SCNLR 332 320

W.R.P.C Ltd v Agbuje(2005) 5 NWLR (Pt 917) 63 at 84-85 77

Yekini v Nigerian Army(2002) 11 NWLR (Pt 777) 127 at 143 Para. G 79

Yusha'u Muhammed Ahmed & Ors v Aliyu Magatakarda Wamakko & Ors ... 348

Zuru v. Chief of Naval Staff (2004) All FWLR (part 237) at page 522 309

TABLE OF STATUTES

Abuja Multi-Door Courthouse Mediation and Arbitration (Procedure) Rules.. 283

Armed Forces Act, Cap. A20 L.F.N, 2004…….. 12,79,72,71,70,69,54,53,38,305

Arbitration and Conciliation Act 283,299,290,301

Constitution of the Federal Republic of Nigeria, 1999 (as mended) ……. 3, 4, 5, 10, 29, 30, 32, 35, 37, 45, 52, 71, 83, 85, 102, 103, 105, 115, 121, 123, 124, 125, 131, 132, 133, 140, 146, 147, 148, 151, 152, 153, 154, 155, 158, 159, 160, 161, 163, 181, 182, 183, 184, 189, 191, 192, 194, 202, 221, 226, 233, 234, 249, 258, 259, 302, 320, 325, 326, 327, 329, 331, 333, 340, 342, 345, 346, 347

Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010.. 10, 337, 145, 124, 120, 341

Constitution of the Federal Republic of Nigeria (Second Alteration) Act, 2010 .....337, 357, 10, 145, 131

Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 .202

Corrupt Practices and Other Related Offences Act 2000 320

Court of Appeal Act, Cap. C6, L.F.N. 2004 191

Court of Appeal Rules 2007 .....191, 252, 253, 254

Court of Appeal Rules 2011 …… 252

Criminal Procedure Code (Northern States) Act, Cap C42 LFN, 2004.....43

Electoral Act 2002 ……..100, 116, 144, 130, 318

Electoral Act 2006 ….....9,322, 148, 136, 133, 128, 86, 108, 146

Electoral Act 2007 146

Electoral Act 2010 ……133, 140, 136, 135, 144

Evidence Act, Cap E 14 2004 ……40, 42, 44, 45, 241, 307

Evidence Act 2011 (HB 214) …… 40, 292

Interpretation Act, Cap 123, L.F.N. 2004 75

Investments and Securities Act, 1999 203

Investments and Securities Act, 2007 203

Military Court (Special Powers) Act. Cap. 225, L.F.N. 1990..... 31, 38,39,43,45

Navy Act, Cap 288 L.F.N 1990 38

Nigerian Army Act, Cap 294 L.F.N 1990 38

Air Force Act 38, 118

Pensions Reform Act No 2, 2004 .....227, 326

Treason and Other Related Offences (Special Military Tribunals) Act, Cap 444 L.F.N 1990 ..... 27, 46

VAT Act, 2004 .....5, 242, 243, 248, 250, 252, 253, 254

LIST OF ABBREVIATIONS

AC	-	Appeal Cases
AFA	-	Armed Forces Act
All F.W.L.R	-	All Federation Weekly Law Reports
ALL N.L.R	-	All Nigeria Law Reports
AVM	-	Air Vice Marshall
CA	-	Court of Appeal
CAS	-	Chief of Air Staff
C.F.R.N	-	Constitution of the Federal Republic of Nigeria
E.N.L.R	-	Eastern Nigeria Law Report
FIRS	-	Federal Inland Revenue Service
FJSC	-	Federal Judicial Service Commission
E.R.N.L.R	-	Eastern Region of Nigeria Law Report
GCM	-	General Court Martial
Ibid	-	Same citation with the one fully cited above
Infra	-	Discussed elsewhere after this
ISA	-	Investment and Securities Act
IST	-	Investment and Securities Tribunal
L.F.R.N	-	Laws of the Federation of Nigeria
L.R.S.C.N	-	Law Reports of Superior Courts of Nigeria

M.C.A	-	Military Court (Special Powers) Act
N.C.L.R	-	Nigerian Constitutional Law Reports
N.C.M.G	-	Negotiation and Conflict Management Group
N.E.L.R	-	Nigerian Election Law Report
NISLR	-	Nigerian Investments and Securities Law Report
NJC	-	National Judicial Council
NJI	-	National Judicial Institute
N.L.R	-	Nigerian Law Report
N.N.L.R	-	Northern Nigeria Law Report
N.R.N.L.R	-	Northern Region of Nigeria Law Report
N.S.C.Q.L.R	-	Nigerian Supreme Court Quarterly Law Report
N.W.L.R	-	Nigerian Weekly Law Report
N.M.L.R	-	Nigerian Monthly Law Report
NNPC	-	Nigerian National Petroleum Corporation
N.S.C.C	-	Nigerian Supreme Court Cases
N.S.C.J	-	Nigerian Supreme Court Judgments
Op cit	-	Cited elsewhere
PFA	-	Pension Funds Administrator
PFC	-	Pension Funds Custodian
PenCom	-	National Pensions Commission

PSC	-	Production Sharing Contract
SC	-	Supreme Court Report
SCN	-	Supreme Court of Nigeria
S.C.O.P.E	-	Some Cases on Procedure and Evidence
Supra	-	Cited elsewhere before this
TAT	-	Tax Appeal Tribunal
U.S	-	United States
WACA	-	West African Court of Appeal
W.L.R	-	Weekly Law Report
W.N.L.R	-	Western Nigeria Law Report
W.R.N.L.R	-	Western Region of Nigeria Law Report
W.R.N	-	Weekly Report of Nigeria

CHAPTER ONE

GENERAL INTRODUCTION

1.1 **Introduction**

It is pertinent to examine the definition of the word "tribunal" and the genesis of tribunals and dispute resolution mechanism as machineries for administration of justice in Nigeria. Tribunal as defined in the Blacks Law Dictionary[1] means "the seat of a Judge; a court of law; … a judicial court …"

A tribunal is by this definition a court of law. Thus both courts of law and tribunals are established for one common purpose i.e. to administer justice. Tribunals therefore supplement or compliment the functions of courts of law. Tribunals are, therefore, hardly divorced from the structure and function of courts of law.

The genesis of tribunals in Nigeria is traceable to Britain as early as 17th century when tribunals were put in place in England for revenue collection. Tribunals continued over the years to not only multiply in number but also metamorphosing into an institution for administration of justice alongside the regular courts. The informal venues used by the tribunals gradually changed to more formal and court-like décor. The activities of tribunals were

[1] 6th Edition, 1995, at p. 1506.

consequentially widening in scope and were so much touching the British life that they gradually became indispensable. As one learned author[2] said:

> There were over sixty different types of administrative tribunals. To deal with some subjects, there was only one actual tribunal, which following the practice of the regular courts, was based in London. This was the case with the Air Transport Licensing Board, the Transport Tribunal, the Betting Levy Tribunal and the Performing Rights Tribunal. The Lands Tribunal, the Pensions Appeals Tribunal and the Special Commissioners of Income Tax sit in different parts of the country, the Lands Tribunal sitting as required and the Special Commissioners making circuits … some of these tribunals sit in the office of the department concerned, although the practice is discouraged. Others sit in separate offices acquired for the purpose or in rooms in the county court building. There is nothing to suggest that the creation of tribunals is at an end. While different post war conservative governments talked of the need to transfer work from tribunals to the courts, they found it impossible to carry out such a programme.

Nigeria like many other common law jurisdictions borrowed a leaf from the British experiment. There have been established, from time to time, a number of judicial, administrative and military tribunals for defined purposes

[2] Brian, A and Robert, S, In Search for Justice (1968) at pp. 78 – 79.

and with specific jurisdictions to adjudicate in respect of certain persons or subject matter. One learned writer[3] remarked:

> Today we have in Nigeria two types of tribunals – judicial and administrative tribunals including those concerned with discipline in professions. The administrative tribunals specifically deal with administrative matters.

With respect, one finds it difficult to agree with the latter submission above. The emphasis is more on the operation or function of the tribunal than the subject matter of its jurisdiction. Every tribunal exercises judicial or quasi-judicial functions similar to that of a court of law. The judicial powers have hitherto been the exclusive preserve of both the Federal and States courts. The Constitution of the Federal Republic of Nigeria, 1999[4] has vested judicial powers in the courts established for both the federation[5] and the states[6]. The superior courts of record established by the 1999 Constitution[7] are:

[1] Supreme Court of Nigeria.

[2] Court of Appeal of Nigeria.

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[3]Okunola, M., 'The Role of Special Tribunals in the Administration of Justice in Nigeria' Being a paper delivered at the 9th Advanced Course in Practice and Procedure at the NIALS Lagos, held from May 21st to June, 16th 1989.
[4] Hereinafter referred to as the 1999 Constitution
[5] Section 6(1), *ibid*
[6] Section 6(2), *ibid*
[7] Section 6(5), *ibid*

[3] Federal High Court.

[4] High Court of the Federal Capital Territory, Abuja.

[5] High Court of a State.

[6] Sharia Court of Appeal of the Federal Capital Territory, Abuja.

[7] Sharia Court of Appeal of a State.

[8] Customary Court of Appeal of the Federal Capital Territory, Abuja.

[9] Customary Court of Appeal of a State.

The Court of Appeal also operates as an election tribunal with exclusive original jurisdiction in respect of any petition on presidential election,[8] from which appeal lies to the Supreme Court[9] as the final appellate court or tribunal[10]. The Court of Appeal is, however the final appellate court in respect of appeals from Election tribunals.[11] Appeals from the Code of Conduct Tribunal also lie to the Court of Appeal.[12] It is submitted that the Governorship and Legislative Houses Elections Tribunal and the Code of Conduct Tribunal are virtually equated with High Court. The inherent supervisory jurisdiction of the Federal High Court or a High Court over subordinate courts, which is premised

[8] Section 239 (1) and (2), *ibid*
[9] Section 233(1), *ibid*
[10] Section 235, *ibid*
[11] Section 246(3), *ibid*
[12] Section 246(1), *ibid*

on inferiority, hardly applies to these tribunals, their non-inclusion in the list of Superior Courts of record under section 6 of the 1999 Constitution notwithstanding. This is because appeals from such tribunals, as good as appeals from the Federal or a state High Court, lie to the Court of Appeal. Similarly, the same status applies to other tribunals from where appeal lies to the Court of Appeal, where an Act of the National Assembly establishing it so provides,[13] such as the Investment and Securities Tribunal[14] and the Vat Tribunal.[15]

The appellate jurisdiction of various appeal tribunals has been analysed under the relevant chapters with an appraisal on their desirability and how far they have enhanced the litigants' constitutionally protected right to fair hearing. It is hardly surprising that the military tribunals provide the lowest degree of respect to fundamental human rights as enshrined in the 1999 Constitution.[16] On the other hand the tribunals established by the Constitution like the Elections Tribunals and the Code of Conduct Tribunal carry with them the flavour of their source by affording full respect for human rights. The quality of justice administered by these tribunals and their conformity with the

[13] Subsection (2), *ibid*
[14] See section 295 of the Investment and Securities Act 2007
[15] See section 24(1) of the VAT Act 2004
[16] See Chapter iv

fundamental rights principles explains why they are the longest surviving and also busiest especially the Election Tribunals.

1.2 **Statement of Problem**

Administration of justice has from time immemorial been the exclusive preserve of courts of law. Judicial powers of government have been vested in the courts established by the Constitution[17] or other law whether federal[18] or states courts[19] as the case may be. The establishment of tribunals with judicial powers parallel to those of courts of law has posed not only a challenge but also a threat to the exclusive preserve and monopoly which regular courts hitherto used to enjoy in administration of justice. A former Chief Law Officer of the Federation[20] quoting Prof. Wade stated "it was long part of the conception of the rule of law that the determination of questions of law, and the application of definite legal rules or principles belonged exclusively to the courts."

Though the evolution and multiplication of tribunals has continued over the years, the courts have, however, maintained their supervisory powers over such tribunals even in cases in which the tribunals have exclusive jurisdiction.

[17] Section 6(1) and (6) of the 1999 Constitution
[18] Section 6(1), *ibid*
[19] Section 6(2), *ibid*
[20] Ajibola, B, 'Military Tribunals and the Concept of Justice' a paper presented on the occasion of Law Week organized by the N.B.A. held at UNIFE on 27/6/88, p.6

The Court of Appeal in the case of **Okoroafor v The Miscellaneous Offences Tribunal**[21] held thus:

> It is the duty of a High Court to see that a tribunal specifically created to take up ... matters (within their jurisdiction) is indeed properly so created and that it conforms to the rules setting out the procedure by which jurisdiction should be undertaken. Thus notwithstanding the conferment of exclusive original jurisdiction on a tribunal the superior court may intervene in the exercise of its supervisory jurisdiction by prohibition or injunction or *certiorari* to quash the entire proceedings so as to prevent such inferior body from stepping outside that area of exclusive jurisdiction.

The restriction of right to appeal against the decision of some tribunals such as Election Tribunals to only once is apparently imposed due to the inherent urgency involved in electoral matters. It is however submitted that it may occasion some threatening consequences to the rights of the litigants to fair hearing. This aspect of the law has been critically examined citing examples of such dangers. It is submitted that the justice of any case ought not to be sacrificed simply for the purpose of "meeting up with time." Though it is often said that justice delayed is justice denied the bottom line in administration of justice is the quality of justice achieved at the end of the day,

[21] (1995) 4 N.W.L.R. (Pt. 387) 59 at 79 – 81.

which must not be sacrificed at the expense of speed. The Supreme Court in the case of **Oshoboja v Amuda**[22], Per Olatawura, JSC (of blessed memory) made a similar observation as follows:

> The Judges seek the truth so as to know the justice of a case. They apply the law to the facts in order to attain justice. In an attempt to do all or any of these the courts sometimes err in law or misdirect themselves. These mistakes and errors are thereafter corrected by appellate courts. If the road to justice is plain and smooth there will hardly be any need for appellate courts. The rules of courts are meant to be followed and to avoid what in common parlance is referred to as 'arbitrary or jungle justice'. Consequently it takes time to know the truth of a case. An error must be corrected so as not to perpetuate injustice. The long time spent before justice is done is better than the harm done in a shorter period and perpetuated forever. We should not sacrifice justice for speedy trial.

The need for respect for fundamental right to fair hearing in both criminal and civil proceedings and the right to personal liberty in criminal trials conducted by tribunals cannot be over emphasized.

The face of Justice worldwide is rapidly evolving. It is fast changing to keep up with the pace of a swiftly expanding global village in which speed and increasingly complex technicalities and specialization are constant. The new

[22](1992) 6 N.W.L.R. (Pt 250) 690 at 709 paras. E – G.

face of Justice is also assuming a human countenance. The parties are now being taken into consideration together with the overall effect of judgements on the relationship between parties and the realities behind their enforcements.

The drift worldwide has been to improve the management of justice by providing alternative means to resolving disputes hence the introduction of Alternative Dispute Resolution in the administration of Justice in Nigeria.

The crux of problems in administration or dispensation of justice in Nigeria especially in tribunals is delay, which defeats the very essence for which they were put in place. One learned writer[23] aptly observed, on problems of quick dispensation of justice in elections petitions, thus:

> It is a matter of the interest generated by this matter that the Nigerian Bar Association (N.B.A) not long ago had to call on the National Assembly to amend the Electoral Act 2006 with a view to checking delays in the hearing of petitions at the Election Tribunals. (Daily Independent, Tuesday, March 6, 2007, 179). The association specifically asked the National Assembly to empower the President of the Court of Appeal to issue Practice Direction as a guide to proceedings in the Election Petition Tribunals to curb delays. In a letter of February 27, 2007 to both the Senate President and the Speaker of the House of Representatives, the N.B.A said it was aware that the National Assembly was engaged in the process of

[23] Popoola, A. A. O, Current issues in Nigerian Jurisprudence, Kupolati, T (ed.), Renaissance Law Publishers Ltd., Lagos, (2007), pp. 443 – 444, *Op cit* at pp 10, 169 and 170 - 173

amending the Electoral Act in an effort to ensure the success of the general elections in April 2007. The body proposed amendment to section 151 of the Electoral Act through the addition of a new sub-section to wit:

> "S.151(2) Notwithstanding the provisions contained in the first schedule to this Act, the President of the Court of Appeal shall issue practice directions to the election tribunals established under the Act and proceedings in the tribunals shall be in compliance with the practice directions."

The N.B.A contended that since the power to empanel the tribunals is one vested in the President of the Court of Appeal by the Constitution, he (the President) should also be clothed with the powers to make rules and practice directions. The Chairman of the N.B.A Election Working Group (EWG) Chief Akuro George who endorsed the letter was reported to have stated that the E.W.G had taken "a holistic view of the issue of electoral justice in Nigeria and discovers that delay appears to be the cardinal point of concern..."

After amendment incorporating the necessary empowerment, the then President of the Court of Appeal Hon. Justice Umaru Farouk Abdullahi promulgated Election Tribunals and Court Practice Directions 2007 containing requirements to be met by candidates filing election petitions. It also provided for necessary documents to accompany election petitions and expeditious time frames for filing all process right through to determination or otherwise disposal of every election petition.

However, with the amendment of the Constitution in 2010, specific, but unrealistic time frames were fixed for delivery of judgment at every stage of the proceedings. A typical example is the requirement that the Court of Appeal shall deliver its judgment within 60 days[24] from the date of delivery of judgment by an election tribunal when there is in fact no appeal.

The learned academic wizard[25] once again noted that one of the biggest problems occasioned by pressure exerted on judicial officers even at the highest level. He observed thus:

> Political pressure on judges also featured ... The pressures were unfortunately carried to the Supreme Court when some of the cases came on appeal there. The Chief Justice of Nigeria had to cry out loud. He stated in a statement read in the Supreme Court on 4th October 1983:
>
> > Over the last few days all sorts of persons, some eminent, others not so eminent from a particular State in the country, have been trying to dictate to me as to who and who should sit on the appeals against the decisions of some of the Election Petition Tribunals, which are before this court. These people who are so concerned about the panel as to what to attempt to interfere with or prevent the course of justice, are advised in their own interests, to desist from doing so. If they do not, I shall have no alternative but to call in the police... No amount of pressure from any

[24] See sections 29(7) and 9(7) of the Constitution of the Federal Republic of Nigeria (First Alteration) Act and (Second Alteration) Act respectively, both of which amended section 285 of the 1999 Constitution.
[25] Popoola, A. A. O, Current issues in Nigerian Jurisprudence, Kupolati, T (ed.), Renaissance Law Publishers Ltd., Lagos, (2007), at p. 468, *Op cit* at pp 9, 169 and 170 - 173

> quarter will make me change the panel which will continue to hear the appeals as directed by me.
>
> If the people involved could summon the courage to put pressure on the Chief Justice of Nigeria, one can imagine what they could do to humbler judicial officers.

The above scenario is but a rather sad event. It is another corrupt way of rigging of election through the process of adjudication. With all due respect, the then Chief Justice would have led an example by not only resisting corruption but also exposing and subjecting them to prosecution as one commentator righty observed[26] thus:

> If these fellows could summon the effrontery to try to influence the Chief Justice, their ilk must do it as a matter of routine with lesser judges. Coming from the Chief justice of Nigeria, the statement did send a vibration through the nation, but it actually did no more than expose what was already widely known... the Chief Justice would have been more helpful to the country in deterring and checking such criminal interference with the course of justice if he had immediately handed the culprits over to the police and ordered their prosecution. An everlasting lesson in how not to temper with justice would thereby have been taught and, hopefully, learnt.

[26] Giwa, D, Sunday Concord, Oct. 9, 1983, at p. 3.

The problems in adjudication by tribunals and courts are quite numerous. However, judicial officers and the bar alike must put all hands on deck to protect the honour and integrity of the profession from being tarnished.

1.3 **Objectives of the Research**

The most compelling reason that led to making this research work is to examine and identify a more expeditious means of dispute settlements especially the classified ones having either an element of urgency inherent in them like election petitions, offences against the Armed Forces Act, the Code of Conduct for Public Officers, or business related or expertise areas like investments and securities and administration of tax laws. Moreover, the establishment of various tribunals at various times has helped to enhance respect for fundamental rights in civil and criminal proceedings and dispute resolution centres in the administration of justice in Nigeria. Sufficient analysis has been done as to whether the purposes of their establishment have been realised, especially with regard to respect accorded to the litigants' fundamental rights. The effectiveness of justice administered by tribunals and/or dispute resolution centres *vis-a-vis* the regular courts has been critically

examined to show the justification for the continued multiplication of tribunals and dispute resolution centres. The establishment of some tribunals in the Constitution[27] to perform adjudicatory roles, which hitherto used to be the exclusive preserve[28] of the courts, were examined.

The relationship between the two sets of adjudicatory institutions i.e. the courts and tribunals were examined with particular focus on enhancement of expeditious or timely dispensation of justice. Also the supervisory power of High Courts over some inferior tribunals[29] has been appraised. The wisdom, if any, in the jurisdiction of a High Court to exercise such power of judicial review even on the face of statutory restriction in that regard was also discussed.

The right of appeal from judgments of tribunals including appeal tribunals where such right exists and the extent thereof has been subjected to critical analysis. This is one of the most distinguished areas in adjudication between tribunals and regular courts and was studied in order to show the difference in the quality of justice and application of fundamental right of fair hearing between the two parallel systems of adjudication.

[27] Section 285 and Art 15, Part 1 of the 5th Schedule to the Constitution, *ibid*
[28] Section 6(1) and (6), *ibid*
[29] *Supra* at p.7

The danger of sacrificing justice for mere sake of speedy disposal of cases[30] has been appraised by citing examples and proffering possible solutions to such judicial pronouncements.

This dissertation, therefore, examined the functions of different tribunals established at different times for certain defined purposes *vis-a-vis* the routine functions of regular courts.

The positive or negative contributions of various tribunals in the development of the legal profession and judicial process in Nigeria have also been thoroughly discussed.

The extent to which dispute resolution centres aid in settling disputes amicably thereby reducing the workload in courts and to a large extent enhancing the administration of justice has been appraised.

The need for ensuring that supporting staff are properly trained and skilled was addressed. Administration of justice being a team work, there is need for the supporting staff including registrars and bailiffs, who perform critical roles, to be skilled on the job. These and other members of the supporting staff are such a strong force to be reckoned with, that the inadequacy of their performance may have serious negative consequences on administration of justice.

[30] *Op cit*. at pp.7- 8

Finally, the desirability or otherwise of tribunals and dispute resolution centres has been appraised and suggestions or solutions are proffered.

1.4 **Scope of the Research**

This dissertation covers administration of justice by tribunals in comparison with similar roles played by regular courts of law in any part of Nigeria. Activities of tribunals in some other parts of the world like the United States and Britain may be cited for purposes of comparison or distinction especially on jurisdiction, general operation and right of appeal. The study focussed on live tribunals operating under democratic governance. Thus, discussions were made regarding existing tribunals and their jurisdiction as well as powers compared and contrasted concerning fundamental and other rights associated with democratic governance. Extinct tribunals were, therefore, not featured in this work.

Dispute resolution centres were also appraised to show their role in the administration of justice. Apart from arbitration centres, particular attention has been directed on some of the recently established centres in Lagos and Abuja called the Multi-door Courthouse. The role-played by these centres in resolution or settlement of disputes and the worthiness of establishing of

similar institutions in more parts of Nigeria like Kaduna, Kano and other States were discussed.

1.5 **Methodology**

It is intended to primarily adopt the doctrinal approach by collecting most of the data from text books, law reports including unreported judgments, manuscripts, newspapers, magazines, journals, seminar papers, etc. In recent times new law reports covering specific areas of administration of justice by specific tribunals have emerged.[31] The judgments of the various tribunals and opinions of learned authors were used in the study. The views of some of stakeholders in respect of various tribunals including the adjudicators, where necessary or expedient may be sampled, analysed and commented upon.

The concept for establishment of the various tribunals notwithstanding the existence of regular courts of law has been examined. In other words, the necessity or exigency for establishing various tribunals to administer justice side by side with the regular courts of law is appraised.

The provisions of the Constitution especially chapter iv dealing with fundamental rights is used as a yardstick for measuring the respect or

[31]Anyanwu, T. "Investment and Securities Law Report" (ISLR), Mark Anthony Law Publications Ltd, Abuja (2004).

otherwise for human rights and dignity through the machinery of justice administered by the various tribunals and dispute resolution centres. The applicable laws on dispute resolution in Nigeria and possibly other countries were also appraised. The involvement of all parties in dispute resolution and the speed by which disputes are resolved were appraised in assessing the success or otherwise of alternative dispute resolution method in Nigeria.

1.6 **Literature Review**

As stated earlier, there are quite some research works on administration of justice by tribunals, but more materials are coming up by the day especially on alternative dispute resolution.

One of the early known presentations[32] on the role of tribunals in adjudication discussed only the concept of justice as administered by Military Tribunals. It is submitted, however, that the learned author of that paper simply focused on the advantages of establishing such military tribunals even outside the military circle without addressing the multiple disadvantages especially with regard to serious disrespect for fundamental rights that seemingly outweighed the advantages. The application and respect for human rights in the administration of justice by military tribunals especially the live

[32]Ajibola, B, 'Military Tribunals and the Concept of Justice', *opcit* at p.6

ones, the jurisdiction of which is restricted to military personnel has been critically examined.

Another learned author and jurist[33] focused on the role of special tribunals that were either military or such civil tribunals established by military administrations. Apart from the fact that most of such tribunals are obsolete having gone with the military governance, there is also need to consider and digest the role played by other more recent and live tribunals in the administration of justice.

This research work will further enrich other literary works that, in recent times, have been focussed decongesting the courts. The onerous role and contributions made by various tribunals and alternative dispute resolution centres, which is believed to be a subject of critical significance in the administration of justice in Nigeria is of critical significance.

In the area of Alternative Dispute Resolution [ADR] there are some recent materials on the subject most of which are seminar papers. One of the early literary presentations was made some few years back[34]. It provides for various methods of dispute resolution, and communication techniques.

[33]Okunola, M, (of blessed memory), *op cit*. at P.3
[34]Ojielo, M.O, Alternative Dispute Resolution (ADR), CPA Books Lagos, 1st Ed. (2001)

Another literary presentation came in recently[35]. This latter book made some developments on the former by analyzing not only the methods of dispute resolution but also discussed the procedure applicable to the Lagos and Abuja Multi Door Court-Houses. It further discussed application of alternative dispute resolution in criminal matters by such methods as plea bargain, which in the recent past was unheard of.

It is intended, in this work, to discuss the practical operation of the Lagos and Abuja Multi Door Court-Houses and similar institutions appraising their achievements and contributions so far to settlement of disputes and decongesting the courts. The role played by the regular courts of law in settlement of disputes especially through the court-connected dispute resolution centres has also been similarly analysed. The complimentary nature of two parallel systems to one another in the administration of justice has been scrupulously appraised. The novel criminal settlement by way of plea bargain has been analysed as a method for dispute resolution. The practical application of plea bargain is significant to this and other similar research works on the subject matter.

[35] Peters, D, Alternative Dispute Resolution in Nigeria, Principles and Practice, Die-sage Nig. Ltd, Lagos (2004).

More recently a journal on negotiation and dispute resolution has been published.[36] It provides the much-needed material towards the development of professional skills and multi-track approach to conflict management and dispute resolution. It also provides ample material for research work on alternative dispute resolution which, *inter alia*, this work aims to achieve. There are as well a lot of other literary materials on this subject especially in seminar papers and other write-ups, thereby making it quite a viable area for research.

1.5.2 **Justification**

The topic is intended to cover live tribunals that function under democratic governance. Extinct tribunals that existed during the military era are no more relevant and are therefore discountenanced.

The chosen topic is therefore purposely designed to focus on the contributions and role played by live tribunals in expeditious trial and determination of cases and decongesting the courts. An analysis has also been made with regard to alternative dispute resolution which is viewed as an inherently native device of settlement of disputes and, therefore, more readily

[36]'Negotiation and Dispute Resolution Journal', Vol. 1 No. 1 January, 2004, Negotiation Powerhouse Co. Ltd, Lagos.

acceptable to the generality of Nigerians especially in matters involving customary law or simple contracts. This manner of administering justice seems to have a common purpose with tribunal trials, which is primarily aimed at achieving speedy dispensation of justice.

The rise in population has consequentially resulted in increase in crimes and disputes in direct proportion. This in turn leads to increasing congestion in the regular courts. Hence the need or desirability of establishing more tribunals, and in recent times multi door dispute resolution centres have been established in Abuja and Lagos and more are in train in Kano, Kaduna and some other States. This is in addition to already existing arbitration centres, which include orthodox and traditional arbitration.

Tribunals and dispute resolution centres have, therefore, become a strong force to be reckoned with in the administration of justice in Nigeria. This dictates the need to analyse and/or appraise their performance especially under democratic governance. This will bring to light the advantages and/or otherwise of establishing such tribunals and dispute resolution centres.

There being few available literary presentation on the role of tribunals and alternative dispute resolution, notwithstanding availability of research material on the subject, one has no difficulty in seeing the worthiness of the chosen topic for this research work.

1.7 **Organisational Layout**

This research work is divided into eight chapters each of which is further divided into relevant topics and subtopics and discussed distinctly, and lucidly including general comments, opinions and suggestions as may be necessary or desirable.

The first chapter deals with general introduction of the chosen topic aimed at giving an overall idea of the topic. It also gives a brief idea of what the research work aims at achieving and gives an insight as to the parameter or the scope of the whole work. It further explains the method by which the research work has been undertaken and accomplished and reviews the available literary work on the chosen or similar subject. Such presentations are appraised and comments, opinions, suggestions and criticisms are made where necessary. Areas not otherwise covered by existing literature are adequately covered, thereby developing the law further. The available literature, however, provides good material for this research work. A justification analysis is also made as to the choice of the topic for the research work and the compelling reasons for its necessity or expediency as a viable field in law. It explains the onerous role of tribunals and dispute resolution centres and their impact and indispensability in the administration of justice in Nigeria.

The second chapter is focused on military tribunals that still remain in existence under democratic governance including Military Court, Special Military Tribunal and Court Martial. The first two have virtually been over shadowed by the last one, the rules of which are in better conformity with fundamental rights of accused persons under the Constitution including the crucial right to fair hearing. The procedures for convening and dissolving a court martial have been discussed thoroughly. Its composition and jurisdiction have also been discussed citing relevant authorities especially from decisions of the appellate courts.

The third chapter discusses the functions of the various election tribunals like the Governorship and Legislative Houses Election Tribunal, the Area Council Election Tribunal and the Appeal Tribunal, which is similar to Local Government Election Tribunal and the Appeal Tribunal. These critical tribunals have been meticulously appraised. The mischief in the 2002 Electoral Act that were removed in the 2006 Act have been subjected to various interpretations by the appellate courts and at the long run the real intention of the legislature has been captured by the Court of Appeal and the Supreme Court.

The fourth chapter is focussed on the role of the Court of Appeal and the Supreme Court as Presidential Election Tribunal and Appeal Tribunal respectively. Some difficulties encountered in the course of trial proceedings

have discussed and causes for delays identified. The qualification and disqualification factors have been critically appraised citing some decisions especially those of the appellate courts that signify developmental attitude of the courts in the interpretation of the relevant provisions of the Constitution.

The fifth chapter is focused on the functions of the Code of Conduct Tribunal that tries public office holders who are accused of contravening any of the provisions of the Code of Conduct for Public Officers as entrenched in part one if the fifth schedule to the Constitution.

The sixth chapter deals with capital market and other revenue based tribunals. The level of control exercised by the Minister of Finance in respect of appointments and discipline of the Chairman and other members of these tribunals has been critically appraised. The jurisdiction and quality of justice delivery by these tribunals has been meticulously analysed.

The seventh chapter discusses the settlement of disputes by alternative dispute resolution as against the normal litigation process. The various methods of dispute resolution have been analysed. These include some flexible approaches like mediation, reconciliation, negotiation and other traditional and orthodox methods of settling disputes. The activities of the various dispute resolution centres have also been monitored and assessed. An analysis has also been made on the achievement or failure of the goals for alternative dispute

resolution, including decongestion of courts, reduction in delay and costs, satisfaction of both parties by their involvement in the settlement process and other objectives of dispute resolution.

The capping eighth chapter concludes the entire research work by summarising the issues discussed in various chapters, identifying the bottlenecks in the operations of the various tribunals and suggesting solutions to such problems, and a possible way forward.

CHAPTER TWO

SPECIAL MILITARY TRIBUNALS

2.1 **Introduction**

It has been pertinent to start with the definition of the operative words under this topic i.e. "Special" and “Military" having already defined “tribunal”.[37] The word “special” is defined[38] as:

> Relating to or designating a species, kind, individual, thing or sort; designated for a particular purpose, object, person or class, unusual, extra-ordinary

The operative words in this definition for purposes of this topic, it is submitted, are "confined to a particular class of persons" that is the tribunal under reference is one confined to a particular class and that is the military personnel and officers. This brings one to the definition of "Military" which is defined[39] as follows:

> Pertaining to . . . the army; . . . also the whole of military forces, staff, etc. under the Department of Defence.

[37] *Op cit* at p.1
[38] Blacks Law dictionary, p. 1397, s*upra*
[39] *Ibid* at p.992

A special military tribunal is, therefore, a tribunal or court specially designated for the military class like the army, air force, navy such as the Military Court, the General and Special Court Martial[40], and so on. In fact a Military Court has been defined as a "Court-Martial"[41] The same dictionary defines[42] Court Martial as:

> A court convened … to try an offence against naval, military or air force discipline, or against the ordinary law committed by a member of the armed forces.

Military Courts being established specially for members of the armed forces will normally be expected to be limited to trial of members of that class. Discussion in this chapter has been focused on live tribunals or courts such as Military Court and Court Martial.

Other military tribunals that existed during the defunct Military regime were empowered to try any person irrespective of whether or not he is a member of armed forces.[43] These included Treason and other Offences Special Military Tribunal and the Recovery of Public Property Special Military Tribunal, both of which are now extinct and will therefore not be countenanced herein.

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[40] *Infra* at Pp 25-52 and 52-103.
[41] Burke J. Jowett's Dictionary of Law, 2nd Ed. Sweet and Maxwell Ltd. (1977) p. 1183
[42] *Ibid* at p. 496
[43] See section 1of the Treason and other Offences (Special Military Tribunal) Act. Cap 444, L.F.N. 1990

The Military Courts are to all intents and purposes tribunals, their nomenclature notwithstanding. Like tribunals, they are composed by a chairman and members and their procedure, unlike regular courts is not strictly formal. Moreover the military tribunals, so tagged, are now extinct. One may say without mincing words that Military Courts are only different from tribunals by their nomenclature. It is, therefore, intended to discuss hereunder the composition, powers and functions of the Military Courts vis-à-vis the observance or violation of fundamental right to fair hearing in the light of the trial procedure and the extent or limit of right of appeal. An appraisal on these issues has been made *seriatim*.

2.2 **Military Court**

2.2.1 **General Over View**

This special military tribunal was established in 1984[44] as a measure to re-introduce the Armed Forces Disciplinary Court, which was dissolved on 30th September 1979. It is, in appropriate cases, convened by the Commanding Officer of a unit or division of the Armed Forces. Like Court Martial it exercises its jurisdiction to the exclusion of any other court.[45] It has all the powers of a Court Martial except that its jurisdiction to impose punishment is limited to

[44] See section 1(1) the Military Court (Special Powers) Acts. Cap. 225, L.F.N. 1990
[45] *Ibid*

five-year term. It is, therefore, clear that it lacks jurisdiction to impose a death penalty.[46]

It is however pertinent to observe that no provision has been made for right of appeal from decisions of the Military Court. It is submitted that the denial of the right of appeal against the decision of the Military Court tantamount to a serious infraction or restriction on the right of persons tried by this "court" to test the decision affecting them, as they would have had if they were otherwise tried by regular courts of law. This ugly situation has thereby violated the accused persons' constitutionally protected right to appeal especially in final decisions in criminal (or even civil) proceedings.[47] One may say that the legality of any law that does not provide for right of appeal after conviction is questionable. The Court of appeal in the case of **Ugwu v the State**[48]has observed that: -

> By virtue of section 222(a) of the 1979 Constitution in criminal proceedings … an accused person has the right to exercise right of appeal under section 220 of that Constitution.

The Appeal Court proceeded to define an 'accused person' for the avoidance of doubt in the following terms: -

[46]*Ibid* see section 1(2)
[47] Sections 224(1) - 226(1) of the 1999 Constitution
[48](1998) 7 N.W.L.R 397

> An accused person is a person against whom a criminal charge is preferred or a person against whom any sentence is imposed.

The right of appeal from regular courts is very clearly stated in the Constitution and pronounced by the appellate courts in a plethora of cases. The Court of Appeal in **UbakaIfeajuna v Charles Ifeajunaand another**[49] held thus:

> By virtue of section 220(1) of the 1999 Constitution, an appeal shall proceed from the High Court to the Court of Appeal as of right in some cases including the following instances:
>
> (a) Final decisions in any civil or criminal proceedings before the High Court sitting at first instance;
> (b) Decisions relating to the interpretation or application of the Constitution;
> (c) Decisions on questions as to whether any provision of chapter IV of the 1979 Constitution has been is being or is likely to be contravened in relation to any person.

A similar pronouncement was repeated by the Court of Appeal in a later decision, citing the corresponding provision in section 241 of the 1999 Constitution in the case of **Idakula v Adamu**[50]where it was held thus: -

[49] (1999) 1 NWLR (Pt. 587) 492 at 502
[50] (2001) 1 NWLR (Pt. 694) 322 at 339

> By virtue of section 241 of the Constitution of the Federal Republic of Nigeria 1999 an appeal shall lie from the decision of the Federal High court or a High Court to the Court of Appeal as of right in the following cases: -
>
> (a) final decisions in any civil or criminal proceedings before the Federal High Court or a High court sitting at first instance;
> (b) Where the ground of appeal involves question of law alone, decisions in any civil or criminal proceedings;
> (c) Decisions in any civil or criminal proceedings on questions as to the interpretation or application of the Constitution.

It is further submitted that the provision of section 1 of the Military Court (Special Powers) Act[51] does not constitute an appellate right. It provides:

> . . . any sentence imposed or awarded by a court shall be subject to confirmation by the service chief concerned and in the case of a commissioned officer, such sentence shall be channelled through the service chief concerned to the Army Council, the Navy Board or the Air Force Council for confirmation; and if confirmed, the sentence shall not thereafter be liable to review or be the subject of an appeal.[52]

Even the so called right of appeal given to commissioned officers from decisions of their relevant council or Board to the Commander-in-Chief is

[51] Cap 225 Law of the Federation of Nigeria, 1990 (hereinafter referred to as the 'MCA')
[52] Section 1(3), *ibid*

nothing more than a mockery of what in the Military language is tagged as an 'appeal'.[53]

It is submitted that what the Army or Air Force Council or Navy Board does or even what the Commander-in-Chief does is nothing more than mere blind exercise of discretion to confirm sentence or otherwise and an accused person whose case is so reviewed or considered could best be said to be testing his luck or otherwise. One therefore wonders what criteria or yardstick is used to measure the soundness or propriety of the Military Court or that of the Army or Air Force Council, or Navy Board. The whole appellate exercise is, thus, reduced to mere guesswork, or something next to gamble. This, it is further submitted, is not a due process in the administration of justice. Such 'military' procedure is quite distinguishable from an appeal process, which ought to be based on pure merit and the decision of any court be it trial or appellate is always based on the evidence adduced during the trial and the applicable law, and the reasons distilled therefrom. The Supreme Court has so held in the case of **Sagay v Sajere**(2000) 6 N.W.L.R (661) 360 at 370 Para H, where Ayoola, JSC, in the lead judgment, observed thus: -

> The decision of a court should be based on the evidence and on reason. It should not be based on the intuition of the judge or conjecture of what the judge,

[53] See section 1(4) & (5), *ibid*

> untrammelled by the evidence, conceives to be a fair conclusion.

The learned jurist again stressed the same point at page 371 Paras. A-B when he stated: -

> The requirement that a judgment must clearly demonstrate that the conclusions arrived at in the case were not based on intuition and whim of the judge but on evidence, properly evaluated, and the law is not an insistence on mere form, but drives from the need to ensure and demonstrate that substantial justice has been done in the case.

It is submitted that the sheer-luck confirmation procedure, which is not based on any particular criteria known to law is not in conformity with the fundamental right to fair hearing and is, to that extent, null and void. Section 1(3) of the 1999 Constitution provides thus: -

> If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.

It is further submitted that decisions of any court or tribunal other than the Supreme Court should be appealable irrespective of its military nature as required by the principle of fair hearing. The right arises out of an executable

and binding decision against the accused, which he has right to disagree with, and hence the need to be afforded an adequate opportunity to ventilate his grievance as matter of right *ex debito justitie.*

It is also submitted that reference to "Commanding Officer" in section 1(5)[54] ought to be reference to "Commander-in-Chief" because the latter constitutes a final appellate authority in respect of commissioned officers.

2.2.2 **Composition**

The Commanding officer of each unit has the singular privilege and power to convene an Army Court for his unit, to be headed by a President who must not be below the rank of the accused person on trial,[55] in case of trial of commissioned officers, and a minimum of not less than two other members. Whether or not more members than two are appointed, the court is deemed as duly constituted when the President and not less than two other members are in session.[56] In other words the quorum for the Military Court is the President and two other members. It is noteworthy that only commissioned officers who are subject to service law and have held a commission in the

[54] *Ibid*
[55] Section 2(1)(b), *ibid*
[56] Section 2(1)(a), *ibid*

Armed Forces for not less than two years continuous period are eligible for appointment as either president or members of the Military Court.[57]

It is submitted that where the Commanding officer or President or member of the Military Court plays more role than one, it could offend the natural justice principle of *nemojudex in causasua*, and the fundamental right to fair hearing. The Court of Appeal has in the case of **Akinwale v Nigerian Army**[58] aptly held that:

> Generally the twin pillars of fair hearing are embodied in the Latin maxim *nemo judex in causa sua*, this is, 'you shall not be a judge in your own cause' and *audi alterem partem* that is, 'hear the other side'.

> Thus, where there is a likelihood of bias on the part of the person sitting in judgment that particular person must not determine, the case, otherwise the judgment would be a nullity. In this case, the procedure adopted by the Lagos Garrison Commander, the convening officer, by being the initiator of the investigation into the wrong doings of the appellant; the convener of the General Court Martial and also the confirming authority, offends the principles of fair hearing.

[57] Section 2(2), *ibid*
[58] (2001) 16 N.W.L.R. (Pt. 738) at p. 120

This constitutionally protected right to fair hearing is as well enshrined in the Military Court Act itself as follows:[59]

> Without prejudice to subsection (3) above, no officer who at any time between the date on which the accused was charged with the offence and the date of trial has been the commanding officer of the accused, or has investigated the charge, or under service law has held or acted as the holder of an enquiry (whether solely or jointly with others) into matters relating to the subject matter of the charge, shall sit as president or member of the Court.

It is submitted that the above provision, notwithstanding the phrase 'without prejudice', seems to be in direct conflict with the next immediate preceding provision[60] which provides:

> A convening officer may himself sit as president or member of a court under this section, if he is satisfied that the exigencies of the service (of which he shall be sole judge and from which decision there shall be no review or appeal) so demand.

This provision, it is submitted, is void in law having contravened the constitutional provision with regard to fundamental right to fair hearing.[61] It is submitted that this provision does not only violate the principle of *nemojudex*

[59] Section 2(4), *ibid*
[60] Section 2(3), *ibid*
[61] See Section 36 of the 1999 Constitution.

*in causasua*by making a commanding officer a judge in his own cause but also gives him such an unconstitutional and seemingly illegal powers to singularly, and without giving any reason whatsoever, constitute himself into a sole judge and his decision so taken is not subject to an appeal. This provision, it is submitted, is in direct conflict with the constitutionally protected right to fair hearing of the accused person, and to that extent null and void. It is believed that whatever decision is made pursuant to it may be quashed upon proper application for judicial review, being the only avenue by which it may be challenged.

2.2.3 **Judge Advocate**

A Judge advocate is a military officer appointed to act in a dual capacity as both an advisor to the court and a counsel for the accused person under trial. It is rather incredible that such a double-edged responsibility should have existed in the temple of justice. Though not a *de jure* member of the court, his functions include:

(a) Swearing-in the members of the court;

(b) Prosecuting cases before the court and

(c) Advising the court on questions of law;

(d) Acting as counsel to the accused and objecting to incriminating or leading questions put to witnesses in the course of the trial, and

(e) Doing anything else as he may be directed by the president of the court.[62]

It is submitted that the statutory role of the judge advocate makes him not only a jack-of-all-trade being a prosecutor, a defence counsel and an assessor-like advisor to the court but also greatly infringes the right of the accused person to fair hearing including right to counsel of his own choice.[63] The validity of that provision is therefore glaringly out of the question having contravened or conflicted with a constitutional provision[64] and the accused person's fundamental right to fair hearing. Moreover, the scenario whereby the same person is prosecuting and defending simultaneously in a criminal trial is unheard of, more so when he also acts as an adviser to the court on questions of law. It is opined that interest of justice and that of the accused has been better served if cases tried by Military Court are sent to the General Court Martial or to the regular courts where all aspects of fundamental rights of accused persons could be respected and enforced, failure of which may lead to quashing of the conviction on appeal[65] for perversity.

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[62] Section 2(5), *ibid*
[63]Section 36(1), (4) and (6) (c) of the 1999 Constitution.
[64]*Ibid*
[65] Abdullahi Diso v Kano N.A. (1968) S.C.O.P.E. 19

Apart from the restriction imposed on the court with regard to persons, the offences triable by this court are similarly restricted. The court has power to try all offences triable by a Court Martial under the provisions of the Armed Forces Act[66] including the Nigerian Army Act, the Navy Act and the Air Force Act.[67] Offences like mutiny, insubordinate behaviour and other offences against property under the various Military Acts[68] are also triable by this court. Other offences[69] triable by the court, without prejudice to those listed in the first schedule are offences specified in:

(a) Part V of the Nigerian Army Act;[70]

(b) Part IV of the Navy Act,[71] and

(c) Part IV of the Air Force Act.[72]

[66] Hereinafter referred to as "the Act"
[67] Section 31(2)(b) of the MCA.
[68] M.C.A First Schedule, *ibid*
[69] Section 3(2), *ibid*
[70] Sections 32 to 74 of the Nigerian Army Act
[71] Sections 33 to 82 of the Navy Act
[72] Sections 32 to 74 of the Air Force Act

2.2.4 **Pre-trial Procedure**

Before trial commences in a Military Court, it is mandatory to take an abstract of evidence.[73] Such summary evidence is taken by the commanding officer or other officer assigned by him and this must be done in the presence of the accused person. The prosecution witnesses (called P.W.) has been required to attend and testify before the officer taking the brief of evidence and the accused shall have the right to cross examine them after giving their evidence in chief, just similar to the court room procedure.

However, where a witness cannot be compelled to appear as witness or owing to exigencies of service or any other reason which the officer taking the evidence considers sufficient, including but not limited to the expense and loss of time involved, which reason the officer taking such brief must record in writing, then he may in his discretion allow a written representation to be made and used in evidence in the abstract. This is done by reading the written representation to the accused thereby automatically denying the accused person any right to cross examine the maker thereof. Such a proxy witness may only appear if the officer taking the abstract of evidence decides, in his absolute discretion, that the maker of the statement can be compelled to attend before him. This power given to the officer who takes abstract evidence

[73] See the Second Schedule to the MCA

is none other than an exercise of discretion, which in the law courts is always done judicially and judiciously.

It is submitted that where a maker of a written statement is not summoned to testify and his written representation is only sent by proxy, such document cannot properly be used against an accused person except if it is proved to be in the hand writing of the person alleged to be the maker thereof.[74] Failure to produce the actual witness for cross examination may also lead to the invocation of section 149(d), which is still retained in the new Evidence Act. It states[75] as follows: -

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case, and in particular the court may presume –
>
> (d) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

The Court of appeal in the case of **Agbi v Ogbeh**[76]at page116has held thus; -

[74] Section 100 of the Evidence Act, Cap E14 L.F.N, 2004
[75] Section 167(d) of the Evidence Act 2011
[76] (2005) 8 N.W.L.R (Pt. 926) 40

> By virtue of section 149(d) of the Evidence Act, any evidence which could be produced by a party but is not produced, would be presumed to be unfavourable to the party who failed to produce the evidence

Moreover the weight to be attached to the evidence that is not tested under cross examination has been adversely affected. In fact even where cross examination is conducted, failure or refusal to answer any question put to the witness may justify the invocation of the presumption of law under section 149(d) of the Evidence Act. In the case of **Orianwo v Okene**[77]the Supreme Court per Ogundare, JSC (of blessed memory) held at page 187 paragraphs D-G that: -

> Where a witness evades a question under cross examination, the court could presume that the answer to the question, if given, would be prejudicial to the case of the party on whose behalf the witness testified.

It is also submitted that the deliberate failure or refusal to present a witness in criminal proceedings for cross examination could affect the credibility of any written deposition sent in by such witness. In **Agbi v Ogbeh**[78]Augie, JCA observed at page 134 paragraphs A - B thus: -

[77] (2002) 14 N.W.L.R (Pt 786) 157
[78] *Supra*

> A trial court accepts and acts on evidence which is credible and uncontradicted by any other evidence; and not evidence which is incredible or has no probative value.

The learned jurist further at page 134 paragraphs B - C painstakingly expressed what amounts to credible evidence as follows: -

> Credible evidence is evidence worthy of belief. And a piece of evidence is worthy of belief only when it proceeds from a credible source, and is natural, reasonable and probative having regard to the transaction which it describes or to which it relates.

It is further submitted that denying the accused a right to cross examine any witness, who could otherwise be produced, tantamount to a grave violation of the accused person's right to fair hearing, and thereby preparing a ground for nullity of the trial proceedings. It is an opportunity which the accused must not be denied being a matter of right *ex debito justitie*. Such right as enshrined in the Evidence Act[79] has been interpreted by the Supreme Court in the case of **Balogun v A.G. of Ogun State**[80] in the following terms:

> The purpose of sections 199 and 209 of the Evidence Act are two-fold; one is that a witness may be cross-examined as to previous statements made by him in writing relative to the subject matter; in that case

[79] Section 199, *ibid*
[80] (2002) 2 S.C. (Pt. II) 89 at 98

> such writing need not be shown to him; the other is that the witness may be contradicted with such writing after his attention is drawn to those parts of the writing which are to be used for the purpose of contradicting him.

In fact the accused person may be visited with necessary sanctions if he were to refuse or neglect cross examining any witness during the trial proceedings. The Supreme Court has in very strong terms condemned failure or neglect to cross-examine prosecution witnesses as this will not only entitle the trial court to act upon such unchallenged evidence but binds the court to so do. In the case of **Aforlete v The State**[81] the Supreme Court made the following pronouncement: -

> The evidence of PW1, the only eye witness was unchallenged under cross-examination. Where that is the case the court is not only entitled to act on or accept such evidence but is in fact bound to do so provided that such evidence is by its very nature not incredible. Thus, where the adversary fails to cross-examine a witness upon; a particular matter, the implication is that he accepts the truth of that matter as led in evidence.

After all, the noble art of cross-examination constitutes a lethal weapon in the hands of the adversary to enable him effect the demolition of the case

[81](2000) 7 S.C. (Pt. I) 80 at 94 - 95

of the opposing party. It is, therefore, good practice for counsel not only to put cross his client's case through cross-examination, he should as a matter of the utmost necessity, use the same opportunity to negative the credit of that witness whose evidence is under fire. Plainly, it is unsatisfactory if not suicidal bad practice for counsel to neglect to cross examine a witness.

It is submitted that the abstract evidence is better taken in the normal way as prescribed by the Criminal Procedure Code.[82] An attempt was made in the second schedule[83] to adopt a police-like investigation procedure. The accused is, for example cautioned in the following terms:

> Do you wish to say anything? You are not obliged to say anything unless you desire to do so … but whatever you say has been taken down in writing and may be given in evidence.[84]

The rules with regard to testimonies of children is substantially the same and in conformity with the provisions of the Evidence Act.[85] A certificate shall be made by the officer taking evidence at every stage of the proceedings. It is submitted that it will suffice if the simpler procedure of signing the proceedings is used rather than formal certification at every stage of taking

[82] Hereinafter referred to as 'the C.P.C'
[83] MCA, Cap 225, L.F.N., 1990
[84] See sections 118 & 123 of the C.P.C.
[85] See the proviso to Paragraph (h) of part A of the Schedule to the Military Court (Special Powers) Act. Cap. 225 L.F.N. 1990

evidence. Even the requirement for certified true copy under the Evidence Act is not so cumbersome.

2.2.5 **Taking of Abstract of Evidence**

Just like summary, an abstract of evidence is similarly taken by the commanding officer or other officer as he may direct. The major distinction between the two methods of taking evidence is that while summary is taken in the presence of the accused abstract is prepared in his absence.[86] One wonders why the accused person's presence is statutorily dispensed with in the course of taking abstract evidence. It is submitted that the exclusion of an accused person from the scene of compilation of witnesses' statements which are necessary to prove the charge is a fundamental vice and in fact constitutes a very serious infraction on the accused person's fundamental right to fair hearing.[87]

It is further submitted that the subsequent copy of the abstract of evidence issued to the accused does not remedy the infringement on his right to fair hearing especially since he has had no opportunity to challenge or make an input in any way in the collation of evidence of others against him.

[86] See Paragraph 1 (b) of part B, *ibid*
[87] See Section 364 (a), (b) & (c) of the Constitution

Moreover, the authenticity of the abstract of evidence is doubtful since it may include what is called “précis of evidence" given by witnesses who may never be procurable. This, it is further submitted, rather tantamount to hearsay evidence, if it seeks to prove the truth of those statements.[88] It is also noteworthy that the signed statements included in the abstract of evidence are not solemn.[89]

Like summary of evidence an abstract must also be certified under the signature of the person who took it. It is submitted that the entire process of taking of abstract of evidence after summary of evidence is not only superfluous but creates an unfortunate forum for time-waste exercise and ultimately delaying justice when the accused is constitutionally entitled to be tried within a reasonable time.[90]

2.3 **Special Military Tribunal**

The Special Military Tribunal is constituted by the Armed Forces Council to try any person, whether or not a member of the Armed Forces who, in connection with any act of rebellion against the Federal Government, has committed treason, murder or any other offence.[91] This means other offences

[88] See Section 77 of the Evidence Act, Cap E14 L.F.N 2004
[89] See Para. (d) of PG30
art B of the Second Schedule to the MCA. Cap. 225 LFN 1990.
[90] See Section 36(4) of the 1999 Constitution
[91] Section 1 of the Treason and other offences (Special Military Tribunal) Act, Cap. 444 L.F.N. (hereinafter under this topic referred to as "the Act."

punishable with death could *adjusdem generis* be within the jurisdiction of the Special Military Tribunal. It is immaterial whether or not the offence was committed before or after the commencement of the Act.[92] It is submitted that where the offence was committed before the commencement of the Act, it would not constitute an offence. This power is valid and lawful because it is the jurisdiction of the tribunal that is retrospective, but not the law creating the offence allegedly committed which should have been already in existence at the time the accused is alleged to have committed the offence with which he is accused, be it treason, murder or any other offence under any law enforced in Nigeria including appropriate service laws.

2.3.1 **Composition**

The tribunal consists of a chairman, not below the rank of a colonel in the Army or a corresponding rank in the Navy or Air Force. It has not less than

[92] *Ibid*

four other members each being an officer in the Armed Forces or the Police who has held a commission for, at least, five years.[93]

2.3.2 **Jurisdiction**

The tribunal generally has jurisdiction to try all persons charged with any offence under the Act and to impose any punishment specified in the appropriate law including service law.[94] For this purpose the tribunal has power to try and punish any person under service law if it is satisfied that such person acted in concert with any other person subject to service law or knowingly took part, no matter how slight, in the commission of an offence under the service law, notwithstanding the fact that the accused so convicted and punished is not subject to service law and anything to the contrary in the service law creating the offence in question.[95]

The Special Military Tribunal itself determines the procedure for trial in every case in a preliminary or pre-trial ruling. The procedure could be general or for the purpose of any particular trial.[96] The tribunal, however, has the option to simply adopt the practice and procedure applicable to proceedings

[93] Section 2(a) & (b) of the Act, *ibid*
[94] Section 3(1), *ibid*
[95] Section 3(2), *ibid*
[96] Section 4(1), *ibid*

before a Court Martial, with such alterations as the tribunal may, in its ruling, consider necessary in the light of the general intendment of the Act.[97]

2.3.3 **Right of Appeal**

The decision of the Special Military Tribunal is appealable, at the option of any person convicted and sentenced by the tribunal, to the Joint Chiefs of Staff. The appeal must be made within seven days of the sentence and upon such appeal; the Special Military Tribunal shall forward its record of proceedings and judgment to the Chairman of the Joint Chiefs of Staff.

The Chairman, Joint Chiefs of Staff must, within fourteen days after the receipt of the record of proceedings and findings of the Special Military Tribunal convene a meeting of the Joint Chiefs of Staff to consider the record of proceedings and findings of the tribunal, and make recommendations thereon.[98] It is submitted that the recommendation of the Joint Chiefs of Staff which is the appellate judgment must be made within the mandatory time frame of fourteen days. The words “and make recommendations thereon" in section 5(2) is conjunctive rather than disjunctive and reference to the fourteen days period, therefore, necessarily includes the time within which the

[97] Section 4(2), *ibid*
[98] Section 5(2), *ibid*

Joint Chiefs of Staff may not only consider the verdict of the tribunal but also make its recommendations.

The Joint Chiefs of Staff shall cause to be transmitted, to the Armed Forces Council,[99] otherwise known as "the Forces Council,"[100] the record of proceedings and findings of the Military Tribunal in addition to its own recommendations.[101] The Council is made up of the following: -

(1) The President (Chairman)

(2) The Minister of Defence

(3) The Chief of Defence Staff

(4) The Chief of Army Staff

(5) The Chief of Naval Staff

(6) The Chief of Air Staff

(7) The Permanent Secretary of the Ministry of Defence who is the Secretary to the Council.[102]

The confirmation of the sentence by the Council injects life into the sentence of the Military Tribunal and the subsequent recommendations made by the Joint Chiefs of Staff.[103] In its discretion, the Armed Forces Council[104],

[99] Section 5(2), *ibid*
[100] Section 4(1) and (2), *ibid*
[101] Section 8, *ibid*
[102] Section 4(1), *ibid*
[103] Subsection (3), *ibid*
[104] Hereinafter referred to as "the Council"

otherwise known as the confirming authority, may confirm the sentence and recommendations or otherwise.[105] Apart from these two extremes the discretionary power of the Council also includes reduction of the severity of the sentence imposed on the accused. When the Council decides to adjust the punishment imposed on the accused person, it may: -

(i) in case of death sentence substitute it with a prison term for such period not exceeding the maximum term which the tribunal could have imposed for the offence in question;

(ii) In case of any other sentence, remit the sentence in whole or in part or substitute it for a less severe punishment.[106]

It is remarkable that a provision should ever have been made as in (i) above for substitution of death sentence with a term of imprisonment not exceeding the maximum term, which the tribunal could have imposed for the offence in question. One wonders whether the tribunal could possibly have imposed death sentence when the maximum punishment for the offence is a term of imprisonment, no matter how long including life imprisonment. That

[105] Subsection (4), *op cit*
[106] Subsection (6)(a) & (b), *ibid*

provision, it is submitted, is not only apparently nonsensical but is also clearly superfluous.

Where the tribunal sentence is tampered with by the Ruling Council, the reduced sentenced shall be deemed as one passed by the tribunal and duly recommended and confirmed.

It is further submitted that the process of recommendation, though done promptly within fourteen days, is at best a mere bureaucracy since all the service chiefs charged with that responsibility are not only members but in fact, the most senior members of the Council. The process of recommendation by the Joint Chiefs of Staff is, therefore, more or less a time-waste exercise, since they can otherwise take that decision in exercising their power of confirmation. Once sentence of death passed by the Special Military Tribunal is confirmed by the Council, the convict is normally executed by a firing squad soon after confirmation. Good examples could be Dimka's, MammanVatsa's and Gideon Awka's executions promptly after confirmation of their death sentences.

It is also pertinent that there is no right of appeal against the decision of the Special Military Tribunal. Since neither the accused nor his counsel could be heard, it is submitted that the process of recommendation and

confirmation is at best only a screening exercise but does not tantamount to an exercise of right of appeal.

It is further submitted that since the passing away of military rule in Nigeria and ushering in of democratic governance, the powers and functions of the Special Military Tribunal are more or less exercised by General Court Martial, whose decision is, however, appealable to the Court of Appeal.[107]

2.4 **The Court Martial**

A Court Martial has been defined[108] thus: -

> An ad hoc military court, convened under authority of government and the Uniform Code of Military Justice … for trying and punishing offences in violation of the Uniform Code of Military Justice committed by persons subject to the code, particularly members of the armed forces …

A Court Martial is, by the above definition, a court of law or tribunal established for an ad hoc purpose to try members of the armed forces in particular who are accused of committing offences under uniform code of the Armed Forces.

[107] See Section 240 of the 1999 Constitution
[108] Black, H.C, Black's Law Dictionary, 6th Ed., West Publishing Co, (1990) at Pp 354-355

2.4.1 **Composition of Court Martial**

The establishment and composition of a General Court Martial[109] and a Special Court Martial[110] has been aptly observed by the Supreme Court in **Obiosa v NAF**[111]by appraising the relevant provision[112] of the law as follows:

> There shall be, for the purposes of carrying out the provisions of this Decree, two types of courts martial, that is
>
> (a) a General Court Martial, consisting of a president and not less than four members, a waiting member, a liaison officer and a Judge advocate.
> (b) special court martial, consisting of a president and not less than two members, a waiting member, a liaison officer and a Judge advocate.

2.4.2 **Jurisdiction**

A General Court Martial shall, subject to the provisions of the Armed Forces Act, try any person subject to the service law for an offence triable by a court martial and award for the offence a punishment authorised by the Act for that offence except that where the court martial consists of less than seven members it shall not be competent to impose a sentence of death.[113] A General Court Martial also has power to try a person subject to service law

[109] Hereinafter referred to as the "GCM"
[110] Hereinafter referred to as the "SCM"
[111] (2003) 1 All N.L.R 423
[112] See Section 129 of the Act
[113] Section 130(1), *ibid*

under the Act who by law of war is subject to trial by a military tribunal and may adjudge a punishment authorised by law of war or armed conflict.[114]

A Special Court Martial has similar powers to that of a General Court Martial, except that where it consists of only two members it cannot impose a sentence exceeding imprisonment for a term of one year.[115]

It is clear from a careful reading of Sections 129 and 130 of the Armed Forces Act that it is envisaged that erring serving officers of the armed forces are subject to trial by either General Court Martial or Special Court Martial.

The composition of GCM depends on the type of court or tribunal put in place. The relevant provision[116] states as follows:-

> There shall be, for the purposes of carrying out the provisions of this Decree, two types of courts martial, that is
>
> (a) A General Court Martial, consisting of a president and not less than four members, a waiting member, a liaison officer and a Judge advocate.
> (b) A special court martial, consisting of a president and not less than two members, a waiting member, a liaison officer and a Judge advocate.

The General Court Martial, which is the more common type of Court Martial consists of a president and not less than four members, a waiting

[114] Subsection (2), *ibid*
[115] Subsection (3), *ibid*
[116] See Section 129 of the Act.

member, a liaison officer and a Judge advocate. Whereas a special court martial is constituted by a president, and not less than two members, a waiting member, a liaison officer and a Judge advocate. By Section 133(3), a special court martial also has the powers of a General Court Martial, except that where the court martial consists of only two members; it shall not impose a sentence exceeding imprisonment for a term of one year.

2.4.3 **Convention of Court Martial**

The Court Martial may be convened by any of the following officers[117]: -

(a) the President or

(b) the Chief of Defence Staff or

(c) Any Service Chief or

(d) A General Officer Commanding, a Brigadier, Colonel or Lieutenant Colonel or their corresponding ranks having command of a body of troops or establishment or

(e) An officer for the time being acting in place of these officers may convene a court martial.

The law proceeds to make provision for officers authorized to convene a GCM and a SCM separately. It is submitted that the first provision in subsection

[117] Section 131(1) of the Act, *ibid*

(1) of section 131 of the AFA is superfluous since a court martial must either be a GCM or a SCM in respect of which separate provisions have been made. A General Court Martial, may be convened by any of the following officers:

(a) the President or

(b) the Chief of Defence Staff or

(c) any Service Chief or

(d) a General Officer Commanding or corresponding command

(e) A brigade commander or corresponding command.

Whereas a SCM may be convened[118] by any of the following officers: -

(a) a person who may convene a GCM, or

(b) The commanding officer of a battalion or of a corresponding unit in the Armed Forces.

It is therefore clear that a person who may convene a GCM may also convene a SCM and in addition, the latter may also be convened by a commanding officer of a battalion or of a corresponding unit in the Armed Forces. It is also provided[119] that a senior officer of a detached unit, establishment or squadron may be authorised by the appropriated superior authority to order a court martial in special circumstances.

[118] Subsection (3), *ibid*
[119] Subsection (4), *ibid*

In the case of **Ex-Wing Commander L.D.James v Nigerian Air Force**[120]where the GCM was convened by a Director of Personnel at the Nigerian Air Force Headquarters on the authority of the Chief of Air Staffthe Court of Appeal held as follows; -

> By virtue of section 131(2) of the Armed Forces Decree No 105 of 1993 (as amended) a General Court Martial may be convened by:-
>
> (a) the President; or
> (b) the Chief of Defence Staff; or
> (c) the Service Chiefs; or
> (d) a General Officer Commanding or corresponding command or
> (e) a Brigade Commander or corresponding command.
>
> In the instant case, the General Court Martial was convened by the Director of Personnel, Headquarters NAF who clearly was not qualified to convene it.

The view of the learned Justices of the Court of Appeal was that the authority to convene a court martial was restricted to the above category of officers. The Court of Appeal went on to further observe per Oguntade, JCA (as he then was) that: -

> The power to convene a General Court Martial under section 131(2) of the Armed Forces Decree No 105 of 1993 cannot be delegated. No person other than those listed thereunder can validly sign a convening

[120] (2000) 13 N.W.L.R (Pt. 684) 406 at 419 paras F-H

> order. In the instant case the convening order signed by the Director of personnel for the General Court Martial which tried and convicted the appellant was null and void and the trial and conviction are equally null and void.

In **Obiosa v Nigerian Air Force**[121] the Court of Appeal upon similar facts[122] made a similar pronouncement as follows: -

> The provision of section 131(2) of the Armed Forces Decree No 105 of 1993 (as amended) does not authorize the delegation of authority to convene a Court Martial. That is why the word "or" is repeated so many times in between the holders of the offices who can validly convene a General Court Martial, the implication being that if any one officer listed is not available, another listed officer can act for him. Only the holders of the offices listed under section 131(2) of the Armed Forces Decree could issue a convening order for a General Court Martial and the power granted by the said section cannot be delegated. In the instant case, the General Court Martial which tried and convicted the appellant was not properly convened. The General Court Martial therefore lacked the requisite jurisdiction to try the appellant. All the orders made by it must therefore be pronounced null and void.

With respect, one finds it hard to agree with the above two pronouncements of the Court of Appeal. It is dictated by simple reasoning that

[121] (2000) 12 N.W.L.R. (Pt 680) 112 at 121 D-H
[122] Pp. 61-67, *infra*

each of the officers listed under section 131(2) has the requisite power or authority to convene a GCM in his or her own right and not to act for another as suggested in the above pronouncement. Moreover, one may further observe that there seems to nothing in the law that prohibits delegation of the officers' power or authority to convene a court martial. If the legislature had intended any such prohibition, it would have so provided. It is, therefore, submitted that the authority to convene a GCM could properly be delegated. It was hardly surprising that the above pronouncement of the Court of Appeal was overturned on further appeal to the Supreme Court.[123] The facts may be summarized as follows: -

In April 1996, the Chief of Air Staff, Air Vice Marshall Femi John Femi was removed from that Office by the then Federal Military Government and was replaced by Air Vice Marshall[124]NsikakEduok. At the time when the changes occurred, one Wing Commander P.E. Iyen was the Director of Finance and Accounting, and would now be referred to simply as (DFA). It would appear, following his assumption of office as the Chief of Air Staff, AVM Eduok raised the allegation that some Air Force Officers shared between themselves the sum of 10 million naira, and that another sum of 48 million naira was hastily withdrawn from the Central Bank of Nigeria. That sum was allegedly

[123](2003) All N.L.R. 423
[124] Hereinafter referred to as "AVM"

withdrawn for the renovation of the guesthouse of the Chief of Air Staff and also the Air House.

The then Chief of Air Staff, therefore, set up a panel to investigate the allegation. As a result, the respondent and eight others were jointly tried, though each accused had his own separate charges levelled against him.

At his initial arraignment, the respondent (Squadron Leader Obiosa) had against him a six-count charge of stealing, receiving stolen property, aiding and abetting services offence, scandalous conduct and disobedience to standing order. The GCM then went on to try the respondent upon the charges as laid. The case for the prosecution was that the respondent forged and uttered four CBN cheques numbers 00003, 00004, 00005 and 00006 that amounted to the sum of N48 million and subsequently stole the proceeds of the said cheques. It was alleged by the prosecution that the respondent also stole the sum of 4.3 million naira in similar circumstances, and that he also received part of another 2.8 million naira that was also stolen, and in the process disobeyed standing orders. In support of its case, the prosecution called 14 witnesses in the course of which 70 exhibits were admitted in evidence.

On the other hand, the case for the defence was that the Chief of Air Staff, AVM Femi John Femi who was keeping the cheque book, authorised the withdrawal of the 48 million naira from the Central Bank of Nigeria. The

cheques were co-signed by the Chief of Air Staff's nominee, who was only known to him. It is also part of his case that the Chief of Air Staff[125] instructed him to give the money to one Mr.Timi Alaibe who made returns to AVM Femi John Femi. He also claimed that he duly sent the returns to the Nigerian Air Force[126] Headquarters. The respondent also denied receiving an allegedly stolen 2.8 million Naira from Wing Commander P. Iyen.

At the conclusion of the hearing, the GCM found the respondent guilty as it came to the conclusion that all the charges against the respondent were proved beyond reasonable doubt. The GCM thereafter pronounced sentence upon the respondent as follows:–

> "Squadron Leader Obiosa, from the N10 million you got N2.8 million and you stole N48 million and on the renovation of the Air House and the Chief of Air Staff's Guest House, you stole N4.3 million. Sub-total, N55,100,000 million. Interest is N82,650,000 million. Your restitution to the Air Force depends on the refund of N137,750,000."

He was, in addition, ordered to serve various prison terms. Being dissatisfied with the judgment and orders of the GCM the respondent

[125]Hereinafter referred to as "CAS"
[126] Hereinafter referred to as "NAF"

appealed to the Court of Appeal. The following issue was raised, *inter alia*, for the determination:–

> Whether by virtue of Section 131(2)(c) of the Armed Forces Decree No 105 of 1993 (as amended), the proceedings of the General Court Martial is not a nullity in view of the convening order signed by Air Commodore F.O. Ajobena purportedly acting on behalf of the Chief of Air Staff on verbal instructions.

After due consideration of the issues raised, the Court of Appeal upheld the appeal as it was of the view that only the holders of the offices listed under Section 131(2) of the AFA could issue a convening order for a GCM, and that the power granted by the said section could not be delegated. The Court of Appeal therefore held that the GCM, which tried and convicted the respondent, was not properly convened, and therefore lacked the requisite jurisdiction to try the respondent.

In conclusion, the Court of Appeal set aside the judgment of GCM and also declared as nullities all the orders made by the GCM, and accordingly discharged and acquitted the respondent.

Being dissatisfied with the judgment and orders of the Court of Appeal, the appellant (NAF) then appealed to the Supreme Court and, inter *alia,* raised the following issue for determination:–

Whether the General Court Martial had been properly convened and had the jurisdiction to try the respondent.

Arguing the issue the appellant's counsel submitted that the arguments and findings of the learned Justices of the Court of Appeal with regard to the interpretations given to the provisions of Section 131 of the Armed Forces Decree were basically erroneous. It was then argued for the appellant that the provision of Section 131(3) of the Armed Forces Decree, clearly invests the delegation of the power to convene a GCM by a person in whom that power resides. Furthermore, it was argued that as there is no doubt that the Chief of Air Staff is an appropriate superior authority that could convene a GCM or delegate such powers to another officer. Upon that premise and having regard to the provisions of Section 128(i)(b) of the Armed Forces Decree, it was the submission of learned Counsel for the appellant that Air Commodore F.O. Ajobena being a Director of Personnel of the Personnel Branch, one of the four branches that constitute the headquarters of the Nigerian Air Force and having been duly delegated by the CAS could properly convene the GCM in compliance with Section 131(3) of the Armed Forces Decree. The special circumstances that existed then were that the accused person, who was retired on the 27 April 1996, had to be tried within three months of his retirement. Time then became of the essence and in such circumstances,

learned Counsel contended, the GCM had to be convened within the time frame of Sections 168 and 169 of the Armed Forces Decree.

The respondent in his brief submitted that the GCM was not properly convened or constituted having regard to the fact that it was convened by Air Commodore F.O. Ajobena who did not fall within the class of those could properly convene a GCM. It was therefore submitted for the respondent that having expressly stipulated those to convene a GCM, the Armed Forces Decree had by implication excluded any other person. It was contended by the respondent that as the convening order was or ought to have been made under Section 131(2), it must be signed by the CAS himself. He could not delegate his powers in that regard, particularly where the power was statutory in nature. The respondent was of the view that the combined effect of the provisions of Sections 128 and 131 of the Armed Forces Decree clearly suggest the category of officers empowered to convene a GCM which was not followed in this case. The said section 128 provides as follows: -

> (1) the following persons may act as appropriate superior officers in relation to a person charged with an offence, that is:–
> (a) the commanding officer; and
> (b) any officer of the rank of Brigadier or above or officer of corresponding rank or those directed to so act under whose command the person is for the time.

(2) the President may make rules for the purpose of this section and those rules may confer on the appropriate superior authority power to delegate his functions in such cases and to such extent as may be specified in the rules to officers of a class so specified.
(3) The senior officer of a detached unit, establishment or squadron may be authorised by the appropriate superior authority to order a court martial in special circumstances.

The Supreme Court, in the lead judgment delivered by Ejiwunmi, JSC (of blessed memory), applied the clear provisions of Sections 129 and 130 of the Act and held thus: -

> The law provides by virtue of Section 131(2) that the following officers may convene it. These are either: (a) the President, (b) the Chief of Defence Staff or (c) the Service Chiefs, or (d) a General Officer Commanding or (e) a Brigadier Commander or corresponding command. For completeness, I need to add that the person who may convene a General Court Martial may also convene a special court martial and in addition, so also the commanding officer of a battalion or of a corresponding unit in the Armed Forces. It is also provided that by virtue of Section 131(3) sic, the senior officer of a detached unit, establishment or squadron may be authorised by the appropriated superior authority to order a court martial in special circumstances …
>
> The convening order was validly made for the following reasons viz, that F.O. Ajobena who signed the order was entitled so to do because he was validly delegated by A.V.M. Eduok so to do, or that he was in

his own right able to sign the convening order in that the position he occupied at the time fell within the category of officers who could convene a Special Court Martial, and was properly so commissioned to do so …

It was also contended for the appellant that the special circumstances in this case were the fact that time was of the essence for the valid trial of the respondent by the General Court Martial, in view of the provisions of Sections 168 and 169 of the Armed Forces Decree.

It is my firm resolve that the Letter of Authority was properly issued by the officer who had the right and authority to order Air Commodore F.O. Ajobena to convene the General Court Martial and which was duly convened accordingly. Furthermore, it has been for the respondent to show that he suffered a miscarriage of justice on account of how the General Court Martial was convened. This he has not done and I do not think that in all the circumstances, it can be said that his trial was adversely affected as a result. It is also my view that the trial and conviction of the appellant cannot be declared as null and void.

In his concurring judgment Tobi, JSC similarly observed thus:–

I have read the judgment of my learned brother, Ejiwunmi, JSC and I entirely agree with him. I would like to add this bit in respect of the issues of jurisdiction of the General Court Martial ("GCM") and the failure on the part of the appellant to call the retired Chief of Air Staff, AVM Femi John Femi to testify before the GCM.

Learned Counsel for the respondent, Mr. S.C. Obi submitted that by Section 131(2) of the Armed Forces Decree 105 of 1993 as amended the power to convene GCM cannot be delegated. He argued that the GCM was accordingly not properly convened and therefore had no jurisdiction to try the respondent. Counsel for the appellant, Miss O.M. Lewis, took a different view. She argued that by Section 131(3) of the Decree the power to order a GCM is one that can be delegated by a person in whom that power resides.

Much as the arguments of learned Counsel appear attractive, they do not seem to push away or push aside the clear statutory provision of Section 131(3) of the Decree.

In my humble view, the subsection empowers an appropriate superior authority to authorise a senior officer to order a court martial in special circumstances. By Section 128(1) of the Decree, an appropriate superior authority in relation to a person charged with an offence includes:

(a) a commanding officer; and
(b) any officer of the rank of Brigadier or above or officer of corresponding rank or those directed to so act under whose command the person is for the time being. I am firmly of the view that the Chief of Air Staff qualifies as an appropriate superior officer under the subsection.

2.4.4 **Disqualification**

None of the following officers is qualified to participate as President or member of a court martial: -

(1) An officer who convenes the court martial cannot participate as a member of the court;[127] or

(2) The accused person's commanding officer between the time when the accused was charged and the date of commencement of trial; or

(3) Anyone who participated in the investigation or enquiry in to matters relating to the subject matter of the charge against the accused.

The above category of military officers is not eligible to participate as member or judge advocate at the court martial.[128]

In the case of **Akinwale v Nigerian Army**[129]the appellant was a Lt Col in the Nigerian Army attached to the Nigerian Army Headquarters, Garrison Command Lagos until his conviction and sentence by the General Court Martial.

On 7/8/96, Brigadier General Aziza (Rtd) the then commander of Lagos Garrison Command convened a GCM to try the appellant for, *inter alia* allegedly being in illegal possession of firearms, conducts prejudicial to good order and service discipline to wit: possession of two Nigerian international passports, harassment of civilians over private land matter; detailing two soldiers to perform guard duties in his house without lawful authority and

[127] See Section 134(1) of the Act
[128] Subsections (3), *ibid*
[129] (2001) 16 NWLR (Pt 738) 109

diverting without lawful authority a Nigerian Army Styr vehicle for personal use.

At his trial before the GCM, the appellant pleaded guilty to four counts of the charge on which he was convicted by the GCM on 16/8/96 and sentenced to 15 years imprisonment on each count concurrently. On the same day 16/8/96 the said conviction was confirmed but the sentence was reduced to 10 years on each count by the same commander of the Lagos Garrison Command who convened the GCM.

The appellant was dissatisfied with that decision and appealed to the Court of Appeal on the ground, *inter alia,* that the Garrison Commander was prohibited from confirming the decision of the GCM by section 152(2) of the Armed Forces Act (Decree No 105 of 1993), which provides thus: -

> The following shall not confirm the finding or sentence of a court martial, that is: -
>
> (a) an officer who was a member of the investigation panel or enquiry into matters relating to the subject matter of the charge against the accused; or
> (b) a person who, as commanding officer of the accused, investigated the allegation against him or who is for the time being the commanding officer of the accused; or
> (c) a person who as appropriate superior authority, investigated allegations against the accused.

The Court of Appeal quashed the conviction and sentence on the ground that the convening and confirming authority is one and the same. Delivering the lead judgment, Oguntade, JCA (as he then was) observed thus: -

> The process of hearing before the General Court Martial and the confirmation of sentences are one and the same integral part of the trial of an accused person under the Armed Forces Decree. When a sentence has not been confirmed by the confirming authority, the hearing is not completed.
>
> The confirmation of the sentence on the appellant in this case is a sham and was contrary to law. It is not possible to set aside the confirmation process and leave the sentence by the GCM in place. Both must go together and what affects the confirmation must affect the sentence by the GCM …
>
> The appellant must have the benefit of an avoidable error recklessly and unfairly embarked upon by the confirming authority. I would also pronounce the trial and conviction of the appellant a nullity.

It is, however, submitted that neither the provision of section 152(2) of the Armed Forces Act (Decree) No 105 of 1993 nor that of section 134(2) of the Armed Forces Act Cap A20 LFN 2004 precludes a convening authority from confirming the decision of a court martial on the simple ground that he convened it. The Court of Appeal has taken that dimension in its more recent

decision in the case of **Shekete v N.A.F**[130]where the appellant was jointly charged and tried along with nine other officers on seven counts including offences of stealing, receiving stolen property and forgery before the General Court Martial. He was found guilty and convicted on five of the seven counts and sentenced to 23 years imprisonment. In addition, he was ordered to pay the sum of N4,630,000 as restitution to the Nigerian Air Force (the respondent). The sentence was confirmed by the Chief of Air staff that reduced the terms to four years imprisonment while the amount of restitution to be paid by the appellant was not varied.

Dissatisfied with the conviction, sentence and the order of restitution against him, the appellant appealed against them. At the Court of Appeal the appellant contended *inter alia* that the convening of the General Court Martial, the preparation and signing of the charge sheet, the confirmation and promulgation of the findings and sentences passed on the appellant by the same person to wit AVM N. E Eduok, the then Chief of Air Staff, breached his right to fair hearing. The appellant further contended that the provision of section 152(1) of the Armed Forces Act No 105 of 1993 which vested in the same person the power to convene the GCM and confirm its decision was inconsistent with the provision of section 36(1) of the 1999 Constitution and

[130] (2007) 14 N.W.L.R (Pt 1053) 159

repealed by the Armed Forces (Amendment) Act No 15 of 1977 which provides for a different confirming authority.

The respondent argued that the Chief of Air Staff, despite all the roles he played, did not preside over or sat as a member of the General Court Martial, nor did he give evidence at the trial of the appellant. It further contended that the fact that the provision of section152 of the Armed Forces Act had been repealed should not affect the legality of the acts carried out under the said Act before its repeal. The Court of Appeal held *inter alia* that: -

"By virtue of section 152(2) of the Armed Forces Act, some officers are excluded from confirming the finding and sentence of a court martial. These include: -

(a)An officer who was a member of the Court Martial; or

(b) Person who as the commanding officer of the accused investigated the allegation against him or who is for the time being the commanding officer of the accused.

In the instant case, the Chief of Air Staff who was qualified as a service chief was empowered by the law to convene the GCM. There was therefore nothing precluding or excluding him from confirming its decision. Thus his actions in the instant case were lawful and permitted by law."

In delivering the lead judgment Dalhatu Adamu, JCA (as he then was) has painstakingly distinguished the position of an officer envisaged under section 152 of the Armed Forces Act and one who merely convenes a court martial. While the former has been statutorily precluded, there seems to be nothing in the law that appears that whittles down the authority of the convening officer from confirming the conviction and sentence imposed by the GCM. The learned jurist further observed[131] thus: -

> The facts of the present case are therefore different from those in all the cases cited and relied upon by the appellant in that the actions of the CAS complained against were permitted by the law and that the said CAS did not do anything apart from the issuance of the convening order (exhibit A1) and the confirmation of the decision of the Court Martial. In other words the situation or circumstances in the present case are in sharp contrast with those in *Fawehinmi v. LPDC (supra)* where the Attorney General who constituted the Disciplinary Committee to try the accused also participated as a member of the same committee. Nor was it similar to the case of *Bakoshi v. Chief of Naval Staff (supra)* where the President of the GCM dominated the hearing in a way or manner, which made him to have descended into the arena as if the battle was between himself and the accused person or the defence counsel. See also *Civil Service Commission v. Buzugbe*(1984) 7 SC 19.

[131] P.192 paras A-D, *ibid*

In the above case however the appeal was allowed upon the resolution of other issues in favour of the appellant, which included the fact that the appellant was convicted by the GCM on the uncorroborated evidence of accomplices in the alleged crime. It was observed per Mukhtar, JCA[132] as follows: -

> Let me, however, observe that the witnesses that testified before the General Court Martial leading to the conviction and sentence of the appellant were not just ordinary accomplices but were in fact *participes criminis* whose evidence require corroboration without which the General Court Martial ought to have considered the danger of convicting the appellant upon their uncorroborated evidence. The witnesses for the prosecution on whose evidence the appellant was convicted were accomplices who partake in the same crime and as such cannot corroborate one another because of the danger that they may have concocted a false story together.

2.4.5 **Venue**

A court martial determines its sitting venue from the order convening it.[133] The convening officer may convene a court martial to sit in any part of

[132] Pp. 203-204, paras D-A, *ibid*
[133] See Section 135(1) of the Act

Nigeria whether within or outside the limits of his command.[134] A court martial may change its sitting venue in the following two instances: -

(1) if the convening officer so directs; or

(2) in its own discretion if it appears that sitting in that other place is required by the interest of justice in the circumstances of the case.

In either of the above two instances, a court martial may adjourn for the purpose of sitting at that other place.[135] As court martial conducts its proceedings expeditiously, it does not at a time adjourn for any purpose for a period exceeding six days[136] except where both parties that is the accused and the prosecution so consent to the excess period. It is submitted that any adjournment made by court martial beyond the six days time frame, without consent of both parties shall divest it of jurisdiction over the matter and all proceedings conducted thereafter including judgment, if entered, shall be void and likely to be struck out on appeal.

Court Martial seems to be the most expedient of all courts or tribunals being the only adjudicating institution that sits daily other than Sundays and public holidays. However, a court martial will sit even on Sundays and public

[134] *Ibid*
[135] Subsection (2), *ibid*
[136] Subsection (3), *ibid*

holidays if the convening officer or the court martial is of the opinion that exigencies of service make it necessary to do so.[137]

It then logically follows that Saturdays, Sundays and other public holidays and also the day on which the adjournment was granted do not count in the computation of time. The Interpretation Act[138] has aptly so provided[139] thus:-

> 15(2) A reference in an enactment to a period of days shall be construed-
>
> (a) Where the period is reckoned from a particular event, as excluding the day on which the event occurs;
> (b) Where apart from this paragraph the last day of the period is a holiday, as continuing until the end of the next following day which is not a holiday.
>
> (3) Where by an enactment any act is authorized or required to be done on a particular day and that day is a holiday, it shall be deemed to be duly done if it is done on the next following day which is not a holiday.
>
> (4) Where by an enactment any act is authorized or required to be done within a particular period which does not exceed six days, holidays shall be left out of account in computing the period.

[137] Section 135(4) of the Act, *op cit*
[138] Cap. I23 LFN, 2004
[139] Section 15(2),(3) and(4), *ibid*

2.4.6 **Dissolution of Courts Martial**

The convening officer has full discretion to dissolve a court martial, much as he has to convene it, before or after commencement of its sitting, if he thinks it is necessary or expedient to do so in the interest of justice.[140] One wonders the yard stick by which the convening officer determines interest of justice. It is submitted that if there appears to be anything wrong with either the composition or membership of a court martial, it could simply be raised by the accused person or even the prosecution which issue, being a fundamental one bordering on jurisdiction, must promptly be settled before commencement or at any stage of the trial whenever raised. It is submitted that there is an incumbent duty upon any court or tribunal to deal with and determine an issue of jurisdiction whenever raised at the earliest opportunity before trial or consideration of any other issue. It is further submitted that anything done by a court or tribunal without or in excess of jurisdiction is null and void as held in a plethora of Supreme Court and Court of Appeal decisions. In the case of **Lakanmi v Adene**[141]the Supreme Court held thus: -

> The importance of jurisdiction in all adjudicative exercise cannot be over-emphasised and it is well settled that if a court is shown to have no jurisdiction to entertain a matter before it, the result has been

[140] Section 136(1) of the Act, *op cit*
[141] (2003) 4 S.C (Pt II) 92 at 96

> that all its proceedings on the matter, however well conducted are a nullity and any decision reached thereon by the court is *void ab initio* and of no effect whatsoever.

The Court of Appeal also in the case of **W.R.P.C Ltd v Agbuje**[142] has expressed similar views as follows: -

> Jurisdiction of court is so fundamental that it forms the foundation of adjudication. It is the lifeline of an action, thus, if a court lacks jurisdiction, it automatically lacks the necessary competence to try the case at all.

Where also the membership of a court martial is reduced, by reason of death or any other reason, to a number lower than the minimum then it has to be dissolved.[143] The law is silent on who could dissolve the court martial in such circumstances. It is, however, submitted that the power to dissolve is exercisable by the convening officer.

An absence of one or more members of a court martial will not invalidate the proceedings of a court martial unless the membership is reduced below the statutory minimum, in which case the court martial has been liable

[142] (2005) 5 NWLR (Pt 917) 63 at 84-85
[143] Section 136(2) of the Act, *op cit*

to dissolution.[144] However, a member is permanently exited from participation in the proceedings of a court martial once he or she is ever absent from any sitting of the court martial[145]

In the event of death of the presiding officer of a court martial or if he or she is otherwise incapacitated to sit, but the number is not thereby reduced below the legal minimum then either: -

(a) The trial proceeds with the most senior member appointed by the convening officer to preside, if he satisfies the following preconditions;

(i) He is an officer not below the rank of a major or corresponding rank, and

(ii) He is senior to the accused person being tried by the court martial; or

(b) Alternatively if the conditions in (a) above are not satisfied, the court martial must be dissolved.[146]

If the convening officer is presented with a report that the accused is so sick or otherwise incapacitated, after commencement of trial, such that it becomes impracticable to present him for continuation of the trial within a

[144] Compare Subsections (2) and (3) of Section 136 of the Act
[145] Subsection (3), *ibid*
[146] Subsection (4) (a) and (b), *ibid*

reasonable time, the convening officer may dissolve the court martial.[147] In any event occasioning the dissolution of a court martial, the accused may be tried by another court martial.[148]

2.4.7 **Right of an Accused to Object to Membership of Court Martial**

The fundamental right to fair hearing has been enshrined in the Armed Forces Act, which makes a court martial bound to observe the rules of fair hearing in the conduct of its proceedings, In **Yekini v Nigerian Army**[149] the Court of Appeal per Galadima, JCA observed thus: -

> It is fairly settled law that the Court Martial like any other court or tribunal established by law … has a duty of fairness in proceedings before it.

This is the only military court or tribunal where an accused person about to be tried, may as a matter of right *ex debito justitie,* object to the membership of the court martial or even waiting member, whether such member was originally appointed or in lieu of another officer.[150] In order to facilitate the exercise of that right by an accused person, the names of the

[147] Subsection (5), *ibid*
[148] Subsection (6), *ibid*
[149](2002) 11 NWLR (Pt 777) 127 at 143 Para. G
[150] Section 137(1) of the Act, *ibid*

president and members of the court martial must be read to the accused before they are sworn in and the accused shall be asked whether he has an objection against any of those officers. The irony, however, is that the objection against either the president or member is considered by the remaining members of the court martial, whose membership has not been challenged.[151] An objection may be successful against the President of the court martial, if allowed or approved by one third of the other members of the court martial.[152] In case of an objection to a member of the court martial, the member against whom the objection is made shall stand removed if allowed by not less than half of the other members of the court martial.[153] It is submitted that the likelihood of bias that may be occasioned by the accused person's objection would have been largely reduced if the objection were to be considered by the convening or some other appropriate officer rather than the other members of the same court martial whose decision could be influenced by solidarity and is not appealable. Where the removal of the presiding officer or member of a court martial reduces the number of the members below the legal minimum, the convening officer shall appoint other

[151] Subsection (3), *ibid*
[152] Subsection (4), *ibid*
[153] Subsection (5), *ibid*

appropriate officers to fill the vacancies so as to ensure that the number is not below the legal minimum.[154]

2.4.8 **Proceedings of the Court Martial**

The trial proceedings in a court martial are normally conducted in the open court like regular courts of law and other tribunals. The court martial may, however, in its discretion sit in camera if it considers it necessary or expedient to do so in the interest of defence and security.[155] The court martial may also order that the public be excluded from the whole or any part of the proceedings if it thinks that any evidence that may be given at the trial may lead to disclosure of an information which could be directly or indirectly useful to any enemy or inimical to national or security interest.

A court martial, while deliberating on its findings or sentence on any charge or on any other deliberation, sits in a closed court exclusively to its members and any other person it prescribes.[156] A Judge Advocate partakes in all proceedings and sessions of the court martial except during deliberation on finding and sentence.[157] Without prejudice to the discretionary power of the court martial to order that the whole or any part of its proceedings be held in

[154] Subsection (5), *ibid*
[155] Section 139 (1) and (2), *ibid*
[156] Subsections (4), (5) and (6), *ibid*
[157] Subsection (7), *ibid*

camera[158], the finding of a court martial on each charge shall be pronounced in open court and if it is one leading to conviction and sentence, it shall be made subject to confirmation and be so pronounced.[159]

The decisions of a court martial are determined by a majority opinion of the members without any casting vote.[160] In the event of equality of votes, the lucky accused person must be discharged and acquitted[161] as good as failure of the prosecution to meet the standard of proof beyond reasonable doubt.

A death penalty may only be imposed by a court martial with the concurrence of all the members of the court martial, failing which the court martial may only impose lesser punishment.[162] However, in case of equality of votes on sentence, the President of the court martial has a casting vote.[163]

As in criminal charges before regular courts of law, an accused person may be convicted for another similar offence carrying lesser punishment than the one with which he has been charged.[164]

[158] Section 139, *ibid*
[159] Section 141(1) and (2), *ibid*
[160] Section 140(1), *ibid*
[161] Subsection (2), *ibid*
[162] Subsections (3) and (4), *ibid*
[163] Subsection (5), *ibid*
[164] Section 142, *ibid*

CHAPTER THREE

ELECTION TRIBUNALS

3.1 **Introduction**

Election Tribunals, as the name suggests, are tribunals established purposely to hear and determine election petitions. "Tribunal" or "court" in the case of Presidential election means the Court of Appeal and in case of any other election, the election tribunal constituted in respect thereof."[165] Like regular courts of law, the composition and jurisdiction of each Election Tribunals is regulated by the law establishing it.[166] These tribunals are not only indispensable under democratic governance but they are also a very crucial force to be reckoned with in the administration of justice in election petition matters. Their establishment in the Constitution emphasizes their critical importance and onerous role as an arbiter in democratic governance. Election tribunals are, in fact, the only tribunals established by Constitutional provision other than the Code of Conduct Tribunal. The word "election" has been defined[167] as: -

> The act of choosing or selecting one or more from a greater number of persons … the choice of an alternative … the selection of one person from a specified class to discharge certain duties in a state,

[165] See Section 140 (2) of the Electoral Act, 2006
[166] See the 1999 Constitution and the Electoral Act 2006
[167] Black, H.C, Black's Law Dictionary, 6th Edition, West Publishing Co, (1990) at p. 517

> corporation, or society. An expression of choice by the voters of a public body politics, or a means by which choice is made by the electorate.

The above definition is more elaborate than the concise meaning in the English Dictionary[168] inwhich "election" is simply defined as: -

> The process of choosing a person or a group of people for a position, especially a political position, by voting.

The genesis electoral process in Nigeria dates back to 1922 when the Clifford Constitution for the first time introduced a legislature consisting of both elected and unofficial members and appointed official members, which replaced the colonial Nigerian Council. The irony, however, was that only 4 out of the 46 legislative house members were elected while 44 were appointed by the colonial masters to make up a total of 46 pioneer membership of the Legislative Council. In other words 42 members were out rightly appointed while 4 were elected to represent Lagos and Calabar in 3 to 1 ratio respectively.[169] It could still be said to be a major step forward since that was the first time ever an electoral process was ushered into Nigeria.

Even then elections were restricted to certain parts or personalities. The process continued through the various elections held in 1950, 1952, 1954,

[168] Hornby, A.S, Oxford Advanced Learner's Dictionary 6th Edition, Oxford University Press, (2001) at p. 374

[169] Babalola, A, Election Law and Practice, First Ed, Intec Printers Ltd, Ibadan . (2003) at p. 3.

1957, 1958 and 1959 after which Nigeria became independent on 1st October, 1960. Another misfortune that besieged the country's polity was the military takeover of governance from January 1966 barely five years after independence. Since then, election and anything to do with politics was completely out of the question. It was not until 1979 when political parties were put in place and general elections conducted that ushered in the second republic democratic governance.[170] The 1999 Constitution was promulgated by the Obasanjo/Yar'Adua military administration which was an off-shoot of the late General Murtala Muhammed's government after the latter's assassination on 13th February 1976, barely seven months after the terminal of Yakubu Gowon's nine-year regime in a bloodless coup in July 1975.

The 1979 Constitution, for the first time, introduced a Presidential system of governance in place of the erstwhile Parliamentary system. It is also the first time election tribunals were introduced to handle election matters with restricted appellate rights aimed at speedy dispensation of justice in election petitions, which for obvious reasons ought not to be unduly delayed.

Apart from the Court of Appeal[171], which operates as an election tribunal and the Supreme Court correspondingly as an election appeal tribunal in

[170] *Ibid* at p. 24
[171] Section 239 of the 1999 Constitution

respect of Presidential elections, other election tribunals established by the Constitution[172] are the National Assembly Elections Tribunal and the Governorship and Legislative Houses Election Tribunal. The Electoral Act further establishes Area Council Election Tribunal[173] and Area Council Election Appeal Tribunal,[174] while Local Government Election Tribunals are established by the various states laws. It is intended to discuss the functions of these tribunals after appraising some teething problems resulting in undue delays in trials experienced by many tribunals despite the fast track statutes put in place to ensure expeditious dispensation of justice like the Electoral Act 2006 and the Practice Direction made thereunder.[175]

The need for speedy trials and timely determination of all election petitions under-scores the very essence of establishing the Election Tribunals. This is expressly provided in the Electoral Act[176] as follows:

> No election and return at an election under this Act shall be questioned in any manner other than by a petition complaining of an undue election or undue return (in this Act referred to as an "election petition") presented to the competent tribunal or court in accordance with the provisions of the

[172] Section 285, *ibid*
[173] See section 142 of the Electoral Act
[174] Section 143, *ibid*
[175] See the Election Tribunal and Court Practice Direction, 2007 Government Notice No. 10
[176] See Section 148 of the Electoral Act, 2006

> Constitution or of this Act, and in which the person elected or returned is joined as a party.

It is regrettable, however, that many election petitions are delayed for one reason or another notwithstanding the above mandatory accelerated hearing provision and precedence accorded to election petitions over other regular cases or matters by the Practice Direction and enhanced by both the bench and the bar. In fact hearing of an election petition is supposed to be a daily business for the tribunal until all petitions are disposed of. Article 24 (1) of the first schedule to the Electoral Act, 2006 provides thus: -

> No formal adjournment of the Tribunal or Court for the hearing of an election petition shall be necessary, but the hearing shall be deemed adjourned and may be continued from day to day until the hearing is concluded unless the Tribunal or Court otherwise directs as the circumstances may dictate,

The zeal of the legislature to put in place an enabling law that would ensure a timely disposition of election petitions is glaring enough by the mandatory provision[177] of the Electoral Act, which states as follows: -

> After the hearing of an election petition has begun, if the inquiry cannot be continued on the ensuring day or, if that day is a Sunday or a public holiday, on the day following the same, the hearing shall not be

[177] See Article 25 (1) and (2) of the First Schedule to the Electoral Act, 2006

> adjourned *sine die* but to a definite day to be announced before the rising of the Tribunal or Court and notice of the day to which the hearing is adjourned shall forthwith be posted by the Secretary on the notice board. The hearing may be continued on a Sunday or on a public holiday if circumstance dictates.

The law also conferred on the chairman of the election Tribunal an onerous power to hear and dispose of all interlocutory applications singularly like a judge of the Federal High Court.[178] The law states thus:

> All interlocutory questions and matters may be heard and disposed of by the Chairman of the Tribunal or the Presiding Justice of the court who shall have control over the proceedings as a Judge in the Federal High Court.

Despite putting in place all these expeditious provisions and more, some election petitions suffer inordinate delays due to some hiccups that derail the "fire brigade" approach in the law, some of which are caused by pendency of litigations in regular courts involving similar issues in the election petition thereby creating compelling circumstance for an election tribunal to halt its proceedings until the pending issue before the regular court is determined. A

[178] Article 26 (1), *ibid*

good example arose in the case of **Agbi v Ogbe.**[179]In other cases delays are caused by other factors like the volume of the processes filed, large number of witnesses called by the parties themselves and exhibits tendered during trial proceedings like in the celebrated case of **Buhari v Obasanjo**.[180]

In **Agbi v Ogbe**[181] (popularly known as "the Ibori case**"**) an allegation was made in a press release in January 2003, on the eve of the 2003 general elections, which was signed by Joe Igbuzor of the Derivation Front and Chief Andrew Oru of Delta Elders Forum titled "Breaking News James Onanefe Ibori an ex-convict" was circulated within and outside Delta State of Nigeria. Attached to the press release was a certified true copy of the record of proceedings of the Upper Area Court Bwari in the F.C.T Abuja dated 28th September 1995 in criminal case No. CR/81/95 titled 'C.O.P. v James Onanefe Ibori'.

Thereafter, Chief James Onanefe Ibori the then Governor of Delta State wrote a petition to the President of the Federal Republic of Nigeria, alleging falsification of court records and superimposition of his name on that of Shuaibu Ayegbe, which he copied to the Inspector General of Police. The President referred the petition to the Chief Justice of Nigeria who in turn referred it to the Chief Judge of the High Court of the FCT Abuja to investigate.

[179] (2005) 8 N.W.L.R. (Pt 926) 40; (2006) 11 N.W.L.R. (pt. 990) 65, *infra*
[180] (2005) 2 NWLR (pt. 910) 241 *infra* at pp. 99 and 107
[181] *Supra*

The reports of the investigations conducted by the Chief Judge of FCT and that of the Inspector General of Police both found the then Governor of Delta State Chief James Onanefe Ibori as the person that was tried and convicted by Upper Area Court Bwari for negligent conduct and criminal breach of trust.

In earlier proceedings two Chieftains of the Peoples Democratic Party (PDP) Engineer Goodnews Agbi and Anthony Alabi had filed an action on 3rd February, 2003 in the High Court of the Federal Capital Territory against Chief AuduOgbe the then Chairman of the PDP and three others claiming *inter alia* declaratory reliefs that Chief James Onanefe Ibori, the then Governor of Delta State was an ex-convict and thus not qualified to contest the 2003 gubernatorial elections. While this matter was pending in court, Chief James Onanefe Ibori contested and won the gubernatorial election in Delta State and was sworn in as the Governor of Delta State, which led to filing of an election petition before the Delta State Governorship and Legislative Houses Election Tribunal seeking similar declaratory reliefs and nullification of Governor Ibori's election. The pendency of the same issues before the High Court of FCT and the appellate Courts necessitated staying proceedings at the Election Tribunal, which commenced before swearing in of the Governor on 29th May 2003 until June 2006 barely eleven months to the expiration of Governor Ibori's four-year tenure.

Engineer GoodnewsAgbi and Anthony Alabi's case was initially filed at the High Court of FCT on 3rd February 2003 against the National Chairman, Secretary of the PDP, the PDP itself and the Independent National Electoral Commission (INEC). Later Governor James Ibori applied to be joined as an interested party and was so joined on 17th February 2003. The High Court of FCT delivered its ruling (per Y. H. Baba, J) on 24th March 2003 holding that there was no conviction by the Upper Area Court Bwari. On appeal to the Court of Appeal and further appeal to the Supreme Court, both appellate Courts held that there was a conviction by the Upper Area Court Bwari of one James OnanefeIbori. The Supreme Court ordered a retrial on 6th February, 2004 for identification of the person convicted by the Upper Area Court Bwari. Upon commencement of retrial before the High Court of FCT, fresh pleadings were ordered and duly filed and exchanged. After hearing the matter *de novo,* counsel addressed the court 29th October, 2004 and in a reserved judgment delivered by the High Court of FCT on 8th November 2004 (per H. Mukhtar, J (as he then was)) the plaintiffs claim was dismissed for failure of the plaintiffs to adduce credible evidence to identify the then Governor of Delta State Chief James OnanefeIbori as the same person that was convicted by the Upper Area Court Bwari.

A notice of appeal was filed on 18th November 2004 and the appeal heard on 8th March 2005 by the Court of Appeal sitting in panel of five Justices, which unanimously dismissed the appeal on 21st March, 2005. Further appeal was lodged at the Supreme Court, which heard the appeal on 23rd February 2006 and also unanimously dismissed it on the 19th May 2006.

It is clear from the above brief facts of the "Ibori" case that proceedings, which commenced in the regular courts as at 3rd February 2003, were only concluded on the 19th May 2006. Thus by the time the Election Tribunal sat in June 2006 and dismissed the petition the person petitioned against had barely about eleven months to finish his four-year term in office as Governor of Delta State. Moreover, the pronouncement made by the regular courts was compelling enough for the election tribunal to dismiss the petition before it, which was virtually an obvious end result.

In the case of **Buhari v Obasanjo**[182] the delay resulted from the large number of witnesses called during the trial at the Court of Appeal and the large number of respondents petitioned against each of which was entitled to be heard in his own right as a party. The brief facts are that General Muhammadu Buhari and All Nigeria Peoples party (ANPP) challenged the election of Chief Olusegun Obasanjo as President of the Federal Republic of Nigeria and joined

[182] *Supra* p. 95

two hundred and sixty seven (267) other respondents most of whom were presiding or returning officers of the Independent National Electoral Commission (NEC) the 3rd respondent in the case.

At the trial a total of four hundred and seven one (471) witnesses testified on both sides and three hundred and eleven (311) exhibits were admitted. Moreover, the petition itself was amended twice and contains two hundred and ninety four (294) paragraphs while the respondents' replies contained a total of three hundred and seventy seven (377) paragraphs. These were reflected as major reasons for the protraction of the case in the lead judgment delivered by Tabai, J.C.A. (as he then was) where his lordship observed thus:

> The trial culminating in this judgment today has been acknowledged by learned leading senior counsel for the 1st and 2nd respondents, Chief AfeBabalola as the longest in the legal history of Nigeria (see page 1 of his written submission). And I think it is truly the longest in terms of the man-hour of both the bench and bar, the number of witnesses and exhibits. Some 355 witnesses were called and 311 exhibits admitted in evidence. The case was first mentioned on the 23rd May, 2003 and the last witness RW 116 testified on the 7th October, 2004 and learned leading senior counsel for the 3rd – 268th respondents formally announced the closure of their case on Saturday the 9th day of October, 2004. With leave of court learned counsel for the parties submitted typed written

> submissions spanning through nearly 800 pages. They made their oral submissions on the 10/11/04. It has been quite a monumental experience.
>
> The petition itself was amended twice, the 2nd and last being that filed on the 8/10/04. It is a 294–paragraph document …
>
> The 1st and 2nd respondents filed their 158–paragraph reply on the 13/6/03. The 3rd – 268th respondents filed theirs of 219 paragraphs on the 11/5/03.

The Learned President of the Court of Appeal made a similar observation, at page 401 paragraphs A-D, in the following terms: -

> "There is no gain saying the fact that this case has attracted a lot of attention both nationally and internationally thus bringing it to the level of a high profile case. This is natural because of some obvious factors some of which are the personalities involved and also the time it took to reach this point today. The large number of witnesses called by all the contending parties can rationally explain the long period of time it took to reach this stage. The petitioner called a total ... of 139 witnesses. The first set of respondents called a total ... of 100 witnesses, while the 2nd set of respondents called a total ... of 116 witnesses altogether making a grand total of 355 witnesses, not to talk of over 311 exhibits tendered in the course of the proceedings, that is in long hand. Be that as it may, today we are closing the chapter at this level."

In the case of **Ngige v Obi**[183] R. D. Muhammad, J.C.A. in the lead judgment, observed thus: -

> After a marathon trial, spanning over two years, a total number of 482 witnesses testified before the tribunal. The petitioner called 45 witnesses. The 1st respondent called 425 witnesses while the 2nd respondent called 12 witnesses. The tribunal delivered its judgment on 12th day of August 2005 in which it held that the petitioner has proved his case and was accordingly entitled to the reliefs sought in its judgment of over 700 pages.

After the tribunal judgment five separate appeals were filed which the Court of Appeal had to consolidate for easier and quicker determination of similar issues involved in all the five appeals. His lordship R. D Muhammad, J.C.A. further noted at p. 96 of the judgment as follows: -

> We therefore have five appeals arising from the judgment of the tribunal. The appeal filed by Dr. Chris Nwabueze Ngige is No. CA/E/EPT/5A/2005, INEC's appeal is No. CA/E/EPT/5b/2005; the appeal filed by the returning officer Anambra East Local Government Area and 182 others is No. CA/E/EPT/5C/2005. The appeal filed by the returning officer Aguta Local Government Area and 168 others is No. CA/E/EPT/5d/2005, while the appeal of the returning officer Anambra State Gubernatorial Election is No. CA/E/EPT/5E/2005. At the hearing of the appeal, with

[183] (2006) 14 N.W.L.R. (Pt 999) 95 at p.103, *infra*

the consent of all the counsel to all the parties, these appeals were consolidated.

The swearing in to office of Governor Peter Obi of Anambra State only at the tail end of the year 2006 was sequel to the time wasted in the hearing and determination of the election petition in **Ngige v Obi**[184] which, consequentially led to filing another suit by the Governor to determine when his tenure expires. It is intended to deal with this last issue later when discussing tenure of office of elected public office holders.

The Electoral Act, 2002 had, from the way it was couched contributed, to a large extent, to proliferation of respondents and of witnesses in trials of election petitions and thereby not only unnecessarily prolonging such trials and consequently over reaching the rights of successful petitioners, but also defeating the concept of expeditious determination of election petitions and the very essence of election tribunals.

The above provision led to joining too many respondents in hundreds who were not necessary parties like agents of INEC when the Electoral Commission was itself a respondent. In turn the respondents who are parties in their own rights, and as such ought to be accorded a right to fair hearing,

[184] *Supra* at p. 102

would normally testify themselves and call several other witnesses at the trial most of whom simply repeat their testimonies. The proliferation of witnesses and exhibits were occasioned by unnecessary multiplicity of respondents which led to nothing other than waste of valuable time and resources. It is so distasteful especially to the trial election tribunals on whose back the donkey load is mostly placed. One learned Jurist[185] has captured a statistical data of some protracted election petitions caused by high number of unnecessary respondents as follows: -

CITATION	CASE	ELECTION	NUMBER OF RESPONDENTS
(2005) 2 NWLR (Part 910) 24	MuhammaduBuhari&anor. v Chief OlusegunObasanjo&Ors	Presidential	268
(2003) 15 NWLR (Part 841) 546	All Nigeria Peoples Party v BoniHaruna&Ors	Governorship Adamawa State	2,188
(2003) 15 NWLR (Part 843) 436	Jonah D. Jang &anor. v Chief Joshua C. Dariye&Ors	Governorship Plateau State	84
(2004) 15 NWLR	Arc. Fidel Ayogu v	Governorship	281

[185]Onanade, P.A, Advocacy in Election Petitions, , Philade Co. Ltd. Lagos, (2007).

(Part 895) 134	ChimarokeNnamani&Ors	Enugu State	
(2005) 16 NWLR (Part 952) 416	Chief Sergeant C. Awuse v Dr. Peter Odili&Ors	Governorship Rivers State	327
(2006) 1 NWLR (Part 961) 375	Amb. Akpang A. Obi-Odu v Donald E. Duke &Ors	Governorship Cross River State	2,340
(2006) 14 NWLR (Part 999) 1	Mr. Peter Obi v Dr. Chris N. Ngige&Ors	Governorship Anambra State	451
(2004) 7 NWLR (Part 871) 16	All Nigeria Peoples Party v INEC &Ors	National Assembly	301

In **Obi v Ngige**[186]while the petitioner called 45 witnesses, the 1st respondent alone called as many as 425 witnesses. The effect of this was definitely to put the trial proceedings at the whims of the respondents, who continue to enjoy the elective office endlessly. This in effect could unduly keep a wrong person in an elective office contrary to the basic tenets of democratic governance.

[186] *Supra* at pp. 102-103

The situation is aptly described in the words of Belgore, JSC (as he then was) in **Buhari v Obasanjo**[187] as follows:

> The petition perhaps holds record for its number of respondents, witnesses, exhibits and length of time taken to hear and determine it. I think this is due mainly to the Electoral Act, 2002 which is riddled with absurdities and anomalies, and several inconsistencies making it the clumsiest Electoral Act ever in the history of this country. But that was the only statute to work with apart from aid from the Supreme Law, the Constitution. The election tribunals were no doubt confronted with very difficult task; they had little room for abridging time or number of parties and witnesses. However it may be mentioned for posterity that the trial took fifteen months with one hundred and thirty-nine witnesses by petitioners, one hundred for 1st and 2nd respondents and one hundred and sixteen for 5th and 6th respondents.

His Lordship Honourable Justice Pats-Acholonu, JSC (of blessed memory) in his concurring judgment similarly observed that: -

> The very big obstacle that anyone who seeks to have the election of the President or Governor upturned is the very large number of witnesses he must call due to the size of the respective constituency. In a country like our own, he may have to call about 250,000 –300,000 witnesses. By the time the court would have heard from all them with the way our present law is couched, the incumbent would have

[187] *Supra* at pp. 95 and 99

> long finished and left his office and even if the petitioner finally wins, it has been an empty victory bereft of any substance.

It is rather unfortunate that judges have to apply the law as it is rather than according to the dictates of the interest of justice in the circumstances of each particular case, no matter how ugly it otherwise appears to be. It is submitted that such situation could hardly be intended by the legislature.

One learned jurist[188] has commented on the Judges' onerous role in interpretation of statutes in the following terms: -

> There is hardly any task more difficult than decision-making. But this is the daily responsibility of a judge. To ask an individual to perform this function successfully on a daily basis would be asking a mortal to perform a divine act. Yet that is what judges are expected to do and what they try to do. A judge is obliged to interpret and apply the laws laid down by the legislature or created by a higher court, whether such laws are harsh or fair, absurd or even dangerous.

The learned jurist went further to lament[189] as follows: -

> Thus a judge, in meeting a new expediency which he considers just, does not have enough space for innovating; he is hamstrung by the supreme of the parliamentary and judicial precedents.

[188] Belgore M.B., The Echo of a Judge, Evans Brothers Publishers Nigeria Ltd, (2006) p. 24
[189] *Ibid*

Thus the whims and caprices of judges are limited as expressed by a former British Attorney General[190] thus:

> A most important principle of our constitutional practice is that judges do not comment on the policy of parliament, but administer the law good or bad, as they find it. It is a traditional doctrine on which the independence of the judiciary rests.

It was not until 2006 when the Electoral Act[191]specifically makes it unnecessary to join any INEC officer or representative as a respondent in an election petition simply because INEC is a respondent. The anomaly in section 133 (2) of the Electoral Act 2002 has, since then, been removed by the provision of Section 144 (2) of the Electoral Act 2006, which states as follows:

> The person whose election is complained of, is in this act, referred to as the Respondent, but if the petitioner complains of the conduct of an Electoral Officer, a Presiding Officer, a Returning Officer or any other person who took part in the conduct of an election, such officer or person shall for the purpose of this Act be deemed to be a Respondent and shall be joined in the election petition in his or her official status as a necessary party provided that where such officer or person is shown to have acted as an agent of the Commission, his non-joinder as aforesaid will

[190] Sir Hartley 'Shawcross', 1950
[191] See Section 144 (2) of the Electoral Act, 2006

not on its own operate to void the petition if the Commission is made a party.

With the above amendment only necessary parties may be joined as respondents to an election petition and where INEC is joined, its agents need not be. One would tend to think that the electoral law that ushered in the second republic was better couched. If not for anything else at least election petitions were determined before the successful candidate assumed office.[192]

Another reason for inordinate delay in trials by election tribunals is indiscriminate filing of interlocutory motions most of which are unnecessary and obviously calculated to delay the trial and determination of the election petition, which in turn defeats the very essence of establishing election tribunals. In **Ngige v Obi**[193]there were four hundred and fifty respondents (450) thereby inflating the volume of the record of appeal to about ten thousand (10,000) pages, the compilation and transmission of which wasted a lot of time that could have been used to prosecute and determine the appeal. The petition in Ngige's case which was filed in May 2003 was finally determined by the Court of Appeal in its celebrated judgment delivered on 15th March 2006. Another factor causing delay in the trial proceedings is the long-hand manner

[192] See Awolowo v Shagari (1979) 6-9 S.C. 51 at 63
[193] *Op cit* at p. 102

in which proceedings are recorded in our courts even at the highest level. It is submitted that automation of proceedings in our courts, especially the superior ones, is long overdue.

There are different election tribunals with various jurisdictions to determine different election matters, some of which are established by the Constitution[194] while others are established by sections 142 and 143 of the Electoral Act 2006

These are:

(1) The Supreme Court which serves as an election appeal tribunal in Presidential election petitions;

(2) The Court of Appeal which serves as an election tribunal for the hearing and determination of Presidential election petition;

(3) The Governorship and Legislative Houses Election Tribunal;

(4) The Area Council Election Appeal Tribunal, and

(5) The Area Council Election Appeal Tribunal.

The composition and jurisdiction of these various tribunals or courts and the application of provisions of the Constitution, the Electoral Act and other applicable laws will now be discussed.

[194] See section 285 of the 1999 Constitution.

3.2 **Governorship and Legislative Houses Election Tribunal**

This tribunal is established[195] in each state of the Federation to hear and determine election petitions in respect of Governorship, National Assembly and State House of Assembly. It is established by section 285 (2) of the 1999 Constitution, which provides thus:

> There shall be established in each State of the Federation one or more election tribunals to be known as the Governorship and Legislative Houses election Tribunals which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor or as a member of any legislative house.

3.2.1 **Composition**

The Tribunal is composed of a chairman and four other members.[196] The chairman must be a High Court Judge, and the other four members are appointed from amongst High Court Judges, Kadis of Sharia Courts of Appeal, Judges of Customary Courts of Appeal or other judicial officers not below the rank of a Chief Magistrate.[197] The Tribunal is constituted by the President of the Court of Appeal who has the singular power and privilege to appoint both the chairman and the members of the tribunal in each state of the Federation

[195] Section285 (2), *ibid*

[196] Sixth schedule article 2 (1), *ibid*
[197] Article 2 (2), *ibid*

in consultation with the respective heads of courts from where such Judges and Kadis are drawn.[198] For purpose of emphasis the provision of article 2 of the sixth schedule to the 1999 Constitution is hereunder reproduced thus: -

> (1) A Governorship and Legislative Houses Election Tribunal shall consist of a Chairman and four other members.
> (2) The Chairman shall be a Judge of a High Court and the four other members shall be appointed from among Judges of a High Court, Kadis of Sharia Court of Appeal, Judges of a Customary Court of Appeal or members of the judiciary not below the rank of a Chief Magistrate.
> (3) The Chairman and other members shall be appointed by the President of the Court of Appeal in consultation with the Chief Judge of the State, the Grand Kadi of the Sharia Court of Appeal of the State or the President of the Customary Court of Appeal of the State, as the case may be.

The attitude of many of the losing-out politicians as soon as election results are announced is to instigate their supporters to condemn the result of the election, alleging rigging or other electoral malpractices, and demand for cancellation of the election results. This has happened on several occasions especially in Presidential and Governorship elections. Examples that readily come to mind were the 2003 and 2007 Presidential elections where some Presidential candidates called not only for cancellation of the election results but also for a nationwide strike and formation of a government of National

[198] Article 2 (3), *ibid*

unity. One wonders how and who constitutes the government of National unity and whether it is permitted by the Constitution in the first place. It is submitted that the only way a recognisable and legitimate Government can be put in place is through election, the result of which is announced by INEC on otherwise by judicial pronouncement following an election petition in respect of any particular election result. An adversary therefore has only one legitimate way to challenge an election result and that is by way of an election petition. The 2006 Electoral Act aptly provides[199] thus: -

> No election and return at an election under this Act shall be question in any manner other than by a petition complaining of an undue election or undue return (in this Act referred to as an "election petition") presented to the competent tribunal or court in accordance with the provisions of the Constitution or of this Act, and in which the person elected or returned is joined as a party.

By the foregoing provision one is left with no doubt that the days are gone when election results could be challenged by disgruntled politicians in any manner other than by way of an election petition before a competent Court or tribunal. This, it is submitted, is on all fours with the Constitutional provision[200] which states: -

[199] See Section 140 of the Electoral Act, 2006
[200] See Section 285 (2) of the 1999 Constitution

> There shall be established in each State of the Federation one or more election tribunals to be known as the Governorship and Legislative Houses Election Tribunals which shall, to the exclusion of any court or tribunal, have original jurisdiction hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor or as a member of any legislative house.

The Election Tribunal must be constituted at least 14 days before the election in respect of which it is constituted is held.[201] One wonders the essence of this provision. One would have thought that it suffices if the tribunals are constituted within reasonable time after the election, since petitions cannot be filed until the election result is declared and within 30 days thereafter. In practice even if the tribunals are constituted, the Chairman and members including their supporting staff hardly assume duty before elections are held. Moreover petitions may be and are actually filed at the Court of Appeal Registry, whenever the registry staffs assigned to a tribunal do not assume duty early enough, in order to avoid time lapse.

3.2.2 **Presentation of Election Petition**

The time, for the presentation or filing of an election petition is limited to thirty (30) days after the announcement or declaration of the result to

[201] See Section 140(3) of the Electoral Act, 2006

which the petition relates.[202] The reason for such a short time frame is clearly to enhance speedy dispensation of justice in disposing election petitions. Where an election petition is filed after the expiration of the time frame within which it ought to be filed, it is incompetent and the resultant effect is that one fundamental precondition to the exercise or assumption of jurisdiction by the tribunal would not have been satisfied such a belated petition must be struck out for being incompetent. The computation of time is from the day of announcement of the result irrespective of what time of the day it is. In other words the day of announcement of the election result is day one in the computation of time. Thus, an election petition filed thirty days after announcement of the result will fall on the 31st day and consequently render the petition incompetent. In the case of **Hon Sani Sha'aban v Alhaji Namadi Sambo**[203] the Court of Appeal held that a petition that was filed on the 30th day after announcement of election result was filed on the 31st day because computation of time begins from the day of the announcement of the result. Belgore, JCA has so held in the lead judgment delivered on the 6/3/09, where the learned jurist observed thus:

> In the instant case, as I have highlighted elsewhere in this judgment, parties agree that the result of the election herein was declared on the 15th day of April,

[202] Section 141 Subsection (3), *ibid*

[203] Appeal No CA/K/EP/GOV/22/2008

> 2007 and that the election petition in respect thereof was presented on the 15th day of May, 2007.
>
> Going by the provisions of Section 141 of the Act, the election petition herein to be competent ought to have been presented on or before the 14th day of May, 2007. The petition herein was presented on the 15th day of May, 2007. Since both the date of declaration of result and the date of presentation of election petition are inclusive in the computation of the 30 days, the election petition herein was presented not within 30 days of the date of declaration of result but within 31 days thereof. This rendered the petition to be incompetent as it has run afoul of the provisions of Section 141 of the Act. The fact that the petition was incompetent robbed the tribunal the necessary jurisdiction to entertain it.

The result of an election has to be declared by the appropriate returning officer in a manner prescribed by the Electoral Act[197] after ascertaining the successful candidate that receive the highest number of votes at the election.[198] The result of an election must be posted on the INEC Notice Board and on its website showing the names of all the candidates that participated at the election and their scores and the person returned at the election or declared elected.[199]

[197]Corresponding provisions of the Electoral Act 2010.
[198]Sections 70 and 69 of the Electoral Act 2006 and 2010 respectively.
[199] Section 72, *ibid*

In **Alataha v Asin**[200] the Court of Appeal held thus: -

> By virtue of paragraph 39 of the 4th Schedule to Decree No. 36 of 1998, the Resident Electoral commissioner or the Electoral Officer as the case may be, shall cause to be posted at the State or Local Government Area office of the Independent National Electoral Commission, as the case may be, a notice showing the candidates at the election and their scores and the person declared as elected or returned at the election. The Local Government (Basic Constitutional and Transitional Provisions) Decree No. 36 of 1998 does not recognise radio announcement as mode or means of declaring an election result and radio announcement of election results is not within the contemplation of or envisaged by the enactment.

A petition presented after the expiration of the time allowed for filing of petitions will therefore be statute barred and therefore incompetent. Salami, JCA in the above case at page 44 paras. E-G aptly pronounced on this point where the learned jurist observed thus: -

> The time therefore began to run in this case on 7th December, 1998 when exhibit 1 or R1 was issued declaring the first respondent 'as being the winner of the election.' The time to sue was up on that day because from that day the petitioners could present their petition against the respondents and all the material facts required by them to prove their case had happened. Since the appellants had only 14 days from the return date to present their petition by virtue of section 82 of Decree 36 of 1998, the petition must be presented any day between 7th December,

[200](1999) 5 NWLR (pt. 601) 32 at pp. 40-41 paras. F-A

> 1998 and 21st December, 1998 otherwise they are out. The petition presented on 22nd December, 1998 is time or statute barred.

It suffices for the purpose of filing an election petition if the petitioner has taken all the steps required of him by filing the election petition and paying the required fees. The Court of Appeal has so held in **Okpoido v Udoikpong**[201] by holding thus[202]:

> A document or process is only properly filed in the court when it is presented to the registrar, assessed for the filing fee, the fee is paid and receipt is issued by the court official in-charge.

It is submitted that the issuance of a receipt by the registrar to the tribunal is immaterial and ought not to be a precondition to valid filing once the petitioner has done all that is expected of him to do on his part. In other wards if the registrar, for any reason, fails to issue the receipt upon payment by the petitioner or issues it on a different day, then such lapse on the part of the tribunal registry should not affect the validity of the petition that has been duly filed within the required time frame. The Appeal Court in the same judgment observed[203] thus:

> Compliance with statutory provision as to time within which to file an election petition is a fundamental pre-condition, breach of which is incurable and failure to comply with the statutory provision is fatal. In such

[201](1999) 5 N.W.L.R. (PT. 604) 595 AT 605 PARAS. C-D
[202]Per Ekpe, J.C.A. delivering the lead judgment.
[203]*Ibid* at p. 607, paras. E-F

> cases, the court has no jurisdiction to entertain the petition.

The fault of the registry like default or failure to issue receipt, therefore, should under no circumstances be visited on the petitioner once he has taken steps to do all that is expected of him to do within the stipulated time frame being a duty which the petitioner himself can neither perform nor exercise any form of control over.

It is submitted that the courts and tribunals are duty bound to do justice in the process of adjudication. The infliction of the slightest punishment on a litigant for a fault which is clearly not attributable to him can never be justified. The Court of Appeal in **Emesim v Nwachukwu**[204] has held thus:

> The guiding principle of a court in deciding cases is to do justice; that is justice according to law, but still justice. What is just in any particular case is what appears to be just to the just man, in the same way as what is reasonable to the reasonable man. The proper role of a court is to do justice between the parties before it. If there is any rule of law which impairs the doing of justice, then it is within the province of the court to do all it legitimately can do to avoid that rule or even change it so as to do justice in the instant case before it. The court need not wait for the legislature to intervene, because that can never be of any help in the instant case before it.

[204] (1999) 6 N.W.L.R. (PT. 605) 154 at pp. 168-169, paras E-A

The courts and tribunals have in a plethora of cases deprecated the practice of visiting the fault of its own staff on any litigant. Niki Tobi, J.C.A. (as he then was) observed[205] as follows: -

> Both Senator Anah, SAN and Mr. Amaechina submitted very strongly that the appeal should be struck out. I ask: What is the wrong of the appellant to deserve such a sanction or punishment? Should or must the appellant suffer because this court was unable to hear the appeal which was ready for hearing way back early this month? As I indicated earlier, the appeal was earlier fixed for 22nd February, 1999 but could not be heard because the Justices of the division were engaged in a very important official assignment. Is it the fault of the appellant that the matter was not heard that day? If so where is that fault? If the appellant was not at fault, then why should the big axe of striking out his appeal fall upon him? Can that be justice? Certainly if the appeal was taken on the 22nd of February, 1999, this whole fur ore should have not found itself in the judicial process. Should the appellant suffer for what he has not contributed in the slightest way, I ask once again. My sense of justice condemns such a position.

It is submitted that no party should be made to suffer the consequences of any fault which is not attributable to him or her. Also in the case of **Agomo v**

[205] *Ibid* at p. 168, paras. A-C

Aroakazi[206] where the Court of Appeal held thus: -

> Irregularities at an election which are neither the act of a candidate nor linked to him cannot affect his election.

In **Lamido v Turaki**[207] the Court of Appeal calculated the time lapse from 9th January when the election result was announced to 3rd March 1999 when the Election Tribunal gave its ruling was more than 50 days and therefore time barred. With the greatest respect, it is submitted that the relevant time frame for purposes of determining whether election petition was filed within time, is by computing the time lapse between the date when the election result was declared and the date of filing of the election petition. In the above case the Court of Appeal per Amaizu, JCA held thus: -

> Under section 132 of decree No. 3 of 1999 a petition must be brought within 30 days from the date on which the result of the election was declared. In the instant case, from the 9th of January to 3rd of March, 1999 when the tribunal gave its ruling is over 50 days. It follows that any action by the tribunal should have been caught by the above provision.

[206] (1998) 10 NWLR (pt 568) 173 at 176, paras D-E
[207] (1999) 4 NWLR (pt 600) 578 at 586 paras B-C

Returning a person at an election simply means declaring him as duly elected by an appropriate returning officer. This interpretation was given in **Alataha v Asia**[208]as follows:

> By virtue of section 99 of the Local Government (Basic Constitutional and Transitional Provisions) Decree No. 36 of 1998, the word 'return' means the declaration by a Returning Officer of a candidate in an election under this Decree as being the winner of the election.

Other electoral procedures has been discussed in due course under appropriate sub-heads.

3.2.3 **Qualification for Election Candidates**

An election may be challenged by way of petition for various reasons contending that the person returned as duly elected does not merit to be declared as winner of the election. An election may even be challenged on preliminary issues like qualification of a candidate for an election which goes to the root of the election and therefore within the jurisdiction of an Election Tribunal. In the case of **Balewa v Mu'azu**[209] the Court of appeal held thus: -

[208] *Supra* at p. 44 paras. C-D
[209] (1999) 5 N.W.L.R. (pt. 604) 636 at pp. 644-645, paras. G-B;F

> By virtue of the provisions of section 134 (1) of the State Government (Basic Constitutional and Transitional Provisions) Decree, the Election Tribunal has jurisdiction and competence to entertain an election petition based on qualification or non-qualification of the person whose election is questioned; that is to inquire into the question whether or not a person elected was qualified to have contested the Governorship election. In this case, the tribunal was in error to have held that it had no jurisdiction to entertain the grounds of the petition challenging the nomination of the 1st and 2nd respondents to contest the election.

When a candidate is disqualified to contest an election, he cannot be returned as elected and if even so returned by INEC an election tribunal seized of the case may upturn such wrong verdict, and the candidate with the highest votes amongst the qualified candidates will, in his stead, be pronounced as duly elected.

In an election requiring a candidate to be fielded with a running mate, the disqualification of one will affect the other. In **Balewa v Mu'azu**[210] the Court of Appeal held as follows:

> Where an elected Deputy Governor-elect is subsequently found not be qualified to contest the election and therefore disqualified as in the instant case, the implication of the disqualification is that the Governor-elect had no running mate and is therefore also disqualified from contesting the election by

[210] *Supra*

> virtue of the provision of section 96 (1) (k) of the State Government (Basic Constitutional and Transitional Provisions) Decree No. 3 of 1999. In the instant case, since the 1st and 2nd respondents were disqualified from contesting the election their election is invalid and by virtue of section 137 (2) of Decree No. 3 of 1999 null and void.

It is submitted with respect, that the above pronouncement has over stretched the law. One wonders why the disqualification of a running mate will affect the main candidate who is otherwise duly qualified to contest the election. It may otherwise disqualify the twin candidates if the main one is directly affected by the disqualification virus. It is further submitted that it will suffice if a disqualified candidate is substituted by a qualified one, unless such disqualification is made known to the electorate prior to the election. It will otherwise tantamount to taking such parties by surprise.

If a candidate is otherwise disqualified from contesting an election, his election may be properly nullified. An example is where a candidate who is employed in the public service of the Federal, State or Local Government contesting an election without resigning his appointment at least 30 days before the date of the election. However, if the office held by the candidate is not a public office as defined by the Constitution[211] the candidate will not be disqualified on that ground. In the case of

[211] See Section 318 of the 1999 Constitution.

DoukplolaghavAlamieyesigha[212] a Governorship candidate was challenged on ground of failure to resign his appointment before the election.

The brief facts of the case are that the appellant and the 1st respondent contested the Governorship election held on 26th March 1999 in Bayelsa State. The appellant was fielded by the All Peoples Party (APP) while the 1st respondent represented the Peoples Democratic Party (PDP). At the conclusion of the election, the 1st respondent was credited with 324,463 votes while the appellant was said to have scored 269,233 votes. The 3rd respondent, the Independent National Electoral Commission (INEC) accordingly declared the 1st respondent winner of the election.

The appellant was dissatisfied with the results and filed a petition in the Governorship and Legislative Houses Election Tribunal, Yenagoa on the grounds that the 1st respondent was not qualified to contest the election in that he was indicted for cheating in an examination and that he was also not qualified because he was a Chairman of a limited liability company wholly owned by Rivers and Bayelsa States; and that 1st respondent did not score majority of lawful votes cast at the election.

[212](1999) 6 N.W.L.R. (pt. 607) 502.

At the conclusion of hearing, the tribunal dismissed the petition in its entirety on the ground *inter alia* that the appellant failed to prove any of the allegations contained in the petition.

Aggrieved by the verdict of the tribunal, the appellant now appealed to the Court of Appeal. In resolving the appeal, the Court of Appeal considered *inter alia* the provision of section 38(1) (f) and (h), State Government (Basic Constitutional and Transitional Provisions) Decree No. 3 of 1999 and held[213] as follows: -

> By virtue of section 38 (1) (f) of the State government (Basic Constitutional and Transitional Provisions) Decree No. 3 of 1999, a person shall be disqualified from contesting a Governorship election if he is a person employed in the public service of the Federation or of any State or of any Local Government Council or Area Council and he did not resign from the employment at least 30 days to the date of the election. In the instant case, it was not disputed by the parties that the 1st respondent was only a part-time Chairman. It was in evidence that he had even resigned his appointment before contesting the election.

The Court of Appeal went further to painstakingly define a public office[214] as envisaged in the Constitution as follows: -

[213] *Ibid* at pp. 511-512, paras. G-A
[214] *Ibid* at p. 512, paras A-C

> By virtue of section 148 (1) of the State government (Basic Constitutional and transitional Provisions) Decree No. 3 of 1999, the public service of a State includes the civil service of the State and such service rendered by the staff of Commission, corporations and authorities of a State. The operative word here is "staff" and a part-time Chairman of a limited liability company cannot be regarded as a staff within the meaning of the above definition. Therefore, it is ridiculous to hold the view that mere holding of a part-time chairmanship of a limited liability company in which a State Government or Federal Government or any Government for that matter holds a controlling share will amount to a person employed in the public service within the meaning of section 38 (1) (f) of Decree No. 3 of 1999 to prevent him from contesting the Governorship election. What is envisaged under section 38 (1) (f) is a full time staff.

In the same judgment, the Court of Appeal considering whether the same candidate was disqualified by reason of indictment for an offence involving dishonesty further held thus: -

> By virtue of section 80 of the Air Force Act, Cap. 15 Laws of the Federation of Nigeria, 1990, before an allegation against an Air Force officer that he has committed an offence against any provisions of the Act is proceeded with, the allegation shall be reported, in the form of a charge, to the commanding officer of the officer so charged and the commanding officer shall investigate the charge in the prescribed manner. However, a mere report to the commanding officer cannot suffice as a charge. In the instant case, exhibit k was nothing more than a report made to the

> commanding officer about the 1st respondent and not a charge. There was therefore no charge ever preferred against the 1st respondent as envisaged in the aforementioned section 80 of the Air Force Act. Consequently, there is no merit in the allegation that the 1st respondent in the instant case had been indicted or convicted or found guilty of any fraud or examination malpractice so as to warrant his being disqualified from contesting the election as envisaged in section 38 (1) (h) of the State Government (Basic Constitutional and Transitional Provisions) Decree No. 3 of 1999.

In his contributory judgment Akaahs, JCA further made the following observation:

> Suffice it to say that the 1st respondent was not convicted by any tribunal duly constituted nor was he indicted as envisaged by section 38 (1) (h) of the State Government (Basic Constitutional and Transitional Provisions) Decree No. 3 of 1999 which was corroborated by the evidence of PW 10 (Lt. Col. Emmanuel EtimBassey) and AVM Frank OnaweryeneAjobena who gave evidence as DW7. Exhibit 'K' could not by any stretch of imagination have amounted to a conviction or indictment.

It is submitted that the law is over stretched beyond the intention of the legislature in **Doukplolagha v Alamieyesigha**(*supra*) by assigning to it a definition inconsistent with the plain and clear provision of the Constitution. The provision of sections 137 and 182(1)(e) and (i) of the Constitution on disqualification of presidential or governorship candidate

respectively are on all fours and unambiguous. Section 137(1) (e) and (i) provide thus:

> 137(1) A person shall not be qualified for election to office of President if-
>
> (a) ...(sic)...
>
> (b) ...(sic)...
>
> (c) ...(sic)...
>
> (d) ...(sic)...
>
> (e) the within a period of less than ten years before the date of the election to the office of President he has been convicted and sentenced for an offence involving dishonesty or he has been found guilty of the contravention of the Code of Conduct; or
>
> (f) …(sic)…
>
> (g) …(sic)…
>
> (h) …(sic)…
>
> (i) he has been indicted for embezzlement or fraud by a Judicial Commission of Inquiry or an Administrative Panel of Inquiry or a Tribunal set up under the Tribunals of Inquiry Act, a Tribunals of Inquiry Law or any other law by the Federal or State Government which indictment has been accepted by the Federal or State Government, respectively;

These provisions are clearly disjunctive. It is submitted that the conjunctive interpretation runs afoul of the provision of section 137(1) of the

Constitution. Moreover that provision has been repealed.[204] It has therefore overtaken so many previous decisions of the Supreme Court like **Action Congress v INEC** (2007) 12 NWLR (pt. 1048) 220, where the Supreme Court at pp 259-260 per Katsina Alu, JSC (as he then was) held that indictment by an administrative panel of enquiry can not disqualify a candidate in an election unless he is convicted by a court of competent jurisdiction.

Before the constitutional amendment the Supreme Court decision in **Action Congress v INEC** had marked a quantum leap on disqualification of indicted candidates in the Nigeria's electoral process. That decision was followed by the Court of Appeal Kaduna Division in its judgment delivered on 22nd May 2008 in the case of **M. Yahaya Abdulkarim & 2 ors v Mahmuda Aliyu Shinkafi & 18 others**[205] the Court of Appeal, per Mukhtar JCA, held that an indictment by an administrative panel of enquiry and duly accepted by the Federal Government in a white paper did not suffice to disqualify the PDP governorship running mate Mukhtar Ahmed Anka as envisaged by section 182(1) (i) of the 1999 Constitution. This section has similarly been repealed by section 19 of the Constitution (First Alteration) Act.[206]

[204] See Section 13 of the Constitution of the Federal Republic of Nigeria (First Alteration} Act, 2010
[205] Unreported Appeal No. CA/K/EP/GOV/30/2007
[206] Section 19, *ibid*

Even before the amendment one would submit that sections 137 and 182(1) (i) of the Constitution were clearly intended to incapacitate any person whose character has been beclouded by indictment for embezzlement or fraud by an administrative panel of enquiry and accepted in a white paper by either the Federal or State Government from contesting an election into the exalted public offices of the President or a Governor respectively. Sections 66 and 107(1) (h) of the Constitution have made similar provisions applicable *mutatis mutandis* to the Federal and States legislatures respectively, which has been discussed hereunder. These provisions clearly and unequivocally disqualifies any person who has been indicted for embezzlement or fraud by an administrative panel of enquiry set up by the Federal or State Government and duly accepted by the said government. It is clear therefore that mere indictment as against conviction is sufficient to disqualify any candidate from contesting an election as presidential or governorship candidate including his or her running mate. In other words the allegation or indictment need never be tried by any court much less a conviction which consequentially follows a successful prosecution.

Sections 66 and 107(1) (h) of the Constitution made similar provisions in respect of disqualification to contest the membership of the National Assembly or House of Assembly of a State respectively. The Court of Appeal

Kaduna Division has similarly held in **Hon Aminu Sule Garo v Senator Bello Hayatu Gwarzo**[207] per Jega, JCA that an indictment by an administrative panel of enquiry against Senator Bello Hayatu Gwarzo did not disqualify him from contesting the National Assembly election as envisaged by section 66(1) (h) of the Constitution.

It is submitted that the interpretations made by the Supreme Court in **A.C v INEC** and the Court of Appeal in **Abdulkarim v Shinkafi** and **Sule Garo v Gwarzo** (*supra*) do not only tantamount to turning the law upside down but also to making of a judicial legislation that overrides a clear and unequivocal provision of the Constitution, which even the legislature, has no power to do.

The Court of Appeal used to be the final Appeal Election Tribunal in governorship and legislative houses election petitions.[215] The 1999 Constitution is very clear on this. It states:

> The decisions of the Court of Appeal in respect of appeals arising from election petitions shall be final.

At times however parties appeal further to the Supreme Court in matters which ought to terminate at the Court of Appeal, may be to buy or waste more time which at the end of the day serves no purpose and is not even

[207] Unreported Appeal No CA/K/EP/NA/1/08 delivered on the 9/9/2008
[215] *Op cit* Section 246 (3) of the 1999 Constitution.

adequately covered by cost. In **Awuse v Odili**[216] the Supreme Court in a unanimous decision held that the Court of Appeal is the final appellate court in respect of all election petitions other than Presidential. The Supreme Court therefore struck out the further appeal against the decision of the Court of Appeal on governorship appeal as being incompetent.

3.3 **The National and States Houses of Assembly Election Tribunal**

This Tribunal was established by the Constitution[217] to, *inter alia*, exclusively determine the question whether any person has been validly elected as a member of the National Assembly or whether the seat of any such member has become vacant. The Tribunal also has a unique jurisdiction to determine whether the term of office of any person under the Constitution has ceased. The 1999 Constitution provides[218] thus: -

> There shall be established for the Federation one or more election tribunals to be known as the National and States Houses of Assembly Election Tribunals which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether-
>
> Any person has been validly elected as a member of the National Assembly;

[216] (2004) 8 NWLR (Pt.876) 481
[217] Section 285 (1) of the 1999 Constitution.
[218] Section 9 of the Constitution of the Federal Republic of Nigeria (First Alteration) Act 2010

> Any person has been validly elected as a member of the House of Assembly of a State;

3.3.1**Composition**

The National Assembly Tribunal is constituted by a Chairman and four other members as set out in the sixth schedule to the Constitution. The Chairman must be a Judge of a High Court and the four other members shall be appointed from among Judges of a High Court, Kadis of a Sharia Court of Appeal, Judges of a Customary Court of Appeal or other members of the judiciary not below the rank of a Chief Magistrate.[219]

Just like other Election Tribunals the chairman and members are appointed by the President of the Court of Appeal in consultation with the heads of court where the Judges and Kadis are drawn from. Article 1 (3) of the sixth schedule to the 1999 Constitution so provides as follows:

> The Chairman and other members shall be appointed by the President of the Court of appeal in consultation with the Chief Judge of the State, the Grand Kadi of the Sharia Court of Appeal of the State or the President of the Customary Court of appeal of the State, as the case may be.

[219] Article 1 (1) and (2) of the 6th Schedule to the 1999 Constitution

The Rules of Procedure for Election Petitions under the first schedule to the Electoral Act, 2006 however confer on the Tribunal Chairman the power to dispose of interlocutory matters single handily to enhance expeditious disposition of election petitions. The provision[220] states: -

> All interlocutory questions and matters may be heard and disposed of by the Chairman of the Tribunal or the Presiding Justice of the Court who shall have control over the proceedings as a Judge in the Federal High Court.

3.3.2 **Candidate in an Election**

The names of candidates sponsored by the various political parties are submitted to the Electoral Commission within a definite time frame and is not deemed closed until INEC has published the names of candidates for the election, and failure of INEC to publish does not operate to deny any candidate his right to contest the election. The Court of appeal in **Ella v Agbo**[221] has held thus: -

> Although the nomination exercise does not end until the Independent National Electoral Commission (INEC) publishes the list of persons standing nominated, a candidate who diligently fulfils all the

[220] Article 26 (1) and (2) of the First Schedule to the Electoral Act 2006, p.A85
[221] (1999) 8 NWLR (Pt. 613) 139 at 150, paras A-B

> requirements in the nomination exercise as prescribed by the Rules will not have his nomination invalidated by failure of INEC to publish the list of persons standing nominated under paragraph 7 (1) of schedule of 4 to the National Assembly (Basic Constitutional and Transitional Provision) Decree No. 5 of 1999. In the instant case, as the 2nd respondent was validly nominated, he was unlawfully excluded from participating in the election.

Once a candidate has been validly nominated to contest an election, this candidature cannot be questioned by way of an election petition. This was the verdict of the Court of Appeal per Salami, JCA in the case of **Ibrahim v INEC**[222] where the learned jurist observed that: -

> By the combined effect of paragraphs 6 (3) and 7 (2) of schedule 4 to the National Assembly (Basic Constitutional and Transitional Provisions) Decree No. 5 of 1999, the election of a candidate who has been validly nominated under the provisions cannot eventual be questioned by an election petition. Similarly, no candidate who has been screened and cleared to contest an election can be stopped from contesting the election for any reason whatsoever except the candidate dies or voluntarily withdraws his candidature. In the instant case, since the 3rd respondent contested the election to the House of Representatives and was returned as elected, in the absence of any other evidence to the contrary, it is presumed that the relevant Federal Electoral Commissioner or Electoral Officer had declared that he had been validly nominated, screened and cleared.

[222] (1999) 8 NWLR (PT 614) 334 AT P. 350, Paras D-H

Election petitions are always determined on the provisions of the Constitution, the Electoral Act and other relevant rules of procedure applied to the facts, the figures and the circumstances of each particular case... Thus where an election result fails to state relevant scores, it is incompetent and liable to be struck out.

In a situation where a political party presents more than one candidate for the same constituency, the INEC reserves the right to allow one amongst such candidates to contest the election and the decision of the Commission is final. It cannot be questioned by any Election Tribunal or Court. In his contribution Omage, JCA aptly expressed the following views:[223]

> By virtue of section 79(4) of the National Assembly (Basic Constitutional and Transitional Provisions) Decree No 5 of 1999, where a political party has presented more than one candidate for a particular senatorial district or Federal constituency, a decision of the Electoral Commission allowing one of such candidates to contest the election is final and shall not be reviewed by an electoral tribunal or any court of law.

The law however took a different dimension in the 2006 Electoral Act. The provisions of sections 144 and 145 have been interpreted by reading the two provisions harmoniously and thereby piercing in to the real intention of the legislature regarding candidates that have been duly nominated but

[223] *Ibid* at p. 354, paras. F-G

unlawfully excluded from contesting the election. In a plethora of authorities election petitions bordering on unlawful exclusion have been out rightly nullified. In the unreported appeal No CA/L/EPT/LAS/NA/001/07 the Court of Appeal per Mukhtar, JCA held thus: -

> The provision of section 145 (1) (d) therefore gives a clear scope and intendment of the lawmaker as to who are a candidate and/or a political party that participated in an election. If the exclusion of a candidate from participating in the balloting process grounds a petition, then common sense suggests that a person duly nominated by his political party but unlawfully excluded from participating at the election is eligible to present a petition….
>
> With the guidance and harmonious interpretation of the two provisions in sections 144 (1) and 145 (1) (d) of the Electoral Act 2006 one has no difficulty in finding that a candidate duly sponsored by a political party and whose nomination has been duly accepted by INEC is, without doubt a candidate and his political party is a party that participated in the election though unlawfully excluded at the balloting process. An unlawful exclusion, usually by INEC does not reduce the status of a candidate or a political party from their *locus standi as* envisaged by section 144 (1). There is nothing in fact in the law to suggest that a candidate or political party must participate at the balloting process on the Election Day to qualify as a candidate in an election. It will otherwise make the provision of section 145 (1) (d) a complete nonsense. That cannot be the intendment of the legislature.

In more recent times the issue of unlawful exclusion has been more radically viewed in the pronouncement of the Supreme Court that nomination of a candidate to contest an election tantamount to actually contesting the election. In the case of **Rotimi Chibuike Amaechi v INEC**[225] the appellant was the plaintiff in the trial court. The appellant emerged as the candidate of the Peoples Democratic Party (PDP) for Rivers State at the governorship primaries conducted by the PDP. The result of the primaries showed that the appellant polled 6,527 votes. The second respondent Celestine Omehia did not contest at the primaries.

Pursuant to the primaries, the PDP forwarded the appellant's name to INEC as the governorship candidate for the State on 14/12/06. INEC subsequently published the appellant's name as the PDP candidate for the State. Soon thereafter rumour became rife that the appellants name was about to be substituted. The appellant went to court to stop PDP from substituting his name or disqualifying him except in accordance with the provisions of the Electoral Act.

Subsequently, on the 2/2/2007, the PDP sent the name of the 2nd respondent Celestine Omehia to INEC as its gubernatorial candidate in substitution for the appellant. INEC affected the substitution during the pendency of the

[225] (2008) 5 NWLR (Pt 1080) 227

appellant's suit, reason being that the appellants name was submitted in error.

The appellant, before the trial court claimed, *inter alia*, a declaration that the changing or substituting a candidate whose name is already submitted to INEC by a political party could only be done if the candidate is disqualified by a competent court order, and that there was no cogent or verifiable reason given for the substitution as required under section 34(2) of the Electoral Act 2006. In a landmark and novel judgment by the Supreme Court delivered by the full Court of seven Justices, it was held, at page 296 paragraphs C-D, that:

> There was no provision of the Electoral Act 2002 similar to section 34(1) of the Electoral Act 2006 in force at the time the cases of **Dalhatu v Turaki** (2003) 15 NWLR (Pt 843) 310 and **Onuoha v Okafor**(1983) 2 SCNLR 244 that political parties have the right to put up as candidates for elective offices any persons they deem fit were decided. Section 34(2) has altered the law and made those cases inapplicable in a case as this one.

The conclusion arrived at by the Supreme Court was not only far-reaching but also novel in the development of the Nigerian polity and democratic governance. Oguntade, JSC observed, at pages 324 – 325 thus: -

> This court and indeed all courts in Nigeria have a duty which flows from a power granted by the Constitution

> of Nigeria to ensure that citizens of Nigeria, high or low get the justice which their case deserves. The powers of the court from the Constitution not at the sufferance or generosity of any other arm of the Government of Nigeria. The judiciary like all citizens of this country cannot be an onlooker when any person attempts to subvert the administration of justice and will not hesitate to use the powers available to it to do justice in the cases before it.

The learned jurist cited the provisions of Section 6(6)(a) of the 1999 Constitution and Section 22 of the Supreme Court Act on judicial powers of the Supreme Court and further observed thus:

> In view of the above provisions, there can be no doubt that there is a plenitude of power available to this court to do which the justice of the case deserves. It enables a court to grant consequential reliefs in the interest of justice even where such have not been specifically claimed. Having held as I did that the name of Amaechi was not substituted as provided by law, the consequence is that he was the candidate of the PDP for whom the party campaigned in the April 2007 election not Omaehia and since PDP was declared to have won the said elections, Amaechi must be deemed the candidate that won the election for the PDP. In the eyes of the law, Omehia was never a candidate in the election much less the winner. It is for this reason that I on 25/10/2007 allowed Amaechi's appeal and dismissed the cross appeal. I accordingly declared Amaechi the person entitled to be the Governor of Rivers State. I did not nullify the election of 14/04/2007 as I never had cause to do so for the reasons earlier given in this judgment.

With respect, this decision seems to be extraneous to the jurisdiction of the Supreme Court, which clearly has no jurisdiction, be it original or appellate on any election matter other than presidential.[208] It is submitted that in deciding the right of Amaechi as the person who was supposed to be fielded by the PDP as its candidate in the gubernatorial election that was held on 14/04/2007, the Supreme Court ultimately decided an election matter. It is not in doubt that a declaration or return of Amaechi as the duly elected Governor of Rivers State is clearly an election matter. It is immaterial that it emanated from an issue of candidature. Moreover, Amechi did not ask the court to declare him as the elected Governor of Rivers State, because he knew as a matter of fact that he did not contest that election and could not have asked for such a relief. In other words he never was a candidate in the gubernatorial election of which he is declared to be the winner. The electorate did not vote for him, but for the fielded candidate Mr Omehia. One wonders whether an election could be won by a person who has not contested for it in the first place. It is submitted that the answer should have been in the negative. What the Supreme Court should have done, with respect, was to decline jurisdiction and direct the matter to be heard on the merits by the Rivers State Governorship and Legislative Houses Election Tribunal and the processes to be deemed as

[208] See Sections 8 and 9 of the Constitution of the Federal Republic of Nigeria (Second Alteration) Act, 2010.

properly filed since time for filing petition had then already elapsed. However, the Supreme Court being the highest in the hierarchy of courts in Nigeria, its decision is final and binding on all other courts. Section 235 of the 1999 Constitution so provides thus: -

> Without prejudice to the powers of the President or of the Governor of a State with respect to prerogative of mercy, no appeal shall lie to any other body or person from the determination of the Supreme Court.

The judgment in Amaechi's case is no longer the current position of the law. Section 141 of the Electoral Act 2010 has set a permanent impediment on candidates that have not physically participated in an election from being declared winner thereof.

3.4 **Local Government/Area Council Election Tribunals**

The Local Government Election Tribunal was hitherto established by the Local Government (Basic Constitutional and Transitional Provisions) Decree No. 7 of 1997. The 1999 Constitution, however, establishes States Independent Electoral Commission[226]for each State of the Federation, which regulates the Local Government or Area Council elections. The elections are regulated by state laws except in the Federal Capital Territory Abuja.[227]

[226] Section 197 (1) of the 1999 Constitution
[227] See Part ix of the Electoral Act, 2006

In the Federal Capital the Electoral Act 2006 established an Area Council Election Tribunal and an Area Council Election Appeal Tribunal.[228] It is intended to discuss the composition, function and jurisdiction of this grassroots tribunal.

3.4.1 **Area Council Election Tribunal**

The Area Council Election Tribunal is established by section 135 of the Electoral Act 2010, which provides thus: -

> (1) There shall be established for the Federal Capital Territory one or more Election Tribunals (in this Act referred to as the Area Council Election Tribunal) which shall, to the exclusion of any other court or tribunal, have original jurisdiction to hear and determine any question as to whether:
>
> > (a) Any person has been validly elected to the office of chairman, Vice Chairman or Councillor
> >
> > (b) The term of office of any person elected to the office of chairman, Vice Chairman or Councillor has ceased;
> >
> > (c) The seat of a member of an Area Council has become vacant; and
> >
> > (d) A question or petition brought before the Area Council Election Tribunal has been properly or improperly brought.

[228] See Sections 142 and 143 of the Electoral Act, 2006

(2) An Area Council Election Tribunal Shall consist of a chairman and two other members.

(3) The chairman shall be a Chief Magistrate and four other members shall be appointed from among Magistrates of the Judiciary of the Federal Capital Territory, Abuja and legal practitioners of at least 10 years post-call experience, non-legal practitioners of unquestionable integrity or other members of the Judiciary of the Federal Capital Territory not below the rank of a Magistrate.

3.4.1.1 **Jurisdiction**

The Area Council Election Tribunal has an exclusive jurisdiction to hear and determine election petitions regarding the office of an Area Council Chairman, Vice Chairman or Councillor or whether the term of office of such officials has ceased. It is also within its exclusive jurisdiction to determine if the seat of any council member has become vacant. It can also determine the competence or otherwise of any matter brought before it.

3.4.1.2 **Composition**

The Area Council Election Tribunal consists of a five member panel that is a chairman and four members. Section 135 (2) of the Electoral Act 2010 provides:

> An Area Council election Tribunal shall consist of a chairman and two other members.

The Chairman must be a Chief Magistrate and the other four members consist of a serving Magistrate in the FTC Judiciary, a legal practitioner of not less than ten years standing at the bar, a non-lawyer of unquestionable integrity, and an officer of the Federal Capital Territory, Abuja Judiciary not below the rank of a Magistrate. The Electoral Act 2010 provides[229]:

> The chairman shall be a chief Magistrate and two other members shall be appointed from among Magistrates of the Judiciary of the Federal Capital Territory, Abuja and legal practitioners of at least 10 years post-call experience, non-legal practitioners of unquestionable integrity or other members of the Judiciary of the Federal Capital Territory not below the rank of a Magistrate.

Although plurality in the various membership categories is signified in the drafting language, it is submitted that less than one member from each category may be appointed to make up the three-man panel that hitherto used to be a five-man panel for an Area Council Election Tribunal.

3.5 **Area Council Election Appeal Tribunal**

A right of appeal is available to parties aggrieved or otherwise dissatisfied with the verdict of the Area Council Election Tribunal to the Area Council Appeal

[229] Section 135 (3), *ibid*

Tribunal[230] established by section 135 (1) of the Electoral Act 2010 which provides: -

> There shall be established for the Federal Capital Territory (FTC) the Area Council Election Appeal Tribunal which shall to the exclusion of any other court or tribunal hear and determine appeals arising from the decision of the Area Council Election Petition Tribunal.

The right of appeal in an Area Council petition is limited to the Area Council Appeal Tribunal which is the final appellate adjudicator on all Area Council election petitions. The Electoral Act 2006 provides:

> The decision of the Area Council Election Appeal Tribunal in respect of Area Council elections shall be final.

The Appeal Tribunal also has the same composition of a five-man panel but in a stronger composition. The Electoral Act 2010 as well makes a similar provision[231] thus:

> An Area Council Election Appeal Tribunal shall consist of a Chairman and two other members and the Chairman shall be a Judge of the High Court and the two other members shall be appointed from among Judges of the High Court of the federal Capital Territory, Abuja, Kadis of the Sharia Court of Appeal of the Federal capital Territory, Abuja, Judges of the Customary Court of Appeal or other members of the

[230] Hereinafter referred to as 'the Appeal Tribunal'
[231] See Section 135(2) of the Electoral Act, 2010

Judiciary of the federal Capital Territory, Abuja not below the rank of a Chief Magistrate.

The Chairman is appointed from amongst serving Judges of the High Court of the Federal Capital Territory, Abuja and the four other members are made up as follows:

(1) Another High Court Judge

(2) A Kadi of the Sharia Court of Appeal

(3) A Judge of the Customary Court of Appeal and

(4) An officer of the Judiciary not below the rank of a Chief Magistrate.

To enhance expeditious hearing and determination of election petitions, an Area Council Election Tribunal is constituted by the Chairman sitting with two other members.[232]

3.6 **Election Petitions**

The term election petition has, regrettably, not been precisely defined even by the Electoral Act, which simply defines[122] the word 'election' to mean "any election under this Act to which an election petition relates." The Black's

[232] Section 143 (4) of the Electoral Act, 2006*, ibid*
[122] See Article 1 of the First Schedule to the Electoral Act, 2006

Law Dictionary[233] only gives a British related definition of the term as follows:

> In England, petitions for enquiry into the validity of elections of members of parliament when it is alleged that the return of a member is invalid[234] for bribery or any other reason.

One learned writer[235] has made an attempt at modifying the definition to suit the Nigerian context as follows:

> A formal written request presented to a court or tribunal for enquiry into the validity or otherwise of a candidates return when such return is allegedly invalid.

The words "when such return is allegedly invalid" are, with respect, superfluous and put a query against validity of an election result. It was however a good attempt to define what the Electoral Act has failed or omitted to define, its significance notwithstanding. It is difficult to make any better attempt. One may say that an election petition is a unique process presented to a court or tribunal by an aggrieved political party and/or candidate challenging the validity of an election or election result.

Election petitions are so unique and special in nature that they are expected to and indeed must take precedence over and above the normal day to day

[233] 6th Edition at p. 519
[234] Underline supplied for emphasis
[235] Onamade, P. A. Advocacy in Election Petitions, Philade Co Ltd, Lagos, (2007) p. 235

adjudication. The importance of a speedy and expeditious disposition of election petitions to the sustenance of democracy and well-being of a democratic society cannot be over emphasized. The following views[236] of Uwais, JSC (as he then was) are apt on this point: -

> Election petitions are by their nature peculiar from the point of view of public policy. It is the duty of the courts therefore to endeavour to hear them without allowing technicalities to unduly fetter their jurisdiction.

The learned jurist further stressed the importance of expeditious disposition of election petitions in the case of **Orubu v NEC**[237] in the following terms: -

> An election petition is not the same as ordinary civil proceedings, it is a special proceedings because of the peculiar nature of elections which by reason of their importance to the well-being of a democratic society, are regarded with an aura that places them over and above the normal day to day transaction between individuals which give rise to ordinary or general claims in court. As a matter of deliberate policy to enhance urgency, election petitions are expected to be devoid of the procedural clogs that cause delay in the disposition of the substantive dispute.

Election petitions are therefore unique and peculiar by their own nature. In **Obasanya v Babafemi**[238] the Court of Appeal following the Supreme Court decision in **Orubu v NEC**[239] held per Galadima, JCA as follows:

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[236] See Nwobodo v Onoh (1984) 1 S.C. 195
[237] (1988) 5 NWLR (PT 94) 323
[238] (2000) 15 NWLR (Pt. 689) 1at 17 paras A-C

> An election petition is not the same as ordinary civil proceedings. It is a special proceeding because of the peculiar nature of elections which by reason of their importance to the well-being of a democratic society are regarded with aura that places them over and above the normal day-to-day transactions between individuals which give rise to ordinary or general claims in court.

As observed earlier[240] the only legally recognizable means of challenging an election or election result is by way of an election petition complaining of undue election or undue return presented to a court or tribunal of competent jurisdiction as provided by the 1999 Constitution or the Electoral Act.

3.6.1 **Presentation of an Election Petition**

The Electoral Act 2010 is very clear on who may present an election petition. It states:[241`]

> (1) An election petition may be presented by one or more of the following persons:
>
> (a) a candidate in an election;
> (b) a political party which participated in the election

[239] *Supra*
[240] *Op cit* at page 114-115
[241`] See Section 137 of the Electoral Act, 2010

> (2) The person whose election is complained of, is in this Act, referred to as the respondent.
>
> (3) If the petitioner complains of the conduct of an Electoral Officer, a Presiding or Returning Officer, it shall not be necessary to join such officers or persons notwithstanding the nature of the complaint and the Commission shall in this instance, be-
>
> (a) made a respondent; and
>
> (b) demed to be defending the petition for itself and on behalf of its officers or such other persons.

The above provision has stated without any ambiguity that an election petition may be presented either by a candidate in the election and, of course, the loser or a political party, which participated in the election or both. The bottom line issue is participation in the election in respect of which the petition is presented. In **D.N.P. v U.N.C.P.**[242] the Court of Appeal held thus: -

> By virtue of section 88 (1) of Decree No. 7 of 1997, only a person claiming to have a right to be elected or returned at an election or who is alleged to have been a candidate at an election may present an election petition. In the instant case, the 2nd appellant was not qualified to contest the election. She therefore had no *locus standi* to present an election petition.

[242] (1998) 8 NWLR (pt. 563) 644 at 648, paras C-D

This important issue of *locus standi* is further interpreted by the Court of Appeal in the case of **Ogunmokun v The Military Administrator of Osun State**[243] as follows: -

> *Locus standi* means a place of standing to interfere. A right of appearance in a court of justice or before a legislative body on a given question. A right to be heard. The term *locus standi* denotes legal capacity to institute proceedings in a court of law.

The law is trite that *locus standi* of a petitioner provides life to the petition itself. Absence of *locus* is therefore so fatal that it renders the petition incompetent and liable to be struck out perforce. In the same **Ogunmokun's** case[244] above the Court of Appeal held:

> Whereas in the instant case there is no dispute affecting the civil rights and obligation of the plaintiff, it means that such a plaintiff has failed to establish his *locus standi*. Therefore, there are no competent parties before the court as set out in the case of **Modukolu v Nkemdilim**(1962) 2 SCNLR 314; and as competent parties are not before the court, the court therefore lacks jurisdiction to adjudicate on the matter. As the appellant in the instant case lacked the *locus standi* the trial court lacked the competence and jurisdiction to adjudicate on the complaints of the appellant before it.

[243] (1999) 3 NWLR (pt. 594) 261 at 285, paras C-E
[244] *Ibid* at p 287, paras A-B

Remarking on the meaning and significance of *locus standi*, one learned writer[245] observed as follows: -

> The *locus standi* of a petitioner is a crucial matter touching on the competence and the jurisdiction of an Election Petition Tribunal to adjudicate on the petition before it. *Locus standi* focuses on the party asking to get his complaint before the court on the issues he wishes to have adjudicated. It is primarily the duty of the Election Petition Tribunal to satisfy itself that a petitioner before it has the *locus standi* to present the petition before proceeding with the hearing of the petition.

The Supreme Court in **Egolum v Obasanjo**[246] has also expressed the following views: -

> Only a person falling within the provisions of section 50 (1) of the Presidential Election (Basic Constitutional and Transitional Provisions) Decree No. 6 of 1999 has the *locus standi* to present a petition under the Decree. And then, in addition, the petitioner should go further to specify how he acquired the right to present the petition.

3.6.1.1 **Proper Respondent to an Election Petition**

Having examined the petitioner's side, it is pertinent to turn the other side of the coin by appraising who a proper respondent in an election petition is.

[245] Babalola, A, Election Law and Practice, Latec Printers Ltd, Ibadan, (2003) p.194.
[246] (1999) 7 NWLR (pt. 611) 355 at p. 385, paras A-B

The sum total of the previous and present sub topics examine what qualifies a person as a necessary party to an election petition, whether as a petitioner or a respondent. It is intended here to discuss the respondent's *locus standi* under the law.

A political party may or may not be a necessary party and when it is not, it will not be necessary to join it as a party. In **Maska v Ibrahim**[247] the Court of Appeal held thus: -

> By virtue of section 83 (1) of the Local Government (Basic Constitutional and Transitional provisions) Decree No. 36 of 1998, an election petition may be presented by one or more of the following persons:
>
> (a) A person claiming to have had a right to contest or be returned at an election;
> (b) A candidate at an election. Also, under sub-section (2) of section 83 the person whose election is complained of in the petition is the respondent. However, if the petition complains of the conduct of an electoral officer, a presiding officer, a returning officer or any other person who took part in the conduct of an election, the electoral officer, the presiding officer, the returning officer or that other person shall for the purpose of the Decree be deemed to be a respondent and shall be joined in the election petition as a necessary party.

[247] (1999) 4 NWLR (pt 599) 415 at 423, paras C-F

> From the above clear and unambiguous provisions, it cannot be said *strictu sensu* that a political party is a necessary party to an election petition, although, it can sue and be sued in its corporate name.

As earlier discussed[248] the amendment of section 133 of the Electoral Act 2002 by section 137 of the Electoral Act 2010 makes it unnecessary to join any INEC officer or anyone else acting for INEC in an election petition. This development in the law effectively removes the worrisome situation under the 2002 Electoral Act whereby the INEC and hundreds of its officials were joined as respondents. That had the effect of proliferating the parties and prolonging trials unnecessarily which the law has used sufficient language to fast track.

[248] *Op cit* at p. 92-101; See also Section 144 of the Electoral Act 2002.

CHAPTER FOUR

THE APPELLATE COURTS AS ELECTION TRIBUNALS

The Court of Appeal and the Supreme Court, at the highest level of the judicial hierarchy operate as the Presidential Election Tribunal and the Presidential Election Appeal Tribunal respectively. In-depth analysis has been made regarding this special and onerous role of the two appellate courts. The recent amendment of the Constitution setting out timelines for trial of election petitions and appeals and broadening the appellate jurisdiction of the Supreme to include governorship election appeals[209] from decisions of the Court of Appeal has been critically appraised.

4.1 **The Court of Appeal as the Presidential Election Tribunal**

It is intended here to discuss the original jurisdiction of the Court of Appeal as an election tribunal. The 1999 Constitution[210] provides for original jurisdiction of the Court if Appeal as follows: -

> Subject to the provisions of this Constitution, the Court of Appeal shall, to the exclusion of any other court of law in Nigeria, have original jurisdiction to hear and determine any question as to whether-

[209] See section 29 of the Constitution of the Federal Republic of Nigeria (First Alteration) Act and section 9 of the (Second Alteration) Act 2010

[210] Section 239 of the 1999 Constitution as amended by sections 25 and 7 of the First and Second Alteration Act 2010 respectively.

> Any person has been validly elected to the office of President, Vice-President, Governor or Deputy Governor under the Constitution; or
>
> The term of office of the President, Vice-President, Governor or Deputy Governor has ceased; or
>
> The office of President, Vice-President, Governor or Deputy Governor has become vacant.

This provision clearly confers an exclusive original jurisdiction, on the Court of Appeal, to hear and determine not only election petitions on Presidential election but also whether the tenure in respect of the most exalted offices of the President or Vice President has ceased or the office has otherwise become vacant.[2]

Thus, the Court of Appeal is an election petition court or tribunal in respect of presidential election by virtue of section 239 of the 1999 Constitution (as amended). The Supreme Court in the case of **Ojukwu v Obasanjo**[3] held that by virtue of section 239 of the Constitution of the Federal Republic of Nigeria, 1999, the Court of Appeal is the Election Petition Court in respect of Presidential election.

[2] See section 145 (1) of the Electoral Act 2006 (Section 134 (1) of the Electoral Act 2007)

[3](2004) 12 NWLR (pt. 886) 169 at 213 paras. A-

4.1.1 **Jurisdiction**

As seen above, the Court of Appeal has an exclusive original jurisdiction to hear and determine election petitions in respect of presidential election. The question whether a petition on Presidential election is competent depends on whether it is based on any of the grounds specified in section 239 (1) of the 1999 Constitution or section 145 (1) of the Electoral Act 2006. The Court of Appeal has so observed in **Buhari v Obasanjo**[34] per Mahmud Mohammed, JCA (as he then was) thus: -

> The jurisdiction conferred on the Court of Appeal to hear and determine petitions on the conduct of the Presidential election is limited by law to the determination of such petitions based on the grounds specified in section 239 (1) (a) of the 1999 Constitution and section 134 (1) of the Electoral Act, 2002. In other words, the jurisdiction of the Court of Appeal as a court and not as a tribunal does not cover matters, which constitute infractions of the 1999 Constitution or any act committed in the course of the conduct of the election, which have not been made specific grounds in the election petition. In the instant case, the petitioners complained of discrimination by the 3rd respondent against them, and bias by the 3rd respondent's resident Electoral Commissioners. These complaints are not cognizable as grounds for challenging a Presidential election under the 1999 Constitution or of the Electoral Act, 2002. In the circumstance, the Court of Appeal had no jurisdiction to entertain the complaints in course of determining the petition.

The corresponding section 138(1) of the Electoral Act 2010which is identical *impari materia*the same with section145(1) of the Electoral Act 2006 provides:

> An election may be questioned on any of the following grounds;
>
> That a person whose election is questioned was, at the time of the election, not qualified to contest the election;
>
> That the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act;
>
> That the respondent was not duly elected by majority of lawful votes cast at the election; or
>
> That the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.

Having seen the parameter or boundaries of a competent election petition, it is now pertinent to analyse the basic components or critical elements upon which a presidential election may be questioned.

4.2 **Qualification**

The Constitution has specifically provided[35] for minimum qualification that a Presidential candidate must possess, thus: -

> 131. A person shall be qualified for election to the office of the President if-
>
> (a) he is a citizen of Nigeria by birth,

[35] Section 131

(b) he has attained the age of forty years,

(c) he is a member of a political party and is sponsored by that political party, and

(d) he has been educated up to at least School Certificate level or its equivalent.

Petitions premised on qualification rarely arise since the political parties themselves take that into consideration in nominating their candidates. The usual controversial issue, more often than not, is disqualification. The Constitution also provides the basic criteria for disqualification[36] thus: -

137(1) A person shall not be qualified for election to the office of President if-

subject to the provisions of section 28 of this Constitution, he has voluntarily acquired the citizenship of a country other than Nigeria or, except in such cases as may be prescribed by the National Assembly, he has made a declaration of allegiance to such other country; or

he has been elected to such office at any two previous elections; or under the law in any part of Nigeria, he is adjudged to be a lunatic or otherwise declared to be of unsound mind; or

he is under a sentence of death imposed by any competent court of law or tribunal in Nigeria or a sentence of imprisonment or fine for any offence involving dishonesty or fraud (by whatever name called) or for any the offence, imposed on him by any court or tribunal or substituted by

[36] Section 137 as amended by section 13 of the Constitution (First Alteration) Act, which deletes para. (i) (underlined). *Ibid*

a competent authority for any other sentence imposed on him by such a court or tribunal; or

within a period of less than ten years before the date of the election to the office of President he has been convicted and sentenced for an offence involving dishonesty or he has been found guilty of the contravention of the Code of Conduct; or

he is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in Nigeria or any other country; or

being a person employed in the civil or public service of the Federation or of any State, he has not resigned, withdrawn or retired from the employment at least thirty days before the date of the election; or

he is a member of any secret society; or

he has been indicted for embezzlement or fraud by a Judicial Commission of Inquiry or an Administrative Panel of Inquiry or a Tribunal set up under the Tribunals of Inquiry Act, a Tribunals of Inquiry Law or any other law by the Federal or State Government which indictment has been accepted by the Federal or State Government, respectively; or

he has presented a forged certificate to the Independent National Electoral Commission.

Both Chief Chukwuemeka Odumegu Ojukwu and General Muhammadu Buhari challenged the election of the former President Olusegun Obasanjo, *inter*

alia, on ground of disqualification. In both **Ojukwu v Obasanjo**[211] and **Buhari v Obasanjo**[212] the issue of disqualification raised against Obasanjo was that he was elected as Military Head of State in 1976 and again elected as President of Nigeria in 1999 and therefore was not illegible for a third term in 2003 elections. The Supreme Court in Ojukwu's case defined "election" in the context in which it is used in section 137 (1) (b) of the 1999 Constitution as follows: -

> The process of choosing by popular votes a candidate for political office in a democratic system of government. In the instant case, the 1976 appointment of the 1st respondent as the Head of the Military Government did not fall within the ambit of section 137 (1) (b) of the 1999 Constitution as the 1st respondent was not appointed to the office of President of the Federal Republic of Nigeria let alone by the popular votes of the people.

The Supreme Court continued further in the same judgment to define[213] "office" as follows: -

> By virtue of section 318 of the 1999 Constitution, "office" when used with reference to the validity of an election means any office the appointment to which is by election under the Constitution. Considering this definition under the Constitution, it means that the only valid election to the "office" of President is the one conducted under the provisions of the 1999 Constitution.

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[211] *Supra*
[212] *Supra*
[213] *Supra* at pp. 199-200, paras H-A

Moreover, even common sense dictates that the provisions of the 1999 Constitution cannot and do not cover Obasanjo's tenure as Head of Federal Military Government between 1976 and 1979 irrespective of whether he was appointed or elected by the Ruling Military Council into that office, because no law including the Constitution takes effect retrospectively as to cover an event that happened two decades before its promulgation. Edozie, JSC in his concurring judgment[214] expressed the following views:

> Even if, but without conceding, that the '1976 appointment' is by any strained construction equated to an election into the office of the President of the Federal Republic of Nigeria, the 1999 Constitution and the provisions therein including the section under consideration have no retrospective effect to include the appointment made in 1976 long before the coming into effect of the 1999 Constitution in May, 1999.

Tabai JCA (as he then was) in **Buhari v Obasanjo,** after holding that Chief Olusegun Obasanjo was qualified to contest the 2003 Presidential election[215] made the following observation: -

> The first issue is whether the first respondent was qualified to contest the 19/4/03 election. In paragraph 293 of the second amended petition the petitioners pleaded;

[214] *Ibid* at pp. 227-228, paras. H-A

[215] *Supra* at pp. 350-351, paras A-A

The petitioners further plead that the 1st respondent being a person who had been elected to the post of Head of State on two previous occasions namely 1976-79 and 1999-2003 is not qualified to contest the election.

The PW 138 Mukhtar Mohammed testified to the effect that he was a member of the Supreme Military Council, 1976 and that following the assassination of General M. Mohammed the 1st respondent was elected the Head of State. The DW 96 Vice Admiral Michael Ayinde Adelanwa gives evidence to the contrary. Learned senior counsel for the respondents submitted that this same issue of the qualification of the 1st respondent to contest the election has been settled in **Ojukwu v Obasanjo** (2004) 12 NWLR (pt. 886) 169. Chief Afe Babalola, SAN referred particularly to the statement of Mohammed, JSC page 198 where he said:

> On this point alone, assuming I accept that when the 1st respondent was appointed the Head of the Military Government he was elected, it is plain to say that he was not elected President of Nigeria but Head of the Federal Military government. The offices of the President and that of Head of Federal Military Government are not the same designations. No amount of analogy and play about words and phrases can change the meaning of what has clearly been provided in section 137(1) (b) of 1999 Constitution and section 6(2) (a) of Constitution (Basic Provisions) Decree No. 32 of 1975. This alone has flawed the contention of the appellant in the petition that the 1st respondent has been elected President of Nigeria by the Supreme Military Council in 1976.

> Chief Ahamba, SAN submitted that there was a distinction between **Ojukwu v Obasanjo**(supra) and the present case and that the earlier decision is not binding in this case. In my consideration the issue of the 1st respondent's qualification to contest the 19/4/03 election now canvassed before us was the same live issue in **Ojukwu v Obasanjo**(*supra*). From whichever way one looks at it, I do not find any distinction between the two cases. If there is any distinction, it is not more than the distinction between Lagos and Eko. I hold that the 1st respondent was qualified to contest the election.

In **Ojukwu v Obasanjo**[216]**,** Uwais, CJN distinguished the office of President of the Federal Republic of Nigeria as envisaged by section 137(1) (b) of the 1999 Constitution and Head of Federal Military Government appointed under Military decree, where the learned jurist observed thus:

> Surely, the office of Head of the Federal Military Government is not the same as the office of the President of the Federal Republic of Nigeria as envisaged by the 1999 Constitution which relates to a general election, while Decree No. 32 of 1975 talks of 'appointment' and not 'election'.

The concurring opinion of Niki Tobi, JSC reemphasized that nifty distinction[217] in the following words: -

> Section 9 (d) of the repealed Decree No. 32 of 1975 and section 137(1) (b) of the 1999 Constitution talk of different offices. While section 8 (d) provided for the office of Head

[216] [42]*Supra* at p. 202, paras G-H
[217] [43]*Ibid* at p. 221, paras. B-C

> of the Federal Military Government, section 137(1) (b) of the 1999 Constitution provides for the office of President. It is my view that the two offices do not mean the same as their functions are different. And so, it is futile for counsel for the appellant to invoke section 137(1) (b) because that 1st respondent is not caught by the subsection. In view of the fact that this is his second term in office as President of the Federal Republic of Nigeria, section 137(1) cannot be invoked against him. No, not at all.

By Section 8 of the Constitution (Basic Provision) Decree 32 of 1975, the Supreme Military Council appoints the Head of the Federal Military Government. The operative word, it is submitted, is "appointment" which does not by any stretch of technical interpretation, bear the same meaning with the word "election" in section 137 (1) (b) of the 1999 Constitution. The argument in both Ojukwu's and Buhari's cases that the appointment of Obasanjo as Head of the Federal Military Government in 1976 was synonymous with election to the office of the President of the Federal Republic of Nigeria was untenable in law as held by the Supreme Court. In other words, the phase "two previous elections" in section 137(1) (b) of the 1999 Constitution means elections conducted under the provisions of the Constitution. The appointment made in a Military regime therefore does not suffice or qualify as previous election.

4.3 **Procedure for Election**

The Independent National Electoral Commission[215] has the singular privilege to fix a date for holding of the Presidential and any other election at all levels. Section 26 of the Electoral Act 2006, which is similar to section 15 of the Electoral Act 2002, provides:

> Elections into the offices of the President and Vice President, the Governor and Deputy Governor of a State, and to the membership of the Senate, the House of Representatives and the House of Assembly of each State of the Federation and Chairman and Vice Chairman and Membership of an Area Council shall be held on the dates to be appointed by the Independent National Electoral Commission.

The INEC also may for compelling reasons, postpone any election in any part of Nigeria and appoint a new date for the election.[216] Where INEC postponed an election on or after the last date for delivery of nomination papers, and a poll has to be taken between the candidates, then on the new date for the election the Electoral Officer must proceed to take the poll as if the date appointed for election was the date for taking the poll[217]

No return shall be made in respect of a postponed election unless polling has duly taken place in the area or areas affected by the postponement.[218]

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[215] Hereinafter referred to as "INEC"
[216] See section 27 (1) of the Electoral Act, 2006
[217] Subsection (2), *ibid*
[218] Subsection (3), *ibid*

However, if the result in the area where election has been postponed is inconsequential to the overall result of the election, INEC may direct a return of the election to be made; that is where the result of the area in which election has been postponed cannot possibly change or affect the overall result of the election then INEC may in its discretion make a return in respect thereof.[219] An example is a situation where if the total number of the registered voters in the area where election has been postponed is added to the total score of the second highest amongst the contestants in the election, such losing candidate could not have won against the successful candidate. This is however, without prejudice to the right of any candidate in the election to challenge INEC's decision to make a return of the election. Upon filing such matter by a contestant in a Court or Tribunal of competent jurisdiction, the INEC's decision shall stand suspended until the matter is determined.[220]

4.3.1 **Preconditions for Winning a Presidential Election**

In Nigeria there are normally several candidates fielded by different politicalparties that partake in Presidential election. In the unlikely event of

[219] Subsection (4), *ibid*
[220] Subsection (5), *ibid*

a single candidate being nominated as presidential candidate, the provision of section 133 of the Constitution applies. It states thus:

A candidate in an election to the office of President shall be deemed to have been duly elected to such office where, being the only candidate nominated for the election-

he has a majority of YES votes over NO votes cast at the election; and

he has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the States in the Federation and the Federal Capital Territory, Abuja.

But where the only candidate fails to be elected in accordance with foregoing proceedure, then there shall be fresh nominations.

However, if only two candidates are nominated, the provision of section 134 of the 1999 Constitution ignites for return of a successful candidate. The various situations provided in the Constitution are:

A candidate in a Presidential election, where there are only two candidates fielded for the election will not be returned as duly elected unless he satisfies the following two mandatory preconditions: -

He has, of course, scored a majority of the votes cast at the election, and

He also has scored not less than 25% that is one quarter of the votes cast in each of, at least two thirds (2/3) of all the States of the Federation and the Federal Capital Territory, Abuja.[221]

Where the Presidential candidates are more than two, then only the candidate who fulfils the following two preconditions shall be returned as duly elected:

He has the highest number of votes cast at the election, and

He has not less than one quarter of the votes cast in each of, at least, two thirds of the States in the Federation and the FCT Abuja.

If no candidate is able to satisfy both conditions, a rerun election has to be conducted at various stages until a winner duly eligible to be returned emerges therefrom.[222] In other words in the event of a default in the emergence of a successful candidate, the fall-back position is to organize a rerun election among two candidates in each of the following instances:

A candidate who scores the highest number of votes in any election held in accordance with section 134(2) of the 1999 Constitution, and

[221] See Section 134 (1) and (2) of the 1999 Constitution
[222] Subsections (3), (4) and (5), *ibid*

One among the remaining candidates who has a majority of votes in the highest number of States. In this case, if there are more than one candidate with majority of votes in the highest number of States, then the candidate amongst them with the highest total votes cast at the election shall stand qualified as the second candidate for the election.

In the event of further default after conducting a rerun under subsection (3), INEC shall within seven days thereafter conduct a second rerun, and the candidate who satisfies the two preconditions as stated above shall be returned as duly elected.

In the event of a further default of any candidate emerging as duly qualified to be returned as elected, then INEC shall within another seventeen days from the date of announcing the result of the second rerun conduct a third and final rerun between the same candidates in which the candidate with the majority of the votes cast at that final ballot shall be returned as the duly elected President of the Federal Republic of Nigeria.

One wonders what happens in the unlikely event of the two candidates scoring equal number of votes. In that situation, it is submitted, only the last step needs to be repeated until one of the candidates gets the majority of the votes cast even if it be by a single vote.

By virtue of section 134(1) or (2) of the 1999 Constitution, a candidate for an election to the office of President shall be deemed to have been duly elected where there being more than two candidates for the election, he had the highest number of votes cast at the election; and he has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the States in the Federation and the Federal Capital Territory, Abuja. In other words, where a candidate scores the highest number of votes cast at the election and in addition obtains not less than one-quarter of the votes cast in at least two-thirds of the thirty six States in the Federation and the Federal Capital Territory, Abuja, he shall be duly returned as elected President of the Federal Republic of Nigeria pursuant to section 134(1) or (2) of the 1999 Constitution, depending on whether there were two or more candidates contesting the election.

The issue of two thirds of all the states in the Federation and FCT Abuja has been controversial in the past Presidential elections. It is submitted that such a straight forward issue should not have been that much controversial since it is determinable with arithmetical exactitude. The formula is clearly 2/3 multiplied by the number of states in Nigeria and the FCT and the answer to this is quite obvious. The difficulty normally arises in respect of the number of States and the FCT which has never been divisible by three.

However the courts or tribunals have adopted the wisdom of calculating ¼ of the votes cast in 2/3 of the States in the Federation and FCT to the extent to which the number is divisible by three and adding ¼ of 2/3 of the votes cast in extra State or FCT to determine any candidate that has satisfied the preconditions for return as elected President. The controversy has its genesis in the 1979 elections that ushered in the second Republic. The Supreme Court's interpretation of the phrase "2/3 of all the States in the Federation" in the Constitution in the celebrated case of **Chief Obafemi Awolowo v Alhaji Shehu Shagari**[223] remains fresh in the minds of Nigerian politicians and Courts or tribunals handling Presidential election petitions. The Supreme Court interpreted 2/3 of 19 States on the exact figure and fraction to arrive at 12 2/3, by the application of which Alhaji Shehu Shagari won the 1979 Presidential election. These facts and figures are clearly beyond hide and seek. The Supreme Court has laid a very clear criterion by arithmetical exactitude and thereby laying to rest the political *furore* in the interpretation of that constitutional provision.

Following the same criterion, the Court of Appeal in **Buhari v Obasanjo**[224] per Nsofor, JCA in his dissenting views stated thus:

[223] (1979) 6-9 S.C. 51 at 63
[224] (2005) 2 NWLR (Pt. 910) 241 at 599 – 601.

And I ask myself this: Does "two-thirds" of the thirty six (36) Federating States of Nigeria require an interpretation? Most certainly not. Why? Because two-thirds is 2/3. Pure and simple. No more and no less.

What is two-thirds (2/3) of thirty six (36) State of Nigeria? Most certainly, unless my simple arithmetic (elementary mathematics – be wrong) it is twenty four (24) States of the thirty six (36).

The all important question now necessarily becomes this: Did 1st respondent (Chief OlusegunObasanjo) in the Presidential election on the 19th April, 2003 secure "at least two thirds" of the thirty six (36) States of Nigeria in order to be "President" of the Nigeria ...

Besides what had been said and held above, in respect of non-compliance with the statutory mandatory provisions of the Electoral Act, 2002, my short, quick and unhesitating answer is capital NO. Based on my findings above, there was no election conducted in Nigeria for the office of President in several of the Nigerian States. Section 134 (2) (b) (*supra*) stipulates that the candidate for the Presidential election "shall" have secured the popular "will" of twenty four (24) States out of thirty (36) States of Nigeria.

It is not and cannot, in my opinion, be "two-thirds" (2/3) of any number of States less by one or more States of the 36 States, No.

Almighty God gave us the country – Nigeria. Man created the States. The 1st respondent, based on the evidence before us failed woefully to secure "at least" twenty-four (24) States in the 19th April 2003 Presidential election in Nigeria, out of the thirty six (36) States of Nigeria.

With the greatest respect to the learned jurist, there seems to be a slight derailment in adopting the principle or criterion enunciated by the Supreme Court in **Awolowo v Shagari** to determine 2/3 of all States of the Federation and the Federal Capital Territory. While the number of States in the Federation is undoubtedly thirty six, the phrase "and the Federal Capital Territory, Abuja" in section 134 (1), (2) and (4) of the 1999 Constitution adds one to thirty six making a total number of thirty seven (37) and not thirty six (36). Going by the arithmetical exactitude in **Awolowo v Shagari,** 2/3 of all the States in the Federation and the Federal Capital Territory, Abuja is, with respect, 24 + 2/3 of 1 and not just 24 as held by the learned jurist Nsofor, JCA in his dissenting views in **Buhari vs Obasanjo.** In order to satisfy the constitutional requirement the provision of section 134(2) (b) Obasanjo needed one quarter of the votes cast at the election in each of at least twenty four States and one-quarter of two thirds of the votes cast in the election in the twenty fifth State. This includes all the 36 States and the Federal Capital Territory, Abuja. This, it is submitted, was the exact criterion laid by the Supreme Court in **Awolowo v Shagari.**

4.3.2 **Irregularities in the Conduct of Election**

The INEC and its officers have more often than not been accused by the Nigerian populace, rightly or wrongly, of being responsible for most electoral misconduct and malpractices. This is, however, owed to default on the part of the INEC to take some precautionary measures towards ensuring not only free and fair elections but exhibition of transparency, honesty and patriotism in the conduct of elections in order to restore confidence in the minds of the electorate. There is need to ensure that candidates voted by the majority of votes and satisfying the preconditions for winning an election are returned as duly elected in order to reflect the wishes of the electorate in election results. An example is the stipulations in section 29 of the Electoral Act, 2006 which required all staff appointed by the Commission, taking part in the conduct of an election to take, before a High Court Judge, an oath of neutrality.[225] One wonders why the oath of this category of officers is cut short of the oath required of electoral Officers, Presiding Officers, Returning Officers and all staff appointed by the INEC taking part in the conduct of an election to take oath of loyalty and neutrality that they will not accept bribe or gratification from any person, and shall perform their functions and duties impartially and in the interest of the Federal Republic of Nigeria without fear or

[225] Section 29 (1) of the Electoral Act, 2006

favour.[226] It is submitted that the first category of electoral officers is covered by the latter category and therefore renders the provision of section 29 (1) of the Electoral Act superfluous. The words "and all staff appointed by the Commission taking part in the conduct of an election" appearing in section 29 (2) it is submitted, has the same meaning with the words "all staff appointed by the Commission taking part in the conduct of an election" used in section 29 (1) thereby rendering the subsection (1) which is narrower in scope than subsection (2) superfluous. It makes the drafting style poor and unnecessarily proliferated.

Where INEC fails or neglects to cause the required oath to be administered, the law is silent as to the consequence that follows. It is submitted that the fault of INEC officials ought not to be visited on any candidate. It is further submitted that the provision of section 29 of the Electoral Act, 2006 hardly makes good sense. In the celebrated case of **Buhari v Obasanjo** the Court of Appeal held thus:

> Although the duty imposed on electoral officers, presiding officers and returning officers by section 18 of the Electoral Act, 2002 to affirm or swear an oath of loyalty and neutrality and that they would perform their functions and duties impartially is mandatory, the section falls short of spelling out the consequences of its breach. Consequently,

[226] Section 29 (2), *ibid*

> the section should be construed in the spirit and intendment of the entire Electoral Act. The lawmakers had in contemplation the fact that there might be occasional breaches of the provisions of the Act in the conduct of an election and went on therefore to enact section 135 (1) of the Act which provides that an election result will not be nullified unless non-compliance with the Act substantially affected the result of the Election.

The Court of Appeal further frowned at the position of the electoral law as provided in section 4(1) of the Electoral Act 2002 that leaves the consequence of misconduct by INEC officials at large when it held [227] that:

> My understanding of the above provision is that the omission or default of a public officer to subscribe to affirmation or oath of loyalty and neutrality does not affect the validity of any act done or intended to be done by the defaulting officer in the execution of his official duty and that the penalty which attaches to such omission or default can only be borne by the officer himself. The Electoral Officers, Presiding Officers and Returning Officers who took part in the conduct of the 19/4/03 election, in my view, fall within the description of public officers. It is my respectful view therefore that the savings provided by section 4(1) of the Oaths Act applies to the official acts of the Electoral Officers, Presiding Officers, Supervisory Presiding Officers and Returning/Collation Officers in the election. I do not see the rational in the argument that the result of an omission of an Electoral Officer, Presiding Officer and Returning Officer to subscribe to the affirmation or swear to the oath should be the prevention of the innocent Nigerian voter from exercising his

[227] *Ibid* at p 360, paras C-G; 449, paras E-G

> Constitutional right to vote. Such a result could hardly have been contemplated by the Lawmakers.

Even where INEC is empowered to make guidelines for the conduct of the elections, at times the power is over exercised thereby rendering the guidelines that are inconsistent with the main Act null and void. This was the views of Abdullahi, PCA in **Buhari v Obasanjo** where the learned jurist observed[59] thus:

> There is no gainsaying the fact that this case has attracted a lot of attention both nationally and internationally thus bringing it to the level of a high profile case. This is natural because of some obvious factors some of which are the personalities involved and also the time it took to reach this point today. The large number of witnesses called by all the contending parties can rationally explain the long period of time it took to reach this stage. The petitioner called a total of 139 witnesses. The first set of respondents called a total of 100 witnesses, while the 2nd set of respondents called a total of 116 witnesses altogether making a grand total of 355 witnesses, not to talk of over 311 exhibits tendered in the course of the proceedings, that is in long hand. Be that as it may, today we are closing the chapter at this level.

> There is however, substance in submission of the learned senior counsel for petitioners that the provision authorising a presiding officer to give a ballot paper to a person who did not present himself with his voter's card to vote contained in chapter 5 of regulations, guideline or

[59] *Ibid* at pp. 413-414, paras C-A

manuals, exhibit "O" is void for inconsistency with express provisions of section 40 (1) of the Electoral Act. The situation is not cured by the provisions of section 149 of the Electoral Act, No 4 of 2002, empowering the Commission to issue regulations, guidelines or manuals, such as exhibit "O". Sections 40 and 49 of the Electoral Act read as follows: -

40(1) every person intending to vote shall present himself to a presiding officer at the polling unit in the constituency in which his name is registered with his voter's card.

49 The Commission may, subject to the provisions of this Act, issue regulations, guidelines or manuals for the purpose of giving effect to the provisions of this Act and for the due administration therefore.

Clearly the power donated to the commission to make regulations guidelines and manuals is subjection to the provisions of the Act itself. Since the Act in section 40(1) requires that any person intending to vote to present himself to a presiding officer at the polling station in the constituency in which he was registered with his voter's card it has been *ultra vires* to make regulations, guidelines or manuals pursuant to section 192 which are contrary to express provisions of section 40(1). The provision of the manuals providing that a person intending to vote without voter's card could be served with ballot paper has the effect of impliedly repealing section 40(1) of the Act. The provision contained in the manual, exhibit O, in that specific regard is for that reason void. In **A.G. Abia State v A. G. Federation** (2002) 6 NWLR (pt. 763) 264 where Act of the National Assembly which merely re-enacted an existing provisions of the Constitution was rendered inoperative.

A common behaviour of some Nigerian politicians is that they are unduly suspicious and hardly accept defeat. As bad losers, whenever there is a decision against them, they resort to making ridiculous remarks and accusations against the tribunals or courts including the Supreme Court. An example is the sort of remarks that followed the judgment of the Supreme Court in 1979 in **Awolowo v Shagari.**[228] One learned academician[229] has made an observation along that line as follows:

> The decision of the Supreme Court in that case has evoked a lot of comments, some complimentary, some adverse, even bordering on sarcasm and emotional expressions of diffidence in the integrity of the judicial system.

One of the most renowned legal luminaries in the history of Nigeria Dr. Graham Douglas also soon after the Supreme Court decision in **Awolowo v Shagari**[62] lamented thus: -

> The cynical observer of contemporary Nigerian political society may deride it as one in which the President, the Head of State, the Chief Executive, and Commander-In-Chief of the Armed Forces of the nation is, in essence not chosen by the popular will of the electorate as expressed through the ballot box but foisted on the nation by a judicial decision.

[228] *Op cit* at p. 161
[229] Popoola, A. A. O, Prof., Current issues in Nigerian Jurisprudence, Edited by Taiwo Kupolati, Esq., Renaissance Law Publishers Ltd., Lagos, at p 460. ; *Op cit* at pp. 9, 10 and 170 to 173

This one must say, with due respect, is not only a wild remark against the Judiciary which normally refrains from joining issues, but is also a challenge on the integrity of the legal profession. It may not be out of place to constructively criticise the reasoning or conclusion arrived at, especially in an academic research work, but an outright serious condemnation of a judicial decision even in matters of public or national interest, especially by senior members of the legal profession, may put doubts in the minds of laymen on the integrity of not only the Judiciary but also that of the legal profession, and reduce it to something other than the last hope of the common man. This may lead to loss of hope and make incalculable damage to the judicial process and also seriously undermine and threaten the security and unity of the country, to say the least.

Where, however, decisions are taken without giving clear reasons or where there appears to be a clear motive on the part of a judicial officer, it may be challenged by way of an appeal or even by petition, as may be appropriate, by any person thereby aggrieved. Any attitude by a Judicial Officer which is inconsistent with his oath of office or the Code of Conduct of Judicial Officers must be strongly and directly condemned. Such an unbecoming and unethical attitude by a Judicial Officer will seriously undermine the integrity of his office and must be avoided. One learned

writer[230] remarked on unethical attitude by judicial officers in the following terms:

> Some of the judges themselves were personally involved in politics. Of course, such involvement had to be carefully masked, but it was none-the-less noticeable. The cultural organizations provided the convenient platform. People began to feel, rightly or wrongly, that the justice administered in the courts was influenced by extra-legal considerations, by political or sectional interests and that its aim was not to uphold the law but to repress interests opposed to the government. It began to look as if the courts were actively aiding the politicians in the persecution of opponents and in the perversion of the Constitution. Confidence in the ability of the courts to decide political issues impartially was consequently undermined to the point that there was a general disinclination to take political complaints to them. To go to court in such matters was felt to be a vain effort, since by past experience a decision in favour of the government was considered a foregone conclusion. The over-confident way in which the ruling politicians sometimes challenged opponents to take their complaints to the court, as if to say they had been assured the courts would never decide against them, helped to sap still further public confidence in the courts.
>
> The scenario represented a real tragedy for Nigeria's first experiment in constitutional government. When a situation degenerates to the point that people with genuine grievances against the government are no longer willing to have recourse to the courts for redress that is the end of constitutional government, and the beginning of

[230] Popoola, A. A. O, Prof., Current issues in Nigerian Jurisprudence, Edited by Taiwo Kupolati, Esq., Renaissance Law Publishers Ltd., Lagos, at pp. 455 – 456. See also pp. 9, 10 and 169, *op cit*

anarchy. But this was precisely what happened in the Western Region. Convinced that they would get no justice from the courts for the rape of their right to choose who should govern them, the people naturally resorted to violence as the only remedy open to them in the circumstances.

The upshot was that the candidates of the United Progressive Grand Alliance (UPGA) who 'lost' the 1965 Parliamentary Elections in the Western Region did not file any election petitions. They simply refused to accept the results of the election or to acknowledge the legitimacy of the government formed as a result of it. Instead, they and their millions of supporters took to the streets of Western Nigeria, threatening, burning, or maiming any member of the Government Party they could corner in the bush or in a back-garden.

Life became insecure in the streets of Ibadan, Ife, Mushin, Agege and Ikeja among other towns. Operation 'soak in petrol and burn' was in full swing. Cars of known party stalwarts were set ablaze. Unpopular customary court Presidents were slaughtered like rams.

The military struck on the night of January 15/16, 1966. The rest is now history. But quite significantly, sometime after the commencement of the military regime, it was reported that some questions arose as to the role of the Chief Justice of Western Nigeria in respect of election petitions filed in court before and after the controversial Regional Elections of October 1965 (Ajayi, 2005:520). It was alleged in a particular case that a candidate who had tried fruitlessly to file his nomination papers with a deliberately evasive Electoral Officer had filed a suit in court for stopping his only opponent who belonged to the Government Party from being declared elected unopposed

in the absence of any second nomination. The allegation against the Chief Justice, as related by Dr. F. A. Ajayi SAN in his memoir, was that in the course of his (the Chief Justice) hearing of the suit filed by the aggrieved candidate he rose in court to go back to his chambers and that when it was 1:00 pm he came back to court and after looking up at the wall clock he remarked that the time was already after 1:00 pm which, under the Electoral Regulations was the last point in time for the Electoral Officer to declare whether or not the nomination of particular candidate was valid and if there should be only one valid nomination whether that one nominee should then be declared elected unopposed.

Regulation 16 of the Parliamentary Electoral Regulations W.R.L.N. 227 of 1960 provided that any candidate may withdraw his candidature not later than one 0'clock in the afternoon of the eighth day before the Election Regulation 19 (1) (b) provided that if after the latest time for the withdrawal of candidates, only one person remains validly nominated, the person shall be declared elected.

It was confirmed by the counsel to the aggrieved candidate that as was normal with the trial Chief Justice, he commenced sitting in court on the day in question at 9:00 a.m. prompt, and that the arguments of counsel for both parties did not last beyond 11:00 am, and that it was thereafter that the Chief Justice rose in court to go back to his chambers only to come out at about 1:00 pm, looked at the clock on the wall and remarked that it was already 1:00 pm, the last moment for the electoral Office to have decided whether or not there had been only one valid nomination, that the court was not in a position to say whether or not he had already taken that decision; and that as the last point in time for stopping him from doing so had elapsed, it would be fruitless to make the order of

> injunction being sought. (Ajayi, *Ibid*). Other lawyers in court that day for some other matters confirmed the same story. The Chief Justice himself confirmed the story, but remarked that he only went back to his chambers to do something. The court's hand-written Record Book showed that the day's proceeding covered only about three (3) pages.
>
> Not long after the conclusion of the inquiry into this matter, it was reported that the Chief Justice had voluntarily retired from the Judicial Service. Although, there was no official public statement on the matter, it was generally assumed that his retirement must have come about as a result of his conduct in office during the troubled political days in Western Nigeria. The lessons of this incident are quite clear for any judge who finds himself in a similar situation.

One persistent problem in the Nigerian electoral process is manipulation of results by electoral officers, which more often than not is master minded by incumbent leaders who want to prolong their tenure in governance by hook or crook by what is particularly tagged by politicians as "*tazarce*" a Hausa word meaning "to continue." These politicians are only challenged by their adversaries in an election tribunal or court and use as evidence the insignificant proportion of the political mess discovered by them. The tribunals or court, however, consider the degree of manipulation in terms of volume rather than degree of seriousness and impact on the election. More often than not the tribunals dismiss the petition on the ground that the irregularity is not substantial enough to affect the overall result. The

measuring yardstick is normally to consider the total number of votes in the area affected by the alleged irregularity, and hypothetically assume if such votes were credited to the petitioner, would the result have been different? Where the answer falls in the negative, the tribunals would normally hold that the irregularity is not substantial enough to affect the result of the election. This situation contributes nothing other than aiding and abetting corruption and rigging in elections, thereby allowing clearly illegality to stand as valid election. It is submitted that any evidence of rigging established by evidence should render an election void. The dishonesty or irregularity need not be too substantial to make difference in the result of the election. The illegality or irregularity that beclouds the election process is enough to defeat the essence of election and democracy.

It even offends common sense that simply because the irregularity complained of is not substantial enough to affect the result of the election, an election tribunal has been left helplessly impotent. It matters not how much reliable evidence of rigging or other forms of irregularity is established. The law unfortunately only seems to be friendly to dishonest politicians who use money to buy over public offices to the detriment of the electorate who are otherwise deprived of their legitimate right to vote leaders of their

choice. This, it is further submitted, tantamount to rape on the Nigerian democratic process and shielded by law at the whims and caprices of politians whom it favours. In **Buhari v Obasanjo**[64] the Court of Appeal held that non-compliance with the Electoral Act does not and cannot invalidate an election unless it has substantially affected the result. The Appeal Court held as follows:

By virtue of section 135 (1) of the Electoral Act, 2002, an election shall not be liable to be invalidated by reason of non-compliance with the provisions of the Electoral Act if it appears to the election tribunal or court that the election was conducted substantially in accordance with the principles of the Act and that the non-compliance did not affect substantially the result of the election. In other words, non-compliance with the provisions of the Act without more is not sufficient to invalidate an election. Consequently, unless there is some proof that non-compliance with the provisions of a section of the Act substantially affected the result, the election will not be invalidated. In the instant case, non-compliance with section 18 of the Electoral Act, 2002 without more, is not sufficient to invalidate the election.

The Court of Appeal further stressed the degree of noncompliance that could be capable of affecting the result of an election[231] by further holding as follows:

Non-compliance with electoral rules which can render an election void must be so great as to amount to a conducting of the election in a manner contrary to the principle of election by ballot and must be so great as to satisfy the court that it did affect or might have affected the majority of the voters or, in other words, the result of the election. In the instant case, although the petitioners were able to show that the election was not conducted in compliance with electoral rules, the non-compliance proved, however, did not substantially affect the result of the election, particularly having regard to the fact that the area affected by non-compliance is comparatively smaller to the areas not affected by non-compliance.

When a tribunal or court is saddled with the determination as to whether there was substantial non-compliance with electoral rules as to affect an election result, it considers the evidence adduced before it and from the facts and figures established at the trial, if the votes affected by the alleged non compliance are significant enough to determine or change who wins the election, the tribunal or court must hold that it is substantial enough to

[231] *Ibid* at p. 417-418 H-F

affect the result, otherwise it will not. In other words if the non-compliance is substantial enough to affect the entire election result it must be annulled *per force*, otherwise a tribunal cannot temper with the result. In **Buhari v Obasanjo**[66] the Appeal Court further held:

In determining whether or not non-compliance with electoral rules alleged in an election petition is substantial, or substantially affected the result of the election, the evidence adduced before the court shall be relied upon by the court. In the instant case, on the evidence adduced before the court, the petitioners did not establish that the non-compliance with the Electoral Act in the conduct of the election substantially affected the election nation-wide to warrant the nullification of the entire election.

The Court of Appeal, per Nsofor, JCA, further emphasized and exposited the guiding principles for nullification of an election[232] by the following pronouncement: -

> An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the electoral officials if the tribunal is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the electoral law, and that the result of the election was not and could not have been affected by the transgressions. If, on the other hand, the

[232] *Ibid* at pp. 369 – 370, paras H-B; B; 518-520, paras H-F

> transgressions of the officials being admitted, the tribunal sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether those transgressions may not have affected the results, and it is uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the tribunal is then bound to declare the election void. In other words, if at the end of the case of the petitioner in an election petition, a case of non-compliance is established which may or may not affect the result of the election and it is impossible for the tribunal to say whether or not the results were affected by the non-compliance established, unless there is evidence on behalf of the respondent that such non-compliance as found could not and did not affect the result of the election, then the petitioner has been entitled to succeed on the simple ground that civil cases are proved by a preponderance of accepted evidence. In the instant case, the election in Ogun State was not conducted in accordance with the existing electoral law. Consequently, it ought to be nullified by the court.

Manipulation of election results by electoral officers is weighed by the same scale and with the same parameters as any other irregularity in an election. But the underlining issue is always whether it is substantial enough to affect the result of the election. In the case of **Buhari v Obasanjo**[233] the Court of Appeal further held that:

[233] *Supra* at Pp 391-393 paras. C-D

> In any election, the electoral officials have a duty to produce only the hard scores of the candidates at the election. Any manipulation of the result by the arbitrary addition or subtraction to the scores of candidates produces a result different from that expressed by the electorate and is liable to cancellation. In the instant case, the petitioners substantiated their averment that the 3rd respondent and its agents manipulated the result of the Presidential election in Ogun State in favour of the 1st and 2nd respondents against the 1st petitioner. In the circumstance, the election was not conducted in substantial conformity with the Electoral Act, 2002 and ought to be nullified.

Although, a tribunal or court ought not to base its decision on mere speculation, where evidence of serious electoral malpractice, it ought to be countenanced. In his dissenting views[234] Nsofor, JCA stated:

> I have duly considered the evidence adduced in respect of Ogun State. Is it really possible let alone probable that hot and cold water would ever run from the same pipe and at the same time? The exhibits tendered by the respondents and those tendered by the petitioners' witnesses which were produced under the order of court ("*subpoena ducestecum*") were official documents of I.N.E.C. And yet the respondents' witness, INEC official, pronounced them unauthentic. I do not accept the version of the evidence by the respondents' witness. I am of the opinion that the 3rd respondent manipulated the election results in Ogun State to the disadvantage of the petitioners and in favour of the 1st respondent. That, in my view, was a form of bias. The petitioners' witnesses were not shaken in their

[234] *Ibid* at p. 537, paras D-F

> evidence. In any point of conflict between the version of the evidence by the petitioners and the respondent's witnesses, I preferred the version of the petitioners.

It is submitted that where evidence of bias is established against INEC, it goes to the root of the electoral process and throws serious doubt on its uprightness. INEC being the heart of Nigeria's democratic process must not only be fair and honest in the conduct of elections but must be transparently so. The misconduct of its officers, however, must not affect the result of an election unless the irregularity occasioned by such misconduct is substantial enough to void the entire election result. Where people were allowed to vote without voters' cards, the inability or refusal by INEC officers to distinguish the genuine votes from the fake ones does not render the deliberately mixed up votes valid. The Court of Appeal in **Buhari v Obasanjo** per Tabai, JCA (as he then was) expressed the following views: -

> By virtue of section 40 (1) of the Electoral Act, 2002, every person intending to vote shall present himself to a presiding officer at the polling unit in the constituency in which his name is registered with his voter's card. In other words, only a person with a voter's card has authority to vote at an election. In the instant case, although there was evidence that people voted without voters' cards, there was no evidence of the number of such votes by people without voters' cards and the units in which such votes were cast. In the absence of such evidence the effect of

> such votes on the election in a unit, ward local or State cannot be ascertained; and the court cannot by mere speculation as to the probable effect of such unlawful votes cancel the election.

The manipulation of results and biasness on the part of the INEC through its electoral officers most of whom are casual staff is regrettable, unfortunate and should be condemned in strongest terms. These matters are important in ensuring a true, fair and transparent democracy and the rule of law in Nigeria, and ought not to be summarily swept under the carpet.

4.4 **The Supreme Court as an Election Appeal Tribunal**

Having discussed the capacity of the Court of Appeal sitting as the only court or tribunal with original jurisdiction to hear and determine petitions regarding Presidential elections in Nigeria, the Supreme Court being the highest court of the land, and the only court having exclusive jurisdiction to hear and determine appeals from the Court of Appeal, will now be focused on of The 1999 Constitution provides[234] that the Supreme Court shall have jurisdiction, to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Court of Appeal.

[234] Section 233 (1), *ibid*

For the purpose of exercising its jurisdiction to hear and determine appeals from the Court of Appeal, the Supreme is duly constituted by a panel of five Justices.[235] However, the Supreme Court is normally constituted by a panel of seven Justices in respect of Presidential election appeals. This is due to the fact that interpretation of the Constitution is inevitable in Presidential election petitions and that automatically requires the Supreme Court to sit in panel of seven Justices.[236]

[235] Section 234, *ibid*
[236] See Section 234 of the 1999 Constitution, *ibid*

CHAPTER FIVE

CODE OF CONDUCT TRIBUNAL

The Code of Conduct Tribunal is established by the Constitution[237] to try offences relating to contravention of any provision of the code of conduct for public officers. It functions side by side with the Code of Conduct Bureau both of which are affiliated to and absolutely controlled by the Presidency. It operates as watch dog to try and punish public officers who contravene the Code of Conduct for Public Officers.

The need for Code of conduct for public officers in developing polity such as Nigeria cannot be over-emphasised. This is particularly so when viewed against the backdrop of large scale fraud and corruption which has become prevalent in the civil/public service.

It is therefore envisaged that a set of ethics and rules of behaviour for public officers will go a long way in curtailing this malaise.

5.1 **Establishment and Composition**

The establishment of the tribunal as an adjudicative organ is spelt out in the 1999 Constitution[218] (as amended) thus: "There shall be established a tribunal to be known as Code of Conduct Tribunal."

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[237] See Article 15of the 5th Schedule to the 1999 Constitution
[218] Part I of the 5th Schedule to the 1999 Constitution, *ibid*

The two key words that make the tribunal's name spell out the very purpose for putting it in place. "Code" is defined[219] as follows:

A set of moral principles or rules of behaviour that are generally accepted by society or a social group; a system of laws or written rules that state how people in an institution or a country should behave.

This definition also incorporates "conduct", which need not be separately defined. At the risk of proliferation, however, the word "conduct" may be defined[220] as "behaviour in a particular way". The code of conduct, on which the tribunal's jurisdiction is premised, is a set of rules that regulates the behaviour of public officers from the moment of their appointment or election to such office to the time they vacate same.

The code of conduct set out in part 1 in the 5th schedule to the 1999 Constitution (as amended) governs all public office holders' behaviourism while in office. The code[221] unequivocally requires a public officer to abide by certain standards of behaviour.

Every public officer is required to desist from putting himself in a position where his personal interest will conflict with his duties and responsibilities. A public officer shall not receive or be paid the emoluments of any public

[219]. Oxford Advanced Learner's Dictionary 6th Ed. p. 212
[220]. *Ibid* at p. 237
[221]. *Op cit* at p. 1

office at the same time as he receives or is paid the emoluments of any other public office or except where he is not employed on full time basis, engage or participate in the management or running of any private business, profession or trade but nothing shall prevent a public officer from engaging in farming.

The President, Vice-President, Governor, Deputy Governor, Ministers of the Government of the Federation and Commissioners of the Governments of the state, members of the National Assembly and of the Houses of Assembly of the State, and such other public officers or persons as the National Assembly may by law prescribe shall not maintain or operate a bank in any country outside Nigeria.

A public officer shall not, after his retirement from public service and while receiving pension from public funds, accept more than one remunerative position as chairman, director or employee of a company owned or controlled by the government or any public authority. A retired public servant shall not receive any other remuneration from public funds in addition to his pension and the emolument of such one remunerative position. Retired public officers who have held office are prohibited from service or employment in foreign companies or foreign enterprises. This

restriction applies to the offices of President, Vice-President, Chief Justice of Nigeria, Governor and Deputy Governor of a State

A public officer shall not ask for or accept property or benefits of any kind for himself or any other person on account of anything done or omitted to be done by him in the discharge of his duties. For this purpose the receipt by a public officer of any gifts or benefits from commercial firms, business enterprises or persons who have contracts with the government shall be presumed to have been received in contravention of the said sub-paragraph unless the contrary is proved.

A public officer shall only accept personal gifts or benefits from relatives or personal friends to such extent and on such occasions as are recognized by custom. Provided that any gift or donation to a public officer on any public or ceremonial occasion shall be treated as a gift to the appropriate institution represented by the public officer, and accordingly, the mere acceptance or receipt of any such gift shall not be treated as a contravention of the code.

The President or Vice-President, Governor or Deputy Governor, Minister of the Government of the Federation or Commissioner of the Government of a State, or any other public officer who holds the office of a Permanent

Secretary or head of any public corporation, University, or other governmental organization shall not accept a loan, except from government or its agencies, a bank, building society. Mortgage institution or other financial institution recognized by law and any benefit or whatever nature from any company, contractor, or businessman, or the nominee or agent of such person. Provided that the head of a public corporation or of a university or other governmental organization may, subject to the rules and regulations of the body, accept a loan from such body. No person shall offer a public officer any property, gift or benefit of any kind as an inducement or bribe for the granting of any favour or the discharge in his favour of the public officer's duties.

A public officer shall not do or direct to be done, in abuse of his office, any arbitrary act prejudicial to the rights of any other person knowing that such act is unlawful or contrary to any government policy.

A public officer shall not be a member of, belong to, or take part in any society the membership of which is incompatible with the functions or dignity of his office. Subject to the provisions of the Constitution, every public officer shall within three months after the coming into force of the Code of Conduct or immediately after taking office and thereafter at the end of every four years and at the end of his term of office, submit to the Code of

Conduct Bureau a written declaration of all his properties, assets, and liabilities and those of his unmarried children under the age of eighteen years. Any statement in such declaration that is found to be false by any authority or person authorized in that behalf to verify it shall be deemed to be a breach of the Code.

Any property or assets acquired by a public officer after any declaration required under the Constitution and which is not fairly attributable to income, gift, or loan approved by the Code shall be deemed to have been acquired in breach of the Code unless the contrary is proved.

Any allegation that a public officer has committed a breach of or has not complied with the provisions of the Code shall be made to the Code of Conduct Bureau.

A public officer who does any act prohibited by the Code through a nominee, trustee, or other agent shall be deemed *ipso facto* to have committed a breach of the Code.

In its application to public officers, members of legislative houses shall be exempt from the provisions of paragraph 4 of the Code and the National Assembly may by law exempt any cadre of public officer from the provisions of paragraphs 4 and 11 of the code if it appears to it that their

position in the public service is below the rank which it considers appropriate for the application of those provisions.

The tribunal is established to try public officers who have been accused of violating or contravening any of the provisions of the code of conduct. The 1999 Constitution (as amended) therefore provides[222] for the establishment of a tribunal to be known as "Code of Conduct Tribunal" which shall consist of a Chairman and two other persons.

The Chairman of the Tribunal must be a person who has held or is qualified to hold office as a Judge of a superior court of record in Nigeria[223]. Both the chairman and members are appointed by the President on the recommendation of the National Judicial Council[224]

This Tribunal is unique in the sense that it has, apart from its judicial powers, an executive power to function as a service commission in respect of appointment, promotion and disciplinary control over its supporting staff. For the avoidance of doubt, the Constitution provides[225] thus:

> The power to appoint the staff of the Code of Conduct Tribunal and to exercise disciplinary control over them shall vest in the members of the Code of Conduct Tribunal.

222. See article 15 (1) of part 1 of the 5th schedule, *ibid*
223. Article 15 (2), see also section 6 (3) and (5) of the 1999 Constitution, *ibid*
224. Article 15 (3), *ibid*
225. Article 16 (2), *ibid*

The chairman and other members of the Tribunal are appointed by the President on the recommendation of the National Judicial Council just like judges of superior courts. The Constitution provides as follows:

> The Chairman and members of the Code of Conduct Tribunal shall be appointed by the President in accordance with the recommendation of the National Judicial Council.

One then wonders why the staff of the tribunal cannot be appointed and disciplined by the Federal Judicial Service Commission[226]. After all the Code of Conduct Tribunal, it is submitted, ought to be an institution under the judicial arm of the Federal Government and not under the Executive. In practice the tribunal members of staff are usually seconded from the Judiciary, and the chairman is appointed from retired judicial officers. Moreover the functions of the tribunal are purely judicial in nature. These reasons are compelling enough to place the appointment, promotion and discipline of the tribunal's supporting staff under the FJSC and the tribunal to function as a judicial institution under the Judiciary.

[226]. Hereinafter referred to as "the FJSC"

5.2 **Right of Appeal**

It is submitted that the Code of Conduct Tribunal is at per with a High Court since appeal from it lies to the Court of Appeal.[227] The law[228] states as follows:

> Where the Code of Conduct Tribunal gives a decision as to whether or not a person is guilty of a contravention of any of provisions of the code, an appeal shall lie as of right from such decision or from any punishment imposed on such person to the Court of Appeal at the instance of any party to the proceedings.

The right of appeal from the Code of Conduct Tribunal is, of course, exercisable in accordance with the Court of Appeal Rules[229] and Court of Appeal Act[230] just like appeals from other courts or Tribunals to the Court of Appeal.[231]

5.3 **Prosecution for Criminal Offence**

Apart from prosecution for breaching any provision of the Code of Conduct at the Code of Conduct Tribunal, the accused may in addition be liable to another round of prosecution, conviction and sentence in a regular court of

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227. Article 18 (4) of part 1 of the 5th Schedule to the 1999 Constitution, o*p cit*
228. *Ibid*
229. See the Court of Appeal Rules 2007
230. See the Court of Appeal Act, Cap. C6 L.F.N. 2004
231. Article 18 (5) of part 1 of the 5th Schedule to the 1999 Constitution, *op cit*

law for the offence which he or she otherwise commits under another law. This is obviated by restrictive provision in the Code of Conduct for Public Officers[232], which only contains a set of rules of behaviour for public officers in active service or even after retirement, and does not therefore stand as substitute for criminal offences otherwise provided in our penal codes. In other words there mere fact that an accused is punished as a public servant for contravening the code of conduct does not exonerate him from liability for an offence which he otherwise commits by the same act or omission. It is submitted that this renders the doctrine of *autrefois acquit* or *autrefois convict* inapplicable to the subsequent criminal proceedings in respect of the same conduct of the accused after his conviction and sentence by the Code of Conduct Tribunal. In effect the trial by the Code of Conduct Tribunal, though criminal in nature is treated distinctively with the "criminal" aspect of the offence committed by the same accused person. The justification for this double criminal trial is that the ingredients of the two sets of offence are not the same, e.g. the fact that the offender is a serving or retired public servant is immaterial in criminal trial while it is a necessary ingredient to the trial by the Code of Conduct Tribunal since the jurisdiction of the tribunal is limited to cases of contravention of the Code of Conduct. It is submitted that the tribunal

[232]. See Part 1of the Fifth Schedule to the 1999 Constitution, *ibid*

should have been further conferred with jurisdiction to turn the other side of the coin by imposing every necessary sanction provided by the penal laws applicable under proper criminal trials. This will ensure a once and for all trial of accused persons before the tribunal and remove the cumbersome provision in the law that requires a second trial and punishment for the same offence. For the avoidance of doubt the Constitution provides thus:[233]

Nothing in this paragraph shall prejudice the prosecution of a public officer punished under this paragraph or preclude such officer from being prosecuted or punished for an offence in a court of law.

One wonders if the tribunal is not meant to function as a court of law. This and other anti- autonomy provisions have not only tied the hands of the tribunal but also render it more or less insignificant in adjudication process. It also speaks volumes of the need to reorganize the tribunal as a judicial organ and not merely an affiliate agency as it now stands.

It is also pertinent that while a person convicted of a criminal offence may be granted prerogative of mercy by either the president of the Federal Republic of Nigeria or Governor of a State as the case may be, a person convicted for contravention of code of conduct cannot enjoy such

[233] Article 18 (6), *ibid*

prerogative[234]. The law unequivocally states that the provision of the Constitution relating to prerogative of mercy shall not apply to any punishment imposed for violating the code of conduct. It is submitted that person tried for breaching the code of conduct for public officers should enjoy equal rights like persons tried under other penal laws.

5.4 **Jurisdiction**

The jurisdiction of the Code of Conduct Tribunal is very narrow both in terms of persons and subject matter in respect of which it may adjudicate. It is intended to discuss these two elements of jurisdiction.

5.4.1 **Public Officer**

The Tribunal exercises its jurisdiction only on public office holders who have been accused of contravening the Code of Conduct[235]. A public office holder has been defined[236] as "a person holding any of the offices specified in part II of this schedule." This includes the following public officers:[237]

(1) The President of the Federation

(2) The Vice-President of the federation

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[234] Article 18 (7), *ibid*
[235]. *Ibid* see part 1 of the 5th schedule to the 1999 Constitution.
[236]. *Ibid* article 19
[237]. *Ibid* part II

(3) The President and Deputy President of the Senate

(4) Speaker and Deputy Speaker of the House of Representatives

(5) Speakers and Deputy Speaker of Houses of Assembly of States

(6) All members and staff of legislative houses

(7) Governors and Deputy Governors of States

(8) Chief Justice of Nigeria and Justice of the Supreme Court

(9) President and Justices of the Court of Appeal

(10) All other judicial officers and all staff of courts of law

(11) Attorney-General of the federation and Attorney-General of each State

(12) Ministers of the Government of the Federation and Commissioners of the Governments of the States

(13) Service Chiefs comprising of the Chief of Defence Staff, the Chief of Army Staff, the Chief of Naval Staff, the Chief of Air Staff

(14) All members of the Armed Forces of the Federation

(15) Inspector-General of Police, Deputy Inspector-General of Police

(16) All members of the Nigeria Police Force and other government security agencies established by law

(17) Secretary to the Government of the Federation

(18) Head of the Civil Service

(19) Permanent Secretaries

(20) Directors-General

(21) All other persons in the Civil Service of the Federation or of the State

(22) Ambassadors, High Commissioners and other officers of Nigeria Missions abroad

(23) Chairman, members and staff of the Code of Conduct Bureau and Code of Conduct Tribunal

(24) Chairman, members and staff of local government councils

(25) Chairman and members of the Boards or other governing bodies and staff of statutory corporations and of companies in which the Federal or State Government has controlling interest

(26) All staff of Universities, Colleges and institutions owned and financed by the Federal or State Governments or Local Government Councils

(27) Chairman, members and staff of permanent commissions or councils appointed on full time basis.

It, therefore, means that the chairmen and members of ad-hoc tribunals, commissions or committees do not qualify as public office holders. It also excludes part-time Chairmen and members of commissions or councils. It is

submitted that these category of the working force should not have been excluded from the application of the Code of Conduct.

5.4.2 **Subject Matter**

The subject matter that falls within the jurisdiction of the Tribunal is such behaviour by an act or omission that contravenes any provision in the Code of Conduct for Public Officers. The Code, *inter alia*, requires thus:

A public officer shall not put himself in a position where his personal interest conflicts with his duties and responsibilities. Without prejudice to the generality of the foregoing, a public officer shall not receive or be paid the emoluments of any public office at the same time as he receives or is paid the emoluments of any other public office, except where he is not employed on full time basis, engage or participate in the management or running of any private business, profession or trade but nothing in this sub-paragraph shall prevent a public officer from engaging in farming.

The President, Vice-President, Governor, Deputy Governor, Ministers of the Government of the Federation and Commissioners of the Governments of the state, members of the National Assembly and of the Houses of Assembly of the State, and such other public officers or persons as the National Assembly may by law prescribe shall not maintain or operate a bank in any country outside Nigeria.

A public officer shall not, after his retirement from public service and while receiving pension from public funds, accept more than one remunerative position as chairman, director or employee of –

(a) a company owned or controlled by the government; or

(b) any public authority.

A retired public servant shall not receive any other remuneration from public funds in addition to his pension and the emolument of such one remunerative position.

Retired public officers who have held offices to which this paragraph applies are prohibited from service or employment in foreign companies or foreign enterprises. This applies to the offices of President, Vice-President, Chief Justice of Nigeria, Governor and Deputy Governor of a State

A public officer shall not ask for or accept property or benefits of any kind for himself or any other person on account of anything done or omitted to be done by him in the discharge of his duties. The receipt by a public officer of any such gifts or benefits from commercial firms, business enterprises or persons who have contracts with the government shall be presumed to have been received in contravention of the said sub-paragraph unless the contrary is proved. A public officer shall only accept personal gifts or

benefits from relatives or personal friends to such extent and on such occasions as are recognized by custom:

Provided that any gift or donation to a public officer on any public or ceremonial occasion shall be treated as a gift to the appropriate institution represented by the public officer, and accordingly, the mere acceptance or receipt of any such gift shall not be treated as a contravention of this provision.

The President or Vice-President, Governor or Deputy Governor, Minister of the Government of the Federation or Commissioner of the Government of a State, or any other public officer who holds the office of a Permanent Secretary or head of any public corporation, University, or other parastatal organization shall not accept-

(a) A loan, except from government or its agencies, a bank, building society. Mortgage institution or other financial institution recognized by law; and

(b) Any benefit or whatever nature from any company, contractor, or businessman, or the nominee or agent of such person:

Provided that the head of a public corporation or of a university or other parastatal organization may, subject to the rules and regulations of the body, accept a loan from such body.

No person shall offer a public officer any property, gift or benefit of any kind as an inducement or bribe for the granting of any favour or the discharge in his favour of the public officer's duties.

A public officer shall not do or direct to be done, in abuse of his office, any arbitrary act prejudicial to the rights of any other person knowing that such act is unlawful or contrary to any government policy.

A public officer shall not be a member of, belong to, or take part in any society the membership of which is incompatible with the functions or dignity of his office.

Subject to the provisions of the Constitution, every public officer shall within three months after the coming into force of this Code of Conduct or immediately after taking office and thereafter at the end of every four years; and at the end of his term of office, submit to the Code of Conduct Bureau a written declaration of all his properties, assets, and liabilities and those of his unmarried children under the age of eighteen years. Any statement in such declaration that is found to be false by any authority or person authorized in that behalf to verify it shall be deemed to be a breach of the Code.

(3) Any property or assets acquired by a public officer after any declaration required under this Constitution and which is not fairly attributable to income, gift, or loan approved by this Code shall be deemed to have been acquired in breach of this Code unless the contrary is proved.

Any allegation that a public officer has committed a breach of or has not complied with the provisions of the Code shall be made to the Code of Conduct Bureau.

A public officer who does any act prohibited by the Code through a nominee, trustee, or other agent shall be deemed *ipso facto* to have committed a breach of the Code in its application to public officers. Members of legislative houses shall be exempted from the provisions of paragraph 4 of the Code and the National Assembly may by law exempt any cadre of public officer from the provisions of paragraphs 4 and 11 of the code if it appears to it that their position in the public service is below the rank which it considers appropriate for the application of those provisions.

Contravention of any provision of the Code by a public officer is what ignites the jurisdiction of the Tribunal. In practice however cases of contravention of code of conduct, which more often than not involves financial crimes are prosecuted directly in the Federal High Court without any form of recourse

to the Code of Conduct Tribunal and thereby rendering the tribunal even more redundant. This, it is submitted amounts to an undue usurpation of the powers and jurisdiction of the tribunal. The cases of some former State Governors and other public office holders in States like Plateau, Bayelsa, Delta, Jigawa, Ekiti, Edo, etc may be good examples of abandonment or violation of the Code of Conduct by public office holders without prosecuting same before the Code of Conduct Tribunal. None of these governors is yet convicted by the Federal High Court or any other conventional court of law.

In fact even accused persons prosecuted before the Code of Conduct Tribunal are hardly convicted, the work of which is further reduced to insignificance by the establishment of the Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt Practices Commission (ICPC). To restore the vigour and functionality of this tribunal, it will need a reorganization and proper positioning in the hierarchy of superior courts of record like the National Industrial Court by the Constitution of the Federal Republic of Nigeria (Third Alteration) Act. This may be the surest means of not only restoring the much needed discipline in the public service but will also properly position the long crippled tribunal that ought to function as a superior court of record. It will also require, apart from the necessary

constitutional amendment, the promulgation of an Act by the National Assembly to regulate the necessary logistics necessary for this much needed transformation.

CHAPTER SIX

CAPITAL MARKET AND REVENUE TRIBUNALS

6.1 **Introduction**

Under the topic the two tribunals that administer justice on capital market and revenue based matters has been analysed. These are:

The Investments and Securities Tribunal (IST) and

The Value Added Tax Tribunal.

Under (1) above, the establishment, jurisdiction and administration of justice by the Investment and Securities Tribunal[238] have been appraised. The erstwhile Investments and Securities Act 1999[239] regulating the capital market in Nigeria was repealed[240] by the Investment and Securities Act 2007[241]. The Act was promulgated on the 25th June 2007 and it took effect on that date. It was one of the first bills passed by the National Assembly under the regime of President Umaru Musa Yar'Adua. Discussions has been made under both laws, side by side especially in distinctive areas, for the following two reasons:

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[238] Hereinafter referred to as the "IST"
[239] Hereinafter refered to as the "ISA 1999"
[240] Section 314 (1) of the Act, *ibid*
[241] Act No 29 of 2007 (hereinafter referred to as "the Act")

(1) Most of the judicial authorities on the subject matter were decided under the provisions of the ISA 1999, and

(2) The Act is virtually a replica of the ISA 1999.

Thus all references to the ISA 1999 equally remain valid as references to the Act, the peculiarities of which has been appropriately highlighted. In contrast with the ISA 1999 which had 16 parts and 265 sections, the Act has 18 parts and 316 sections with several innovative provisions strengthening the regulatory powers of the Securities and Exchange Commission[242]. It introduced corporate responsibility measures for public companies and conferred exclusive jurisdiction on the IST in respect of certain capital market matters.

Discussion on the Value Added Tax Tribunal will follow subsequently.

6.2 **Investment and Securities Tribunal (IST)**

The Investments and Securities Tribunal (IST) was established by section 274 of the Act, which provides thus:

> There is hereby established a body to be known as the Investments and Securities Tribunal (in this Act referred to

[242] Hereinafter referred to as "SEC"

as "the tribunal") to exercise the jurisdiction, powers and authority conferred on it by or under this Act.

It was constituted and inaugurated by the Minister of Finance[243] on the 19th December 2002 with the approval of the President. The IST is a specialised fast-tract tribunal for the resolution of disputes arising from investments and securities transactions and appeals relating to pensions matters. The IST focuses on not only timeous and cost effective dispensation of justice but also a specialized and harmonious adjudication in order to retain and maintain the good business or commercial relationships between the adverse parties.

Fortunately the position under the ISA 1999 whereby the Minister of Finance was, to all intents and purpose, the alpha and omega in respect of, not only the establishment, but also the operation of IST has been removed under the Act. The Minister of Finance had exclusive statutory [244] power to specify the matters and places in relation to which the IST may exercise its jurisdiction. One may simply say that the IST was fully controlled by the Minister of Finance not only regarding the exercise of its jurisdiction but the Minister has also the onerous power to hire and fire [245] both the chairman and members of the IST hitherto known as Capital Market

[243] See section 224 of the ISA 1999.
[244] Section 224 (2) of the ISA 1999, *ibid*.
[245] Compare Sections 225 (1) and 228 (2) of the ISA 1999 and Sections 275(1), 279 and 281 of the Act, *ibid*.

Assessors[246] who constituted the IST. Section 225 (1) of the I.S.A. 1999 [247] provides thus:

> The tribunal shall consist of nine persons (hereafter referred to as "Capital Market Assessors") to be appointed by the Minister, one of whom shall be the chairman.

Fortunately section 224(2) of the ISA 1999, that gave the Minister of Finance a singular power to specify the matters and places in relation to which the IST may exercise its jurisdiction, was repealed by the Act,[248] while section 225 thereof has been substantially up surged by incorporating positive measures and reducing but not completely removing ambiguities in the erstwhile law. Section 275 of the Act provides thus:

> (1) The Tribunal shall consist of ten (10) persons to be appointed by the Minister as follows:
>
> (a) A full time chairman who shall be a legal practitioner of not less than fifteen years with cognate experience in capital market matters;
>
> (b) Four other full time members, three of whom shall be legal practitioners of not less than 10 years' experience and one person who shall be knowledgeable in capital market matters who shall devote themselves to issues relating to adjudication and shall not exercise any administrative function;

[246] Compare sections 225 of the ISA 1999 and 275 of the Act
[247] Hereinafter referred to as "the ISA 1999"
[248] See section 274 of the Act

(c) Five other part time members who shall be persons of proven ability and expertise in corporate and capital market matters.

The chairman shall be the chief executive and accounting officer and shall be responsible for the overall control, supervision and administration of the tribunal.

The composition of the IST which hitherto used to comprise of an odd number nine[249] is now increased to ten persons.[250] The status of the IST chairman is that of a full time presiding officer of the IST[251] and, as provided in the ISA 1999 must be a legal practitioner not less than fifteen years standing, and with cognate experience in capital market matters. He is the Chief Executive and Accounting Officer of the IST and is responsible for the overall control, supervision and administration of the IST.[252] Four out of the members are also full time, three of which must be legal practitioners of not less than ten years' experience and the fourth full time member must be knowledgeable in capital market matters. The yardstick for measuring "knowledge in capital market matters" is, however, still ambiguous. These

[249] Section 225 (1) of the ISA 1999, *ibid*
[250] Section 275(1) of the Act, *ibid*
[251] Section 275 (1) (a), *ibid*
[252] Section 275 (2), *ibid*

four full time members must devote themselves to adjudicative functions only.[253]

The other five members who are appointed on part time basis must be persons of proven ability and expertise in corporate and capital market matters.[254] It is submitted that the word "proven" used by the law makers in this provision is a relative term left to be the discretion of the Minister of Finance, who still has the sole authority and onerous power to hire and fire.[255]

The Chairman under the ISA 1999 should similarly be a legal practitioner of not less than fifteen years standing at the bar with experience in capital market matters. The degree of the chairman's experience in capital market matters is not defined and is therefore left at the Minister's absolute discretion. It is submitted that the word "cognate" used by the draftsman [256] to qualify experience in capital Market matters hardly makes much sense. It would suffice and further reduce ambiguity in the law if the experience of fifteen years in capital market matters is precisely required to have been acquired in practice as a legal practitioner.

[253] Section 275 (1) (b), *ibid*
[254] Section 275 (1) (a)
[255] Sections 275 (1), 279 and 281, *ibid*
[256] Section 225 (2), *ibid*

The IST is constituted by not less than three members which panel is constituted by the chairman[257] from amongst its members.[258] However, the IST[259] may only be presided over by a legal practitioner member. In other words a non-lawyer member cannot preside.

Another ambiguous provision in the ISA 1999[260] which was removed by the Act was the requirement of a capital market assessor to be knowledgeable about the laws, regulations, norms, practices and operations of the capital market.[261] The law ought not to have left such an important issue, like qualification of the chairman or members, uncertain. The legislature has rightly removed that unclear provision, and defined the qualifications of both the Chairman and members more precisely.[262]

6.2.1 **Tenure and Disqualification of the Chairman and Members**

The Act has made a very clear, precise and concise provision regarding the tenure of the chairman and members of the IST.[263] For emphasis, it is deemed pertinent to reproduce the apt provision of section 277 which states thus:

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[257] Section 276 (1), *ibid*
[258] Subsection (2), *ibid*
[259] Subsection (2) (a) and (b), *ibid*
[260] Sections 225 (1) and (2) and 226 of the ISA 1999, *ibid*
[261] *Ibid*
[262] Section 275(1) (a), (b) and (c) of the Act, o*p cit*
[263] Section 277 (1) and (2), *ibid*

> (1) The Chairman shall hold office for a term of 5 years renewable for another term of 5 years and no more.
>
> (2) Other members shall hold office for a term of four years renewable for another term of four years and no more.

This requires no further expatiations as against the provision of section 227 of the ISA 1999 which stated thus:

> A Capital Market Assessor shall hold office for a term of five years from the date on which he assumes his office or until he attains the age of seventy years, whichever is earlier.

By the above hitherto cumbersome provision the tenure of office of a Capital Market Assessor whether as Chairman or Member of the IST was five years provided that such tenure is deemed to have lapsed if he or she earlier attains the age of seventy.[264] This affected only persons appointed after the age of 65 years.

The further irony of the ISA 1999 was that while qualification for appointment of Capital Market Assessors had been defined,[265] the Minister's power to appoint them was unquestionable irrespective of whether or not the person(s) he appointed was or were qualified under the law. For the avoidance of doubt the law [266] stated thus:

[264] Section 227 of the ISA 1999
[265] See Sections 224 and 225 of the ISA 1999, *ibid*
[266] Section 231, *ibid*

> The question as to the validity of the appointment of any person as a Capital Market Assessor shall not be the cause of any litigation in any court or tribunal and no act or proceedings before the tribunal shall be called into question in any manner on the ground merely of any defect in the constitution of the tribunal.

This ouster provision, with respect, has the flavour of a military decree and therefore unsuitable under democratic governance. It is submitted that since the law provided for membership qualification and composition of IST, any failure to comply with the provisions of the law was certainly a fundamental issue affecting the jurisdiction of the IST and ought to have been open to legal attack by an aggrieved party. The Minister, with respect, lacked such an absolute or supreme power to do right or wrong in the performance of his public duty without a corresponding right to an aggrieved party to have recourse to due due process of law by either judicial review or an appeal. The IST itself has, discouraged shutting out of litigants on issues affecting their rights. The IST stated[267] that once the applicant/respondent can be said have based the averments before the tribunal upon a reasonable cause or complaint which the tribunal has jurisdiction to determine one way or the other, he shouldn't be shut out without being heard at all.

[267] See Samuel Osigwe vs. B. P. E. & 15 Ors (2004) 1 ISLR 51 at 88; (2007) 2 NISLR 201

If not for anything else, at least the issue of jurisdiction is fundamental and goes to the root of the adjudication, for which purpose the IST was established. The Court of Appeal following the Supreme Court authority in the notorious case of **Madukolu v Nkemdilim** (1962) 2 SCNLR 341 at 358 in the case of **Ogunmokun v Military Administrator Osun State**(1999) 3 NWLR (pt 594) 261 at 279-280 paras G-B held as follows:

> A court is competent to entertain a case when:
>
> It is properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or another; and
>
> The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and
>
> The case comes before the court initiated by due process of the law and upon fulfilment of any condition precedent to the exercise of jurisdiction.

The issue of jurisdiction is fundamental and most crucial element in adjudication process striking at the root of every cause or matter before a court of law or tribunal. It cannot be divorced from the competence of the court or tribunal to adjudicate in a matter before it. It therefore follows that any defect in the competence of the IST is fatal and will render the proceedings before it a complete nullity. The competence of the IST, it is further submitted, includes the composition and qualification of the

Chairman and Members including quorum for its sitting as provided by its enabling law. Once the IST is not duly constituted, it lacks the competence to adjudicate and any proceedings conducted thereby is null and void. This situation, it is submitted must be open to legal questioning either by judicial review or by way of an appeal as a matter of right *ex debito justicie.*

6.2.2 **Jurisdiction**

The IST jurisdiction under the ISA 1999 was limited to disputes arising under the provisions of that Act including the rules and regulations made there under,[268] and appeals from the National Pensions Commission.[269] Apart from this blanket cover jurisdiction, the IST was specifically empowered to adjudicate on matters[270] relating to the interpretation of any law, enactment or regulation to which the Act applies as follows:

(1) Disputes between the Commission and a Securities Exchange or Capital Trade Point;

(2) Disputes between Capital Market Operators and the Securities Exchanges or Capital Trade Point;

(3) Disputes between Capital Market Operators;

(4) Disputes between Capital Market Operators and their clients; and

[268] Section 234 (1) of the ISA 1999, *ibid*
[269] Hereinafter referred to as "PenCom"
[270] Section 234 (2) of the ISA 1999, *ibid*

(5) Disputes between quoted companies and the regulators or the SEC.

The jurisdiction of the IST has been strengthened and enhanced by the Act[271] and this is perhaps one of its most significant landmarks. Section 234 of the ISA 1999, which specified the jurisdiction of the IST did not signify an element of exclusiveness. The Act[272] has, however, now made the jurisdiction of IST exclusive by providing that the tribunal shall, to the exclusion of any other court of law or body in Nigeria, exercise jurisdiction to hear and determine any question of law or dispute involving;

(a) A decision or determination of the Commission in the operation and application of this Act, and in particular, relating to any dispute:

(i) Between capital market operators;

(ii) Between capital market operators and their clients;

(iii) Between an investor and a securities exchange or capital trade point or clearing and settlement agency;

(iv) Between capital market operators and self-regulatory organization;

(b) The Commission and self-regulatory organization;

[271] See Section 284 of the Act, *ibid*
[272] Section 284 (1), *ibid*

(c) A capital market operator and the Commission;
(d) An investor and the Commission;
(e) An issuer of securities and the Commission; and
(f) Dispute arising from the administration, management and operating of collective investment schemes.

In addition to the aforesaid exclusive jurisdiction, the ISA also is competent to exercise jurisdiction in relation to any other matter as may be prescribed by an Act of National Assembly.[273] The IST also has power to interpret any law, rules or regulations as may be applicable in the due exercise of its jurisdiction.[274]

The powers of the IST have been expressly adumbrated under the Act[275] which provides that the tribunal shall have, for the purpose of discharging its functions under the Act, power to:

summon and enforce the attendance of any person and examine him on oath;

require the discovery and production of documents;

receive evidence on affidavits;

call for the examination of witnesses or documents;

review its decisions;

[273] Subsection (2), *ibid*
[274] Subsection (3), *ibid*
[275] Section 290, *ibid*

dismiss an application for default or deciding matters *ex-parte*;

set aside any order or dismissal of any application for default or any order made by it *ex-party*; and

do anything which in the opinion of the tribunal is incidental or ancillary to its functions under this Act.

Any proceedings before the tribunal shall be deemed to be a judicial proceeding and the tribunal shall be deemed to be a civil court for all purposes. Proceedings of the Tribunal may be held in camera as and when deemed appropriate in the interest of the public. In **Osigwe VS B. P. E.**[276] the IST relied on the provision of section 234 (1) of the ISA 1999 and guided by the parameters of its jurisdiction in the notorious case of **Madukolu vs Nkemdilim**[277]and held thus:

> We find that based on the facts and circumstances of this case … and the totality of all authorities cited, the Tribunal has power and also competence to examine complains of this nature and to decide one way or the other.

In **Osigwe**[278] the applicant/respondent initiated the action before the IST, by an originating application dated 10th November 2003, and supported by a five-paragraph statement of evidence, pursuant to the IST 1999 and Rule 31(1)

[276] *Supra* at p. 5
[277] (1962) 2 All NLR 581
[278] *Supra*

of the IST (Civil Procedure) Rules 2003 on his behalf and as a representative of the classes of all persons other than the respondents/applicants and the class they represent who have registered to purchase shares in public companies under the Privatisation Share Purchase Loan Scheme (PSPLS) claiming, *inter alia,* as follows:

> Issuance of an order directing the respondent to suspend the share acquisition scheme as presently structured until the 1st respondent (BPE) complies with the relevant provisions of the I.S.A. 1999 and the rules/regulations promulgated thereunder;
>
> In the alternative, an order directing the respondents to immediately comply with provisions of the I.S.A. 1999 and the underlying Rules and Regulations with respect to the PSPLS by ensuring that the relevant registration statement/prospectuses are duly filed with and effectuated by the SEC.

The originating application was accompanied by a statement of evidence and pleadings thus:

> The applicant's evidence during trial principally will centre on proving the fact that the respondent's scheme is aimed at conditioning the capital market and overvaluing of the shares of non-performing public enterprises – **NITEL and Niger-dock Plc** during the initial public offering of shares of such enterprises.

That the respondent practiced fraud on and deceived the applicant and his class by deliberately failing to disclose to the applicant the financial statement of the public enterprises whose shares is offered to the applicant.

That the applicant's evidence will show that the respondents deliberately and without reasonable excuse or cause avoided making adequate disclosures concerning the return potential of the underlying securities offered for sale especially NITEL and Niger-dock Plc.

The evidence of the applicant shall point to the fact that the respondents offered shares to the public without compliance with the ISA 1999 and SEC Rules by not registering their prospectuses with SEC.

The applicant's evidence at trial will also seek to prove that the respondent's advertisement, billboards, publications, brochures and websites qualify as prospectus pursuant to the ISA 1999 and ought to have been registered thus disclosing facts material to the exercise of a reasonable investment decision. The applicant is not presently in possession of the aforesaid publications as the defendants have possession of them. The applicant will demand from the defendants' copies of these documents at trial.

A preliminary objection dated 7th January 2004 was filed on the 29th January 2004 challenging the tribunal's jurisdiction *inter alia* to hear and determine the originating application as presented by the respondents. Dismissing the preliminary objection on the issue of competence of the respondent's

originating motion, the IST held,[279] *inter alia,* that it has jurisdiction to hear and determine all the issues raised in the originating motion.

The IST referred to section 234(1) of the ISA 1999 and unequivocally pronounced on the scope of its jurisdiction[280] as follows:

> The Tribunal shall have power to adjudicate on disputes, and controversies arising under this Act and the rules and regulations made thereunder.
>
> The Tribunal shall in particular adjudicate on matters relating to:
>
> The interpretation of any law, enactment or regulations to which this Act applies;
>
> Disputes between the Commission and a Securities Exchange or Capital Trade Point;
>
> Disputes between Capital Market Operators and the Securities Exchanges or Capital Trade Point;
>
> Disputes between Capital Market Operators;
>
> Disputes between Capital Market Operators and their clients; and
>
> Disputes between quoted companies and the regulators or the Securities Exchanges.

The overriding objective of this Tribunal as stipulated in Rule 2(1) and 3(1) of the Investments and Securities Tribunal (Procedure) Rules[281] 2003 is to

[279] See Samuel Osigwevs B.P.E at p 96, *supra*
[280] *Ibid* at pp. 228-229 paras B-A
[281] (hereinafter referred to as "the Rules")

provide a reliable, informed, expedient, flexible and affordable dispute settlement mechanism for investors, public companies, capital market operators, self-regulatory organizations and other market participants with a view to promoting capital market integrity and stability in the economy.

It is pertinent that the IST (Civil Procedure) Rules 2003 remain in full force notwithstanding the repeal of the ISA 1999[282] because section 314 (2) of the Act has saved anything done or purported to have been done under the ISA 1999. This of course, includes the procedural rules that were made in 2003 pursuant to the ISA 1999.

However, where offences that are criminal in nature are disclosed during investigation, the SEC normally refers such case to an appropriate prosecuting authority like the Attorney General of the Federation or of a State as the case may be.

In **U. B. N. PLC (Registrar's Department) v S.E.C.**[283]while the IST directed the SEC[284] to formally hand over the fraud aspect of the case to Economic and Financial Crimes Commission [285] and to the Attorney General of the Federation for criminal prosecution on the one hand, the IST went further and directed the SEC to liaise with the EFCC or the Inspector General of

[282] See section 314 (1) and (2) of the Act
[283] (2004) 1 ISLR 1
[284] Hereafter referred to as "SEC"
[285] Hereinafter referred to as "EFCC"

Police to locate and produce one Lawrence Okwufulueze and his cohort in order to seize assets belonging to him. The IST further ordered that such confiscated assets be sold and the proceeds thereof be used to compensate the investors who were defrauded. For the avoidance of doubt the IST precisely held[286] thus:

> The tribunal hereby directs SEC to formally handover the fraud case to the Economic and Financial Crimes Commission (EFCC) and the Attorney General of the Federation for criminal prosecution of those involved in the forgery/cloning of the share certificates. Furthermore, SEC should liaise with or request the assistance of the EFCC or the Inspector-General of Police to locate and produce Lawrence Okwufulueze and his cohort, and in order to seize assets belonging to him as SEC found that he was the mastermind of the fraud. Such assets should be disposed of and the proceeds used to pay damages/compensation to the defrauded investors or any other party who had paid the compensation and is entitled to contribution.

It is submitted that the above verdict was tantamount to conviction of the appellant by the IST without trial and merely directing the SEC to execute its disguised conviction. The fact that the person convicted is a corporate body is immaterial. The fundament right to fair hearing under the 1999 Constitution[287] has no barriers regardless of natural or corporate personality. The word "person" used in section 36 of the 1999 Constitution

[286] *Supra* at p. 50
[287] See Section 36 (2) (a) of the 1999 Constitution.

has not been defined under section 318 thereof. It is submitted that the word "person" in section 36 should be interpreted to mean not only natural person but also corporate entity, if not for any other purpose, at least, with regard to the fundamental right to fair hearing in criminal trials.

Although, the jurisdiction of the IST has been clearly defined[288] it seems sometimes to be loath at adjudicating on matters that may conflict with administrative decisions of the SEC. In **U.B.N. Plc v S.E.C.**[289] the tribunal did not consider it ridiculous to say that it has difficulty with an order for restitution made by the SEC and declined to make the simple restitution order that was merely consequential. It is pertinent to quote verbatim from the judgment of the IST in that case,[290] where the tribunal observed thus:

> The Tribunal has difficulty with the SEC order of restitution/restoration, as there is no basis or formula for apportionment among the several persons found liable. Attempting the apportionment will amount to our making independent findings and inquiry into facts, which the SEC is better placed to do.
>
> For this reason we refer this case to SEC to review its decision/order on buy-back/restoration as regards the appellant in line with this judgment and our direction.

[288] See Section 234 (1) and (2) of the
[289] *Supra*
[290] *Supra*

With respect, it behoves the IST to apply the law to the relevant facts and circumstances of any case before it and make a clear and unequivocal pronouncement on every issue raised in the pleadings and evidence led thereon. Instead of reviewing the decision of SEC which was purely administrative and which the IST had the jurisdiction to do, it simply drew up the guiding principles which itself would have used to decide the matter and wrongly remitted the case to SEC to review its own decision. The learned chairman and members of the IST remarked thus:

> In reviewing its decision/restoration order, SEC should consider the following factors in order to arrive at an equitable relief:
>
> The total number of shares involved in the fraud/scam;
>
> The price at which they were sold to investors and thus the total amount in naira;
>
> The investors who bought the said shares;
>
> The stockbrokers found liable by SEC, who have either restored or bought back or submitted a schedule of buy back to SEC;
>
> Any stock broking firms/persons not liable to restore/compensate investors who bought through them (any party not liable to restitution/compensation);
>
> Percentage of Nestle Foods Plc shares which should be apportioned to each party involved in the scam or found culpable;

> That any investor found by SEC to have been part of the fraud syndicate should not be allowed to get compensated;
>
> In the case of Nestle Foods Plc shares, UBN (Registrar's Dept.) shall bear forty per cent (40%) of the residual amount of loss as deemed proportionate to its degree of culpability.

It is pertinent to observe that the IST, like any other court of law, has not only the power but a duty to consider all issues in any case of which it is seized, and exhaustively decide on all issues properly raised before it for determination. It is submitted that restitution order ought to be made only by the tribunal and not the SEC especially in a case in which SEC is a party. In **F.I.S. Securities Ltd v S.E.C** the IST adopted the black's law dictionary meaning of restitution as follows:

> Restitution is an equitable remedy under which a person is restored to his or her original position prior to loss or injury, or placed in the position he or she would have been had the breach not occurred. It also means restoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury; and indemnification.

The IST has itself observed the fundamental nature of the right to fair hearing which includes the principle of *nemo judex in causa sua*. In **F.I.S. Securities Ltd v S.E.C**[291] the tribunal held thus:

[291] *Supra* at p. 169

> It is a fundamental principle of law that no man can be a judge in his own cause *nemo judex in causa sua*. It is not necessary for a party to establish actual bias but a real likelihood that in the circumstances of the case an adjudicator has been biased, or that a reasonable person would have reasonable grounds in the circumstance of the case to suspect bias or that justice has not been manifestly done.

It is further submitted that the reference made by the IST to SEC for restitution order was a clear misdirection in law and hardly sustainable if tested on appeal. It is also further submitted that the tribunal would have called for further evidence at the trial, if the evidence upon which it could make an order for restitution was insufficient. It is always the duty of a party claiming any right, including restitution, to adduce sufficient evidence before the tribunal to show the right position it ought to have been placed by the equitable order of restitution. This may be done by showing the fact of the fraud on the party affected thereby and the position it would have been if the fraud or breach, as the case may be, had not taken place. The issue of restitution is premised on unjust enrichment which may arise either in contract or in tort and the guiding principles were adumbrated by the tribunal in its judgment in **UBN Plc (Registrars Dept) v S.E.C.** [292] when it observed thus:

[292] (2004) INISLR 115 at 160

> In equity, a person who unjustly enriches himself at the expenses of another is required to make restitution to the other. While in tort, restitution is essentially the measure of damages and in contract a person restitution aggrieved by a breach is entitled to be placed in the position in which he would have been if the defendant had not committed a breach. The rationale behind the principle of restitution is the need to discourage unjust enrichment. In the Nigerian case of **Eboni Finance & Securities v Wole Ojo Technical Services** 1996, 7 NWLR, part 461, page 464, Acholonu JCA. While delivering the judgment commented on the need for employment of equity to prevent unjust enrichment thus: 'I think the principle of unjust enrichment which unfortunately is not well developed in English Law as both in US & Scotland should of necessity be nurtured to growth in a new and complex society like ours where people can easily at a whiff of breath resort to law to ward off debt or other enrichments they have had, at the expense of the other. This is specie of constructive trust which is an instrument which the court of equity may employ to prevent undue enrichment. I believe that when a person is holding tight that which is subject of equity he should not be allowed to hold it firmly. Therefore, where a party unjustly enriches himself at the expense of the plaintiff he must be made to disgorge it is therefore in consonance with the principles enshrined in the restitution, remedy shall be available wherever the defendant is unjustly enriched at the expense of the plaintiff. In this case, the respondent must be made to vomit out what they have taken (unjustly).

The evidential burden of proof is always on an applicant or appellant as the case may be.[293]

[293] See Section 292 of the Act

6.2.2.1 **Jurisdiction Over Matters Relating to The Companies and Allied Matters Act (CAMA)**

The IST has a restricted jurisdiction over matters relating to the Companies and Allied matters Act.[294] By its powers to adjudicate on Capital Market maters,[295] the IST is competent to deal with matters under the provisions of C.A.M.A dealing with quoted companies securities, merger acquisitions, etc. In **F.I.S. Securities Ltd v S.E.C.**[296] the IST held thus:

> The Tribunal and the APC have jurisdiction in capital market matters, so empowered to adjudicate on the matters in issue considering the provisions of sections 234 (2), and section 255 (2) of the I.S.A. 1999. The Tribunal has jurisdiction to deal with matters specified in CAMA in so far as it deals with quoted companies, securities, transactions in those securities, merger, acquisitions etc. So there is no conflict at all between the I.S.A 1999 and the Constitution since capital market is an item under the exclusive Legislative list of the 1999 Constitution.

6.2.2.2 **Appellate Jurisdiction of the I.S.T.**

The Investments and Securities Tribunal apart from its original jurisdiction as discussed above also exercises an appellate jurisdiction over the decisions

[294] hereinafter referred to as "CAMA"
[295] See Sections 234 (2) and 255 (2) of the I.S.A. 1999
[296] *Supra* at p. 175

of the Administrative Proceeding Committee[297] of the SEC pursuant to section 236 of the ISA 1999. The IST also has both original and appellate jurisdiction on pension disputes,[298] which include but not limited to the following:

> Misappropriation of client's money by Pension Funds Administrator (PFA) and/or Pension Funds Custodian (PFC);
>
> Non-payment of pension as at when due by a PFA;
>
> Non-crediting or wrong crediting of a beneficiary's contribution (s) or benefits arising from investments of his/her fund by a PFA/PFC;
>
> Disputes over pensions between the beneficiaries/pensioners and the PFA/PFC, and PenCom;
>
> Disputes between PFA and PFC;
>
> Disputes arising from the rules, regulations and such other guidelines made by PenCom;
>
> Disputes arising from any decision, notice and/ or decision issued by PenCom;
>
> Appeals against disciplinary measures by PenCom such as suspension and/or barring of any participant from the market;
>
> Appeal against de-licensing of any PFA/PFC by the PenCom; and

[297] Hereinafter referred to as "the APC"
[298] See Section 93 the Pensions Reform Act No 2, 2004

Disputes/claims arising from misrepresentation or false statements in PFA reports/documents or in pensions investments.

6.2.2.3 **The Two Fold Jurisdiction**

One could see from the foregoing that the IST is empowered to hear all civil disputes in both the Capital Market and Pensions administration. Such disputes may be between participants, investors, regulatory organizations and operators as well as the SEC which is the apex regulator in the capital market, and also between the National Pensions Commission and other parties involved in any pension dispute. The jurisdiction of the IST is therefore two fold covering both capital market and appeals in respect of pension matters.

6.2.3 **Capital Market Disputes**

The IST has both original and appellate jurisdiction in respect of capital market disputes.[299] The law, however, fails to make a clear distinction between capital market disputes falling under the original jurisdiction of the IST and those in respect of which the tribunal could only exercise appellate jurisdiction. This uncertainty is given statutory flavour whereby a person aggrieved by a decision of the SEC is given the option to either institute a

[299] Section 284 of the Act, *op cit*

new action in the IST or alternatively appeal against such decision. It is submitted that the decision of the SEC being *quasi*-judicial and appealable, could be properly appealed against because filing a new action on the same cause of action and between the same parties will not only proliferate capital market disputes but will also offend the *res judicata* rule. The law [300] provides thus:

> A person aggrieved by any action or decision of the Commission under this Act, may institute an action in the Tribunal or appeal against such decision within the period stipulated under this Act.

It is submitted that the above provision makes it uncertain as to which process one should file at the IST against any particular decision of the SEC. The law, it is submitted, must be clear, certain and unequivocal. The option to file a fresh action in the IST as hitherto provided under section 236 (1) of the ISA 1999 should therefore have been removed by the Act which is intended to remove all anomalies under the ISA 1999.

The right to appeal to the IST is exercisable, *ex debito justiciae*, within thirty days [301] from the date of the decision of SEC or PenCom appealed against. The period may be extended by the IST at its discretion, which, however, must be exercised judicially and judiciously, if it is satisfied that there are

[300] Section 289 (1) of the Act
[301] Subsection (2), *ibid*

good and substantial reasons for the delay[302] in filing the appeal within the prescribed time frame.

Decisions of the Administrative Proceeding Committee of the commission are deemed to be decisions of the commission itself. In **UBN Plc (Registrar's Dept) v S.E.C.**[303]the Investments and Securities Tribunal held thus:

A committee set up by the Commission is part of the Commission. The Administrative Proceeding Committee (APC) is not an ad hoc committee and therefore not different from the Commission.

It is submitted that even if the Administrative Proceeding Committee of the SEC were ad hoc it would not have made any difference since it is an agent of the SEC. Its decisions are therefore legally that of SEC. The IST must avoid undue delay in the conduct of its proceedings. Its processes are fast-tracked to ensure minimum delay. In fact it has only three months from the date of commencement of action to deliver its judgment[304] otherwise the proceedings conducted has become stale and a complete non-starter- as good as never conducted at all.

[302] Proviso to subsection (2), *ibid*
[303] *Supra* at p. 159, para C
[304] Subsection (3), *ibid*

6.2.4 **Pensions Disputes**

As mentioned above the IST has appellate jurisdiction in respect of pension matters. Any person dissatisfied with the decision of the PenCom may ascend upstairs to the IST.[305] Such disputes may arise between Pensions Funds Administrators (PFA) and their clients or between the beneficiaries of the pension funds, or the Pension Funds Custodians (PFC) and Pension Fund Administrators (PFA) and their clients or any of the said parties against the PenCom. The original jurisdiction on pension disputes is exercisable by the National Pension Commission (PenCom).

6.2.5 **Operational Distinctiveness of the I.S.T**

The IST like regular courts of law operates by the application of relevant laws both substantive and procedural. It also applies rules of common sense as may be dictated by the circumstances of each case before it, in order to achieve responsiveness, flexibility, speed and cost effectiveness. It also has dispute resolution mechanisms, which include mediation, negotiation, conciliation and early neutral evaluation.

The IST has a Technical and Operational Services Department and a Legal Services Department that does the technical and legal research works

[305] See Section 93 of the Pension Reform Act No 2, 2004

respectively. It also receives external expert advice when the need arises. One wonders where the "external expert advice" comes from. As a tribunal charged with adjudicative responsibility, the IST must be totally independent of any external direction or advice.

6.2.6 **Legal Representation**

Another landmark development made by the Act is in the area of legal representation. Unlike the erst-while position under the ISA 1999, a party may now appear before the IST either in person or authorize one or more legal practitioners to represent him or it before the tribunal. This conforms to the norms of legal practice. The ISA 1999 hitherto awkwardly provided for representation of any party before the tribunal by either legal practitioners or even laymen under the ISA 1999.[306]

The procedure for filing and prosecuting cases in the IST was so incredibly liberalized that right from the start to the conclusion of any matter any party may handle his or its own case personally or by representation by any person whether a legal practitioner or not. One wonders how a layman could represent any party in judicial proceedings, more so before such a highly placed tribunal, an appeal from which lies directly to the Court of

[306] Section 238 (1) and (2) of the ISA 1999, *ibid*

Appeal. [307]Moreover, considering the fact that some of the proceedings before the IST were criminal or quasi criminal in nature parties should only have been allowed to appear and conduct their cases by themselves in person or be represented by a legal practitioner of their own choice as provided by section 36 (6)(c) of the 1999 Constitution which states that "every person who is charged with a criminal offence shall be entitled to defend himself in person by legal practitioner of his own choice."

It is submitted that the provision of the ISA[308] that previously gave right to laymen to represent litigants before the IST especially in criminal or *quasi* criminal proceedings is inconsistent with the above provision[309] of the Constitution and therefore void to the extent of such inconsistency. This "right" of representation has been removed in the Act.[310]

6.2.7 **Right of Appeal**

As noted earlier above there is a right of appeal from the decisions of the IST to the Court of Appeal.[311] as provided by the Act[312] thus:

[307] Section 295 (1), *ibid*
[308] Section 238, *op cit*
[309] Section 36 (6) (c) of the 1999 Constitution, *ibid*
[310] See Section 291 of the Act
[311] See Sections 295 of the Act and section 240 of the 1999 Constitution
[312] Section 295 (1) of the Act *Ibid*

> Any person dissatisfied with a decision of the Tribunal may appeal against such decision to the Court of Appeal if:
>
> The decision was taken in the exercise of its appellate jurisdiction, on points of law only; or
>
> It is a final decision taken in the exercise of its original jurisdiction, on points of law; or mixed law and fact; or
>
> It is an interlocutory decision of the tribunal, on points of law only.

It is clear from the above provision that there is no right of appeal against any decision of the tribunal, be it interlocutory or final in the exercise of original or appellate jurisdiction, on points of facts only. One wonders if there could be any decision of the IST on points of fact *simplicita*. A right of appeal could only be exercised on points of law in respect of interlocutory or appellate decision of the IST, while an appeal in respect of final decisions of the tribunal in the exercise of its original jurisdiction may be made on mixed facts and law.

The ISA, however, went further to make another provision on the right of further appeal from the Court of Appeal to the Supreme Court.[313] It is submitted that such provision is not only superfluous but unnecessary for two reasons.

[313] Section 297 of the Act, *op cit*

First the right of appeal from the Court of Appeal to the Supreme Court is constitutionally enshrined.[314] The Constitution provides[315] thus:

> The Supreme Court shall have jurisdiction to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Court of Appeal.

It is therefore needless for any other law to re-enact the same provision especially when Constitution makes a very clear provision.

Secondly the Act establishing the IST and defining its jurisdiction has no business to define the jurisdiction of the Supreme Court in respect of appeals from the Court of Appeal. The limit to which the Act could define jurisdiction should have ended by the provision[316] that gives the Court of Appeal exclusive jurisdiction to hear and determine appeals from the IST. Once an appeal emanates from decision of a court or tribunal whose jurisdiction has been defined in the Constitution, it is unnecessary and superfluous for the Act to restate same.

It is pertinent that the Investment and Securities Tribunal enjoys an exclusive jurisdiction on matters in respect of which it has been established. The Act also regulates award of cost in appeal cases by section 296 thereof which provides that 'each party to an appeal shall bear its own cost.' This

[314] Section 233 of the 1999 Constitution
[315] Section 233 (1) of the 1999 Constitution, *ibid*
[316] Section 295 of the Act, i*bid*

provision seems to be novel. In judicial proceedings, cost is a matter of discretion of the court, which is, however exercised judicially and judiciously and it follows events. A court or tribunal exercising judicial function has an absolute and unfettered discretion to award or refuse costs defending on the circumstances of each case in **N.B.C.I v Alfijir (Mining) Nig Ltd**[317] **the** Supreme Court commenting on the power of court in awarding cost held thus:

> A court has an unfettered and absolute discretion to award or refuse costs in any particular case, but that discretion must be exercised judicially and judiciously. Thus, the assessment of the amount allowed in terms of an award of costs is the responsibility of the court, which determines what is reasonable in the circumstances. And when the court in exercise of its discretion orders the costs payable and does so without being capricious, in the sense that it is ordered in honest exercise of discretion, it will not be questioned.

The Court of Appeal in the case of **Delta Steel (Nig) Ltd v A.C.T. Inc**[318]similarly held thus:

> Cost follows the event. Thus, a court in awarding costs will always take into consideration all expenses reasonably incurred by the successful litigant in the ordinary course of the prosecution of the suit. Extra-ordinary or unusual expenses are never taken cognisance of.

[317] (1999) 14 NWLR (pt 638) 176 at 203, paras A-B
[318] (1999) 4 NWLR (pt 597) 53 at 68, para G

One wonders why the law makers blindly repeated section 244 of the ISA 1999 that disrobes the IST of its discretion to award costs only in respect of appeal matters. If the IST could award cost in respect of first instance matters, it is difficult for one to see reason why it has been stripped off a parallel discretionary power in appeal cases. One gets a very dim view on why these provisions were blindly transplanted from the ISA 1999 in to the Act.

6.2.8 **Procedure**

Since the IST has both original and appellate jurisdiction cases are ignited in the following two manner:

The applicant or his authorised representative initiates an action by completing and filing a reference notice[319] (form IST 001, similar to writ of summons used in regular courts of law), which is obtainable from the Chief Registrar's office of the IST. Copies of all the relevant documents must be attached[320] to the reference notice and an address for service on all the parties shall be provided. The IST has to be notified of any change in the address occurring during the pendency of the proceedings. Only capital market disputes could be originally initiated in the IST.

[319] See Rule 5 of the IST (Procedure) Rules 2003
[320] Rules 5, 6 and 9, *ibid*

6.2.9 **Time Frame**

An original reference to the IST must be made within three months from the date when the cause of action arose i.e. when the complainant becomes aware of the event that gave rise to the claim under reference. Appeals from the SEC or the PenCom must be filed within 30 days from the date of the decision appealed against. However, there is no time limit in respect of appeals from the PenCom. It is submitted that there should have been a time limit within which a notice of appeal could be filed in respect of pension matters as well. Moreover, the IST could in its discretion grant an extension of time for filing any process brought out of the time allowed for filing of such process, provided there are good and substantial reasons for the delay deposed to in a supporting affidavit.

As noted above the IST must hear and determine any matter before it and judgment thereon delivered within 90 days from the date of filing the initial reference notice or notice of appeal as the case may be. It is submitted that any judgment or decision delivered outside that time frame is null and void and likely to be set aside on appeal.

6.2.9.1 **Preliminaries to Trial**

When a reference notice is filed in the IST, a copy thereof is sent to the SEC. The SEC must, within fourteen days after receiving such notice from the tribunal, forward a statement of case in support of the referred action together with list of documents and all material pieces of evidence on which it intends to rely. The IST upon receipt of the statement of case from SEC shall serve the applicant with same upon being served with statement of the case the respondent must file his response within 21 days and the IST will send copies of the response to each party in the case. When all representations have been duly filed and exchanged the IST fixes a date for hearing of the case.

Upon an application of any party or on it's own motion the IST may give directions regarding the preparation for the hearing of the case. This may include such interlocutory matters like extension of time or hearing of the case in camera and the like.[321] The IST may also hear and dispose of interlocutory applications and other preliminary issues before hearing the substantive matter.

[321] Rules 34 and 35; see also Section 290 (4) of the Act, *ibid*

6.2.9.2 **Trial Proceedings**

As soon as the preliminary or interlocutory issues have been disposed of, the case proceeds to hearing. The tribunal states it on the cause list against a definite date and hearing notices, stating the date time and venue of the hearing are served on all the parties, at least, seven days before the date fixed for hearing. In case of any change in venue, a notice to that effect is served on the parties not less than three days before the hearing date. The trial proceedings are normally conducted in the IST building in Abuja but the tribunal may arrange hearing of cases, especially appeals, elsewhere.

The IST may also enter judgment without hearing a matter when all the parties have given their written consent or where the respondent states in writing that he does not oppose the application or the appeal. This is similar to consent, default or undefended-list judgment in regular courts.

Just like in the regular courts of law, a party who filed a reference notice or an appeal has a right to withdraw it if he does not wish to proceed therewith. The SEC may also either not oppose a reference or withdraw its opposition earlier filed. The IST also has an alternative dispute resolution mechanism[322] by which parties may apply for settlement out of court by

[322] Hereinafter referred to as "ADR"

any of the available windows or means for settlement of disputes amicably. This issue has been discussed in detail in the appropriate chapter[323].

As in all judicial proceedings hearing is conducted in public unless, for good reasons and in the interest of justice the IST directs the whole or part of the hearing in camera.[324] Such reasons that may justify hearing in camera include public order, morals, national or individual security, etc.

Due to time constraint, the tribunal is normally reluctant in granting adjournments. However, adjournments are granted by the IST on request by any party and for reasons which the tribunal considers compelling enough to adjourn matters before it. The parties should normally agree on an alternative hearing date. Fresh hearing notices of any adjournment at the instance of the tribunal itself will inform the parties of any new date fixed by the tribunal.

A default of appearance by any party may result in the hearing and determination of the matter in his absence unless the tribunal is satisfied that the absence is for an excusable reason necessitating an adjournment.

At the end of the hearing the tribunal may deliver its decision or judgment instantly i.e. bench decision or adjourn to another date either fixed at the

[323] See Chapter 7, *infra*
[324] Section 290 (4) of the Act, *op cit*

time of the adjournment or later through hearing notices, for a considered judgment or ruling just like a regular court law. Evidence is also taken in the normal way of taking evidence in regular courts although the provisions of the Evidence Act do not strictly bind the IST. of

Section 293 of the Act is apt on the nature, format and enforceability of any judgment of the IST. It states thus:

> The Tribunal shall give its judgment in writing and may make orders as to fines, suspensions, withdrawal of registration or licenses, specific performance, or restitution as it may deem appropriate in each case.

An award or judgment of the tribunal shall be enforced as if it were a judgment of the Federal High Court upon registration of a copy of such award or judgment with the Chief Registrar of the Federal High Court by the Tribunal.

6.3 **Value Added Tax Tribunal**

The value Added Tax Tribunal[325] is a revenue tribunal that the Minister of Finance[326] has the singular power or authority to establish in each zone of the Federal Inland Revenue Service.[327] The VAT Tribunal in each zone

[325] Hereinafter referred to as the "Vat Tribunal"
[326] Hereinafter referred to as "the Minister"
[327] See Article 1 of the 2nd Schedule to the Value Added Tax Act, Cap VI L.F.N. 2004 (hereinafter referred to as the "Vat Act")

consists of a Chairman and not more than seven members who are appointed by the Minister[328]

The chairman must be a legal practitioner of not less than fifteen years' experience and he is the head and presiding officer of the Zonal VAT Tribunal.[329] The members of the tribunal are appointed from among persons not necessarily who have, but who appear to the minister to have, wide and adequate practical experience, professional knowledge, skills and integrity in the profession of law, accountancy or taxation as well as persons who have shown capacity in the management of trade, business and retired senior public servant in tax administration.[330]

6.3.1 **Membership of Zonal VAT Tribunal**

Members of the VAT tribunal are appointed by notice in the Federal Gazette by the Minister from among persons appearing to him to have a wide and adequate practical experience, professional knowledge, skills and integrity in the profession of law, accountancy or taxation in Nigeria, as well as persons that have shown capacity in the management of trade, business and retired senior public servant in tax administration.

[328] Articles 2 and 4, *ibid*
[329] Article 3, *ibid*
[330] See Article 4 (a), *ibid*

It is observed that the above provision apart from laying an ambiguous criterion for the appointment of members of the VAT Tribunal confers upon the Minister of Finance a very wide discretion to appoint everyone as he/she deems fit including traders and businessmen and women. It is submitted that he law should have defined precisely the standard or level of knowledge and experience required and the yardstick for measuring skills and integrity of persons to be appointed, even in respect of professionals like lawyers and accountants, similar to the screening procedure for appointment of judges of superior courts. The status of the VAT Tribunal is high since an appeal from it lies to the Court of Appeal[331] and not "Federal Court of Appeal" as wrongly stated in section 16 (3) of the VAT Act that an "appeal from the Value Added Tax Tribunal shall be made to the Federal Court of Appeal."

The appeal issue has been discussed in greater detail under the appropriate sub topic. The tenure of members including the Chairman[332] is three years.[333] The Chairman, who is the Presiding Officer, must be a legal practitioner of at least fifteen years standing at the Bar.[334] Article 3 of the 2nd schedule provides as follows:

[331] Section 16 (3) of the VAT Act, *ibid*
[332] Article 2 of the 2nd Schedule to the VAT Act, *ibid*
[333] Article 4 (b), *ibid*
[334] Article 3(a), *ibid*

The chairman of each of the Zonal VAT Tribunals shall -

(a) shall be a legal practitioner of not less than fifteen years' experience;

(b) shall preside over the proceedings of the Tribunal.

The above provision indicates the qualification of the chairman and his leadership role as the Presiding Officer. Article 4 which regulates the qualification of members of the VAT Tribunal went a mile further to provide for tenure and the Minister's discretionary power not only to hire but also to fire by merely serving a notice of termination of appointment. The said article 4 sub-articles (b) and (c) provide thus:

A member of each Zonal Vat Tribunal-

(b) Shall hold office for a period of three years from the date of appointment and may resign at any time by a notice in writing addressed to the Minister;

(c) Shall cease to be a member upon the Minister determining that his office be vacated upon notice of such determination.

The Minister has a duty to terminate the appointment of any member upon being satisfied that such member has been absent at two consecutive sittings of the tribunal without the chairman's written permission or has failed to declare his pecuniary interest in any pending appeal before the tribunal and even on ground of illness incapacitating him from performing his duties. It is submitted that incapacity to perform duties for which a

member is appointed should be permanent or protracted in nature to warrant termination of his appointment. Another reason for termination of a member's appointment is commission of a criminal offence under any enactment imposing tax on income or profit. It is submitted that commission of any criminal offence not necessarily in relation to tax on income or profit suffices as good cause for removal of either the chairman or a member from such a dignified office. It is submitted that mere absence at two sittings of the VAT Tribunal should not earn a member such drastic measure like termination except in circumstances indicating that he/she has abandoned the membership or refuses to respond to notices of sitting without justifiable excuse. It should suffice if a member takes permission to be absent in any form not necessarily written, even on phone or by electronic message or the like. It is pertinent that the word "member" includes the "chairman".[335] The procedure for the removal of a member therefore equally applies to the chairman since he is primarily a member and only designated as chairman by the Minister who picks him from amongst the members. Article 2 of the second schedule provides thus:

> Each of the Zonal VAT Tribunals shall consist of not more than eight persons, none of whom shall be a serving public

[335] Article 2, *ibid*

officer and one of whom shall be designated as chairman by the Minister.

The Minister has also been conferred with power to make ad-hoc appointments for the purpose of constituting a quorum for the hearing of an appeal in any situations where a quorum has not been formed.[336] The Minister also has the singular authority to appoint or designate any serving public officer as the secretary of the VAT Tribunal.[337] Like other appointments, the appointments must be gazetted.[338]

The law could, however, be self-contradictory regarding the members' tenure of office because while at one breath the law provides for three-year tenure, [339] at another the same law provides[340] that "the members of the VAT Tribunal shall remain in office until new ones are sworn in."

Thus, in a situation where the three-year tenure expires before new members are sworn in, the old members will still remain in office. It is submitted that any exercise of jurisdiction by the chairman and members whose tenure have expired and any decision taken by them including the entire proceedings conducted by them after the expiry of their tenure is null and void. The Minister should therefore, immediately appoint or renew the

[336] Article 6, *ibid*
[337] Article 7, *ibid*
[338] See articles 1, 4(a) and 7 *ibid*
[339] Article 4 (b), *ibid*
[340] *Ibid*.

appointment of any member whose tenure has expired instead of allowing the old ones to remain in office until new ones are appointed and sworn-in. It is submitted that the tribunal is better off not being constituted than improperly constituted.

6.3.2 **Jurisdiction**

The VAT Tribunal established for each zone of the Federal Inland Revenue[341] hears and determines appeals emanating from that zone and brought before it either by any taxable person aggrieved by the assessment or demand notice made upon him by the Federal Board of Inland Revenue[342] against such assessment or demand notice by giving written notice to that effect to the Board through the Secretary to the VAT Tribunal. Such notice of appeal must be filed written 15 days after the date of service of the assessment or demand notice which is appealed against, [343] or by the Board, if aggrieved by the noncompliance of a taxable person to any provision of the Act. [344] The Board must file its appeal in the zone where the taxable person is resident by filing the notice of appeal at the office of the Secretary to the VAT Tribunal.[345]

[341]Hereinafter referred to as the "Zonal VAT Tribunal."
[342] Hereinafter refereed to as "the Board"
[343] See article 9 of the 2nd Schedule to the Act
[344] Article 10, *ibid*
[345]*Ibid*

It is submitted that while a taxable person may properly file an appeal against the assessment or demand notice of the board, a case filed by the Board does not qualify as an appeal, because noncompliance not being a positive act does not tantamount to a decision that may be appealed against. It is neither a decision nor an exercise of discretion like an assessment or demand notice which is an exercise of power or discretion and which could be appealed against. This, it is submitted, is an exercise an original jurisdiction notwithstanding its purport and wrong tagging as an "appeal."

An assessment or demand notice becomes binding on a taxable person upon failure to file a notice of appeal within the prescribed 15 days time frame after service of the assessment or demand notice and, as seen above, the board has been entitled to proceed to file a "notice of appeal" at the zone VAT Tribunal to recover same from the defaulting taxable person.[346] The VAT Tribunal is essentially established to review and recover any tax, penalty or interest which remains unpaid after the period specified for the payment thereof,[347] where the taxable person appeals against the assessment to the VAT Tribunal. [348]

[346] Article 11, *ibid*
[347] See Section 20 (1) of the VAT Act
[348] Subsection (2), *ibid*

6.3.2.1 **Enforcement and Conflict of Jurisdiction**

The VAT Tribunal is a kind of toothless bull-dog. Its power terminates with an award or entry of judgment. In other words, it has no power to execute its judgments and awards but same has to be registered in the registry of the Federal High Court and executed as if it were judgment of that court.[349]

It is submitted that jurisdiction in civil causes and matters relating to the revenue of the Federal Government in which the Government or any of its organs is a party or matters connected therewith or pertaining to taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal Taxation is exclusive to the Federal High Court.[350] For the avoidance of doubt section 251 (1) of the 1999 Constitution states as follows:

> Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters-
>
> relating to the revenue of the Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is a party;

[349] Article 12, *ibid*
[350] See Section 251 (1) (a) and (b) of the 1999 Constitution (as amended).

> connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal Taxation;

It is further submitted that an assessment or demand notice in respect of taxation by the Federal Inland Revenue Board is a matter relating to the revenue of the Federal Government and/or pertaining to or connected with the taxation of companies and other bodies established or carrying on business in Nigeria or a person subject to Federal taxation. It is therefore submitted that the matters purportedly coming under the jurisdiction of the VAT Tribunal are within the exclusive jurisdiction of the Federal High Court. This explains why the VAT Tribunal is more or less redundant. The conflict is yet to be judicially considered and pronounced upon.

6.3.3 **Notice of Appeal**

The filing of notice of appeal at the registry of the tribunal initiates proceedings at the VAT Tribunal. It must, therefore, be sufficiently front-loaded like filing of a civil action in a High Court. Thus, it is required[351] that sufficient particulars regarding the tax assessment appealed against be provided in the notice thus:

> The name and address of the taxable person;

[351] Article 13 of the 2nd Schedule to the VAT Act, *op cit*

The total amount of goods and service chargeable to tax in respect of each month;

Any input tax;

Net amount of tax payable;

The copy of assessment notice;

The precise grounds of appeal against the assessment; and

An address for service of any notice, process or other document to be given to the appellant and the Secretary to the Zonal Tribunal.

The parties must be given seven-day notice of hearing any matter before the VAT Tribunal by the tribunal's secretary, stating the date and place for the hearing of the appeal.[352] The secretary to the tribunal signs all documents emanating from the VAT Tribunal other than judgments[353] which is only certified by him.

6.3.4. **Hearing Proceedings**

Unlike other tribunals or courts whose proceedings are open to the public, save in exceptional circumstances, the VAT Tribunal, to the contrary conducts its proceedings in camera. The parties, however, do not lose their right to appear in person or be represented by a legal practitioner at the hearing or, as the case may require, by a chartered accountant or tax

[352] Article 17, *ibid*
[353] Article 18, *ibid*

consultant.[354] The law, however, instead of giving equal right of representation to both parties has unduly restricted such right to only an appellant. Article 18 of the VAT Act, *inter alia,* provides that the Zonal Tribunal, upon the determination of an appeal against tax assessment, unlike regular court, has power to confirm, reduce, increase or otherwise amend such assessment[355] as it may deem necessary in the interest of justice.

The Minister is empowered to make rules of practice and procedure for the VAT Tribunal, in default of which the tribunal shall apply the procedural rules of the Federal High Court with such modifications as may be necessary.[356]

6.3.5 **Right of Appeal**

There is however, no right of appeal on facts against the decision of the VAT Tribunal. However, any aggrieved party may appeal on points of law to the Court of Appeal by filing a notice to that effect at the Zonal Tribunal Secretary's office within thirty days after the date of the decision. Like all notices of appeal the notice shall contain[357] the names of the parties and

[354] *Ibid*.
[355] Article 20, *ibid*
[356] Article 21, *ibid*
[357] See Order 6 of Rule 2 (1), (2) and (3) of the Court of Appeal Rules, 2011 (The same with the 2007 Rules)

their respective addresses for service, the suit number, the part of decision appealed against, the grounds upon which the appeal is predicated and the exact nature of the relief sought.

Any ground which is vague or general in terms or which discloses no reasonable ground of appeal shall not be permitted, save the general ground that the judgment is against the weight of the evidence, and grounds of appeal or any part thereof which is not permitted may be struck out by the court of its own motion or on application by the respondent.

The rules regulating appeals under the Act are to be made by the President of the Court of Appeal of Nigeria pending which the Court of Appeal Rules shall apply in respect of hearing and determination of an appeal under the Vat Act.[358]

There are two types of appeals under the Act. These are appeals filed at the VAT Tribunal by either an aggrieved taxable person or by the Board of Internal Revenue, which is an initiating process and appeals against the decision of the VAT Tribunal to the Court of Appeal.

[358] Article 25 of the 2nd Schedule to the VAT Act, *supra*

It is submitted that the rules of procedure in respect of the first type of appeal above is made by the Minister in default of which the VAT Tribunal adopts the Federal High Court (Civil Procedure) Rules.[359]

The VAT Tribunal applies the Court of Appeal Rules in its proceedings[360] as the law requires.[361]

6.4 **Tax Appeal Tribunal**

The Tax Appeal Tribunal was established by the Federal Inland Revenue Service (Establishment) 2007,[362] which provides[363] thus:

> 59. Establishment of a Tax Appeal tribunal. First Schedule.
>
> (1) A Tax Appeal Tribunal is established as provided for in the fifth schedule to this Act.
>
> (2) The Tribunal shall have power to settle disputes arising from the operations of this Act and under the first schedule.

Various tax entities are taxed according to the various tax laws at the Federal and States levels, which include personal income tax, companies' tax, petroleum profit tax, stamp duties, among others. Federal Inland Revenue Services,[364] which replaced the erstwhile Federal Board of Inland Revenue, administers the various Federal tax laws in Nigeria and any other enactment or

[359] Article 21, *ibid*
[360] Court of Appeal Rules 2007, *op cit* at p.252
[361] Article 25 of the 2nd Schedule to the VAT Act, *supra*
[362] Hereinafter referred to as "the FIRS Act"
[363] Section 59 and the 1st and 5th Schedules to the FIRS Act, *ibid*
[364] Hereinafter referred to as "the FIRS"

law on taxation in respect of which the National Assembly confers power on the FIRS, including all the functions of the defunct Federal Board of Inland Revenue[365]. In the exercise of this onerous task, the FIRS is empowered to call for tax returns and all relevant document, as it may consider necessary, for purpose of assessment of profits or income of any person natural, corporate or organisation. In the process of so doing disputes are bound to arise. Hence, the need to put in place a specialised adjudicating body like the Tax Appeal Tribunal[366] to resolve such tax disputes. It is submitted that the nomenclature of this tribunal should have been "Tax Tribunal" since its jurisdiction is essentially original. This new TAT only found its feet three years ago when the Minister of Finance issued the Tax Appeal Tribunal Establishment Order 2009.[367] It is pertinent to note that the TAT has extinguished and indeed replaced both the former Body of Appeal Commissioners and the VAT Tribunal. A learned academician[368] observed the recent take off of the TAT thus:

> ... the Tax Appeal tribunal Chairmen and Commissioners were inaugurated on the 4th of February, 2010 while the secretariat staff resumed duties at their respective posts on July 1st 2010 after a two-week induction training. This

[365] See Section 25 of the FIRS Act, *ibid*
[366] Hereinafter referred to as "TAT"
[367] See the Federal Gazette No. 296, Vol. 96 of 2nd December 2009.
[368] Idornigie, P. O, The Role of the Tax Appeal Tribunal (TAT) in Nigeria's Tax Jurisprudence, a paper presented at a 2-day capacity building interactive workshop on tax laws, ethics and judicial interpretation for superior court judges and senior tax law officers at Transcorp Hilton Hotel, Abuja on Tuesday 18th December, 2012, at p. 7

> marked the take off of the new Tax Appeal Tribunal in Nigeria.

In fact the TAT started functioning as a tribunal barely two years ago after enactment, by the Minister of Finance, and commencement of its procedural rules[369] on 1st September 2010.

6.4.1 **Composition**

The TAT is nothing more than the erstwhile Board of Appeal Commissioners that has been transformed by the Minister of Finance into the TAT. The FIRS Act has so provided[370] in clear and unambiguous terms thus:

> Subject to the provisions of this Act, the Executive Chairman of the former Board is deemed to have been transferred to the service established under this Act in the same capacity.

The TAT comprises of five members[371] who are appointed by the Minister of Finance at her absolute discretion. One would expect that the Commissioners must be knowledgeable in tax jurisprudence. The Chairman for each zone shall be a legal practitioner of not less than 15 years cognate

[369] Tax Appeal Tribunal (Procedure) Rules 2010
[370] See section 65 of the FIRS Act.
[371] Referred to as "Commissioners"

experience in tax matters. The zones are established by the Minister of Finance through a notice in the Federal Gazette. At the moment the TAT sits in eight zones.

Each of the other Four Tax Appeal Commissioners only qualifies for the appointment if he is knowledgeable in the laws, regulations, norms, practices and operations of taxation in Nigeria or has managed trade or business or a retired public servant in tax administration. One may submit, with respect, that the criteria for appointment of a Tax appeal Commissioner are so vague that it leaves the Minister's discretion to appoint them quite at large.

6.4.2 **Jurisdiction**

The TAT is established for the purpose of settling disputes arising from the operation of the FIRS Act and under the various Federal tax laws,[372] which it is empowered to apply in the determination or resolution of any dispute before it.

If the TAT discovers any evidence of criminality in a case before it, such matter must be sent to an appropriate prosecuting authority like the Attorney General of the Federation or of a State as the case may be or any relevant law enforcement agency.

[372] See the Fifth Schedule to the FIRS Act.

Matters, in cases where the FIRS is complaining of non compliance by any person or organisation of any provision of tax law, are presented to the TAT in the exercise of its original jurisdiction. All other cases are filed at the TAT registry by way of an appeal against any action or decision of the FIRS by a person aggrieved thereby.

6.4.3 **Conflict in Jurisdiction**

The question that arises in view of the exclusive original jurisdiction of the Federal High Court in respect of causes and matters relating to revenue of the Federal Government and also matters connected with or pertaining to taxation of persons subject to Federal taxation. It is submitted that the exclusive jurisdiction of the Federal High Court as provided under the law[373] completely subsumes the jurisdiction of the TAT. For the avoidance of doubt the law[374] states thus:

> 251(1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters –

[373] See Section 251(1) of the 1999 Constitution (as Amended).
[374] *Ibid*

(a) Relating to the revenue of the Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is a party.
(b) Connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation.

The foregoing provision leaves no room for doubt that all causes and matters relating or in connection with Federal Government revenue or taxation is within the exclusive jurisdiction of the Federal High Court. It is further submitted that the problem of the conflicting jurisdiction of the TAT is not cured by the laying of appeals from it to the Federal High Court. This is because the "exclusive jurisdiction of the Federal High Court refers to an "original" and not "appellate" jurisdiction. The issue is yet to come up for judicial interpretation.

The entire jurisdictional parameter of the TAT is questionable in view of the exclusive jurisdiction of the Federal High Court subsuming that of the TAT under the FIRS Act and regulations made thereunder, which are null and void to the extent to which they conflict with section 251 of the 1999 Constitution under which the Federal High Court derives its jurisdiction.

The Constitution provides[375] thus:

[375] Section 1(3) of the 1999 Constitution (as Amended)

> 1(3) if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and that other law shall to the extent of the inconsistency be void.

It is submitted that this provision clearly renders the similar ones under the FIRS Act conferring parallel jurisdiction on the TAT null and void. The issue is yet to be contested in court.

6.4.4 **Procedure**

The practice and procedure of the TAT is provided by the Tax Appeal Tribunal (Procedure) Rules 2010.[376]

Under the Rules[377] any person aggrieved by an assessment or demand notice made upon him by the FIRS or by any action or decision of the FIRS pursuant to the provision of any tax law administered by the FIRS, may appeal against such action, decision, assessment or demand notice within a period of 30 days from the date of such action, decision, assessment or demand notice by the FIRS. The appeal is filed by format provided in 'Form TAT 1'.[378] Upon filing the initiating process, the secretary must compute or cause to be computed necessary fees, which must be paid.[379]

[376] See Para. 15 of the Fifth Schedule to the FIRS Act, *ibid*
[377] Order 3 Rules 1 and 2, *ibid*
[378] Order 3 Rule 4, *ibid*
[379] See the Second Schedule to the Rules.

An appellant, that is the party filing the initiating process, is required to frontload list of witnesses and their written statements on oath, if desires to call witnesses at the trial. Copies of every document intended to be relied upon at the trial shall also be frontloaded.[380]

Just like the procedure in the defunct VAT Tribunal, any party may be represented at the sittings of the TAT by either a legal practitioner or a chattered accountant or an adviser.[381]

The parties and processes are tagged as if it an appeal, notwithstanding their being originally initial in fact. This follows the tagging of the 'Tax Tribunal' itself as a 'Tax Appeal Tribunal.' If the respondent intends to contest the appeal, he shall, within 30 days from the date of service of the notice of appeal on him, file with the tribunal's secretary a reply[382] acknowledging receipt of the notice of appeal and state if he intends to contest the appeal. If he does, then he must frontload[383] along with the reply a list of his defence witnesses to be called at the trial, written statements of the witnesses and copies of documents to be relied on at the hearing.

The Tax Appeal Commissioners (as the members of the TAT are called) meet in their various zones as the exigency of their work dictates to hear

[380] Order 3 Rule 5, *ibid*
[381] Order 5 Rule 5, see also Paragraph 5 of the Fifth Schedule, *ibid*
[382] See Form TAT 3 in the First Schedule to the FIRS Act, *ibid*
[383] Order 8 Rule 3, *ibid*

appeal within their jurisdiction. The secretary of the TAT serves, on the directives of the Chairman, 7 clear days notice to the FIRS and the parties of the date and venue of the first hearing of an appeal.

The rules of natural justice apply in the TAT proceeding, notwithstanding the fact that it is a purely administrative tribunal as one research professor[384] observed thus:

> TAT is an administrative tribunal that performs quasi-judicial functions albeit on tax matters. To this extent the rules of natural justice apply in their proceedings. The hearing is held in public. The principle of he who asserts must prove applies. Consequently the appellant has the evidential burden to prove that the assessment complained of is excessive.

The principle of *nemo judex in causa sua* also applies to the TAT proceedings. Any Tax Appeal Commissioner including the chairman who has an interest in any matter cannot participate in the proceedings. The renowned research professor further observed thus:

> To ensure its independence and impartiality, the Act requires that a Tax Appeal Commissioner who has any form of direct or indirect pecuniary interest regarding a matter before the TAT or who has acted for or on behalf of the tax payer in the past, must disclose such interest or

[384] Idornigie, P. O, The Role of the Tax Appeal Tribunal (TAT) in Nigeria's Tax Jurisprudence, a paper presented at a 2-day capacity building interactive workshop on tax laws, ethics and judicial interpretation for superior court judges and senior tax law officers at Transcorp Hilton Hotel, Abuja on Tuesday 18th December, 2012 at page 9

> involvement to the other commissioners and must refrain from participating in that proceeding.

What immediately come to mind is the supreme kind of control exercised by the Minister of Finance over the TAT in terms of hiring and firing the Chairman and the Tax Appeal Commissioners when the FIRS that is directly under the Minister's control is a party in almost all cases, similar to the relationship of the Securities and Exchange Commission (SEC) with the Investments and Securities Tribunal (IST). The learned academician once more aptly commented[385] on an instance in Lagos Zone of the TAT as follows:

> An argument that has always been raised by jurisdictional objectors is that the composition and affiliation of the TAT to the FIRS makes it impossible for the TAT to be independent and impartial. In one of the sittings of the Lagos Zone, General Telecoms Plc raised the issue among other jurisdictional objections. Expectedly, the TAT overruled the objection and held that it remains an independent and impartial administrative tribunal.[386]

It is submitted that the TAT may hardly use sufficient language to change the general perception of the public that its affiliation or subordination to FIRS and the Minister of Finance may very likely affect its independence and impartiality. The TAT has, however, in some instances been bold enough to rule against the FIRS, may be in attempt to change the negative public perception about its independence and impartiality. In the case of **Oando**

[385] *Ibid* at pp. 9 - 10
[386] See Thisday Online July 18, 2012 at www.thisdaylive.com

Supply and Trading Ltd v FIRS[387] the counsel representing FIRS raised a preliminary objection to the competence of the notice of appeal filed by the appellant on the ground that the appeal was premature since the FIRS had not yet issued the appellant with notice of refusal to amend the assessment (NORA). In its ruling delivered on 7th April 2011 dismissing the objection, the TAT Lagos Zone held that once a notice of assessment is received from FIRS, an aggrieved party therewith may file his notice of appeal. He need not complain to the FIRS much less waiting for refusal to amend the assessment from FIRS. The TAT held categorically that under the Companies' Income Tax (Amendment) Act 2007, an aggrieved tax payer can appeal directly to the TAT immediately upon being served with the assessment. The learned academician cited an example where the TAT upturned the assessment of FIRS where he observed[388] thus:

> Another worthy example is the boldness of the TAT in upturning the decision of FIRS in the case of **Halliburton Energy Services Nigeria Ltd.** Following the sanctions imposed on Halliburton incorporated in the United States, FIRS decided to impose a tax of $167.7m on Halliburton Energy Services Nigeria Ltd as representing Halliburton Inc. (US). Although Halliburton Energy Services Nigeria Ltd was denying liability for the acts of Halliburton Inc (US), what

[387] Unreported appeal number TAT/LZ/041/2010

[388] Idornigie, P. O, The Role of the Tax Appeal Tribunal (TAT) in Nigeria's Tax Jurisprudence, a paper presented at a 2-day capacity building interactive workshop on tax laws, ethics and judicial interpretation for superior court judges and senior tax law officers at Transcorp Hilton Hotel, Abuja on Tuesday 18th December, 2012 at page 10, *ibid*

> stands out for commendation is the courage of the TAT, Lagos Zone in rejecting the FIRS tax imposition on the ground that you cannot impose tax on a criminal penalty which is a loss to the company and not a profit taxable by law.

One other important point is whether alternative dispute resolution may be resorted to in tax disputes, like where the contract agreement the subject of the tax dispute incorporates an arbitration clause. The case **FIRS v NNPC & 4 Ors**[389] is in respect of production sharing contracts (PSC) between the NNPC and the International Oil Companies (IOCs). The PSC provides for arbitration of any dispute arising from the PSC. This and other pending litigations are yet to be pronounced upon judicially. Suffice to say that the law is trite that parties are bound by the terms of their agreement and courts do not make or alter such terms freely agreed upon.

The TAT does not enforce its decisions. Rather decisions of TAT are registered at the Federal High Court registry and enforced as if they were decisions of the Federal High Court[390]. Ironically, one may say, appeals against such decisions still lie to the same Federal High Court. Is is submitted that any judgment registered at the Federal High Court as if it were its decision cannot be heard by the same court on appeal.

[389] Pending suit number FHC/ABJ/CS/774/2011
[390] Para. 16 of the Fifth Schedule, *ibid*

6.4.5 **Right of Appeal**

Any party aggrieved by any decision of the TAT has a right to appeal against it to the Federal High Court.[391] An appeal may, however be only on grounds of law just like an appeal from the IST to the Court of Appeal. The appeal is filed in the normal by filing a notice of appeal with TAT secretariat from where the record of proceedings of the TAT will be compiled including the notice of appeal, exhibits tendered and the decision appealed against and transmitted to the Registry of the appellate court that is the Federal High Court.

[391] See Para. 17 of the Fifth Schedule to the FIRS Act, *ibid*.

CHAPTER SEVEN

THE MULTI-DOOR COURTHOUSES AND OTHER DISPUTE RESOLUTION CENTRES

Alternative Dispute Resolution[392] may be defined as a range of dispute resolution processes or mechanisms designed and available outside, but supplementary to, litigation. The ranges of these processes include Negotiation, Mediation, Arbitration, Neutral Evaluation, as well as various hybrids like Med-Arb and Lit-Med.[393]

7.1 **The Imperatives for an Alternative Avenue of Dispute Resolution**

The face of Justice worldwide is rapidly evolving. It is fast changing to keep up with the pace of a swiftly expanding global village in which speed and increasingly complex technicalities and specialisation are constant. The ADR process is also gaining human countenance. No longer is winning just 'won' and losing just 'lost', the underlining interests of the parties are now being taken into consideration together with the overall effect of judgements on the relationship between parties and the realities behind their enforcements.

[392] Hereinafter referred to as 'ADR'
[393] *Infra* at p 277 and 282

The drift worldwide has been to improve the management of justice by providing alternative and easier means to resolving disputes hence the introduction of Alternative Dispute Resolution in the administration of Justice in many jurisdictions.

The advent of information technology has made the world a big global village. No longer are jurisdictions far flung in ideologies and experiences. It would even appear that there is a deliberate effort at homogeneity in global reasoning especially in the areas of business, politics and laws. The sheer connectedness of the global business world has in particular fast-tracked this development.

Disputes are inevitable in any societal context. Human beings are bound to disagree on and at almost every point in life. Disagreements and disputes are bound to occur as long as human beings, and even corporate entities, continue to multiply and interact. The spate of disputes worldwide at the turn of the century has particularly been accentuated by the speed, complexity and frequency of local and global transactions.

Disputes effect change, test group cohesion, re-examine existing ideas and the boundaries between the possible and impossible, reveal and eliminate fears. Disputes can also reveal the different interests and needs of

individuals and groups, explore personalities, enable people learn about each other, prompt the expression of strong feelings, discover the way people think, and finally create a mutual dependence amongst individuals and corporate entities. The fact that disputes occur should not be the crux of the matter, rather their management and resolution.

The need for an understanding of a system that will work both locally and globally has been the bane of legal practice worldwide. No longer can a lawyer be just be a 'local' lawyer in Nigeria, he is a global lawyer in Nigeria working within diverse jurisdictions. His clients are as far flung as Africa, America and the Caribbean, Asia, Europe and the Middle East. To be on the cutting edge of his vocation therefore, he must keep abreast of trends in both his local and global playfield. As the cliché goes, today's legal practitioner must 'think global'

One point on which the global community agrees on in particular is the need for a legal system that meets up with contemporary trends. The need for a universally applicable, cost effective, user-friendly, and speedy means of dispute resolution is imperative to cope with the speed and complexity of disputes that do arise.

The most common formal mechanism for resolving disputes till recent times, but perhaps the most ineffective, has been litigation. The history of litigation has been one of adversarial dispute resolution, of a win-lose process which rarely made to understand the underlining motives behind conflicts. The complexity of today's business and social world calls for more than one way of resolving disputes, it calls for a multi- track approach – alternatives to the rather bureaucratic regular door of litigation. In most jurisdictions within and without Nigeria, ADR has been an indispensable elixir incorporated into the legal system.

The justice system in Nigeria is not, in any way, different. However, as would be found in a number of judiciaries worldwide, judges face the onerous task of administering justice and equity, bound by rigid rules of law and overflowing dockets. The statistics provided by the Judiciary proved a stunning eye opener to the enormity of the task that befalls our judges and how ill equipped the system in which they are expected to function has been. For example in Lagos State alone, an annual report by the State Ministry of Justice in 1990 provided the following statistics within the year:

9,929 fresh cases were filed

23, 197 remained pending

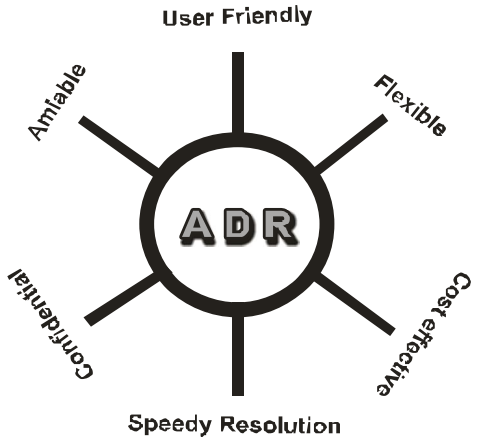
It took an average of between 5-7 years to conclude an average civil case and 8-10 years (conservatively) to resolve land disputes. One of the leading proponents of ADR in the Nigerian Judiciary[394] aptly described the state of the judicial system and the need for ADR thus:

> Our courts are overflowing with cases. Congestion in the courts has generated more anger, more agony in the parties. Each Honourable Judge has not less than Three Hundred cases pending before him with new ones on a daily basis. We must not forget that proceedings are still being recorded in long hand and with other various technical problems, some cases last over 10 years from the date of filing. For instance, in my court, I have over 20 years old cases inherited by me from retired Judges. These are cases that have gone before two or three Judges before coming to my court. I remember vividly that suit No. LD/469/77, **A. J. Lawal & Anor v Santos** is 26 years old, Suit No. LD/89/74 **Mrs. S. A. Abudu v Alhaja T. Ogunbambi & Anor** is 29 years old, while suit No. LD/4/78 **Sipeolu & Anor v AIICO Eng. Group Nig. Ltd.** is 25 years old. I have about 50 cases that are more than 10 years old and 140 cases that are over 5 years old.

ADR provides an opportunity to resolve disputes creatively and effectively, finding the process that best handles a particular dispute. It is useful for resolving many disputes that never get to court, as well as providing a means of settling 90 to 95% of the cases that are filed in courts. As burgeoning court queues, rising cost of litigation and time delays continue

[394]Oke, O.O, 'Decongesting the Courts: The Place of the LMDC', September 30, 2003

to plague litigants, more businesses and judiciaries have begun implementing ADR programs, the multiple advantages of which may be reflected graphically as follows:



Dissatisfaction with the judicial system is, more often than not, a direct result of unnecessary protraction of cases in the regular courts. Parties on both sides go away dissatisfied with the outcome of their matter. Such is the challenge that the judiciary faces in the new millennium. In order to ensure justice in today's complex society, the effigy of justice must no longer mete out the law blindfolded. She must realise that not all pegs fit a square hole and that the overriding needs of the parties and the society should be taken into account in welding the sword. Therefore, she must of necessity take a more holistic view of issues in dispute, their mode of resolution and realise that the mono door of litigation is no longer adequate for resolution of all disputes.

The face of Justice worldwide is rapidly evolving. It is fast changing to keep up with the pace of a swiftly expanding global village in which speed and increasingly complex technicalities are constant. The new face of Justice is also assuming a human countenance. No longer is winning just 'won' and losing just 'lost', the underlining interests of the parties are now being taken into consideration together with the overall effect of judgements on the relationship between parties and the realities behind their enforcements.

The drift worldwide has been to improve the management of justice by providing alternate/appropriate means to resolving disputes hence the introduction of Alternative Dispute Resolution in the administration of Justice in many jurisdictions. As noted earlier,[395] Alternative Dispute Resolution includes processes like Negotiation, Mediation, Arbitration, Neutral Evaluation, as well as various hybrids as Med-Arb and Lit-med. However, mediation is the most prominent of these mechanisms, while arbitration is the best known. The various ADR processes, are hereunder, discussed in their nitty-gritty.

The concept of Alternative Dispute Resolution is not new to our society; our traditional legal system was hinged on Alternative Dispute Resolution. Our

[395] *Infra* at p. 1

pre-colonial mode of resolving disputes could be identified in four hierarchical options: First, the disputants try to resolve their matter by themselves (negotiation), Failing which, the assistance of senior kinsmen is sought (mediation). If this second option failed, the matter was taken to the Headman of the neighbourhood in which the defendant lives (neutral evaluation/ mediation). In the eventuality of the matter not being resolved, it was then referred to a High Chief or the King for a binding decision (arbitration).

7.2 **The Genesis of the ADR Process**

The history of dispute resolution in Nigeria is indeed an interesting one, which many in the legal profession have never sat back to think about or carry out a research on. In truth, the findings[396] might radically change one's perception of dispute resolution and the legal profession as it is known.

Prior to colonial rule in the geographical and cultural area now known as Nigeria, a system of dispute resolution, recurrent in most other African cultures existed and was adhered to. The traditional approach to dispute resolution was a multi-faceted one which was utilized according to the peculiarities that occasioned each dispute. Dispute in African societies

[396] *Infra* at pp 266 - 267

generally has four hierarchical options for resolution in a typical traditional African society: Attempts were first made by disputants to settle their disputes at an inter-personal level (negotiation), failing which, the assistance of senior Kinsmen is sought (mediation). If this second option fails, the matter is taken to the Headman of the neighbourhood in which the defendant lives before the last option of taking the matter to the local chief is explored (neutral evaluation/mediation). In an instance where this does not achieve the desired goal, the matter may be referred to a King or traditional ruler for adjudication (arbitration).

However, with the advent of colonial rule, not only was there an executive foray, but also an assault on the legislative and judicial system. With this new regime came the formal English courts systems as we now know them. The courts were novel in so many respects like their formal settings, the incomprehensibility of their language, the outlandish mode of dressing, adversarial nature and the strangeness of the entire proceedings. The masses strongly resisted the introduction of the British legal system into Nigeria! Interestingly, Lord Lugard had recommended a return to the traditional mode of dispute resolution, which counsel on the orders of the Crown with no first-hand knowledge of the situation and in its attempt at maintaining a firm grip of the protectorate had sadly rejected. Perhaps, the

best approach would have been a systemic combination of the dispute resolution culture of the natives with the imported English litigation system.

Apathy to a legal system that offers the mono-option of litigation is not peculiar to Africa alone, as the Chief Judge of Ontario, Canada has also rightly said:

People attend lawyers with problems they want resolved, not problems they want litigated. A trial is only one way to resolve a case, yet a trial is the only option offered by the court-administered system. Lawyers and their clients deserve better.[397]

Indeed in most societies, the initiation of litigation marks the beginning of enmity and possibly severance in relationships, both formal and informal, whether the parties are educated or not. A traditional Yoruba adage is apt at this point: 'We do not come back from the (formal) courts and remain friends'. Litigation is not an ineffectual system of dispute resolution in itself. However, where no other options for resolving disputes are presented by a justice system, then the mono-door of litigation becomes congested, rigid and ill fitted to a number of cases presented before it.

[397] Forrest, S. M, 'The Evolving Field of Mediation in the United States' Bond Law Review, Vol 13, Issue 2, Article 13 (ADR Adobe Reader 10.4 pdf)

According to the final report of the Massachusetts Futures Commission that was set up to address the difficulties plaguing the American Justice System[398]:

Adjudication alone would not be adequate to accommodate the next century's wide variety of disputes and disputants.

The Commission advocated a system in which consumers of the public justice system would have convenient access to a wide variety of methods for resolving their disputes. Some of those remain adjudicatory in nature, such as trials and arbitration. Others rely on agreement between the parties, like mediation, case evaluation, and various forms of facilitated but non-binding settlement processes. The report further noted that the courts would take an active role by assisting the parties in choosing the most appropriate method. The system would be characterised not only by wide range of dispute resolution methods but a respect for consumer choice.[399]

7.3 **Forms of Alternative Dispute Resolution**

ADR is flexible, adoptable and user friendly. Its forms can be devised to suit complex disputes in commercial and other sectors. Where parties are willing to use alternative methods of dispute resolution, an appropriate

[398] *Ibid.*
[399] *Ibid.*

process can be found. The ADR forms are also called ADR doors, which include the following:

Negotiation

Conciliation

Early Neutral Evaluation

Facilitation

Mini-trial

Med-arb

Summary jury trial

Mediation and

Arbitration.

It is pertinent to discuss the various forms of dispute resolution. Perhaps the commonest, cheapest and fastest of all the ADR processes is the mediation.

7.4 **Mediation**

Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement

of a dispute or difference with the parties in ultimate control of the terms of resolution.

7.4.1 **The Mediation Procedure**

Mediation procedure is ignited by suggestion or request by one party to the other. This signifies the readiness of the requesting party to settle amicably. Such a friendly approach is hardly rejected.

7.4.1.1 **Request for Mediation**

Any party or parties to a dispute may initiate mediation simply by writing, telephoning or visiting the Multi-Door Courthouse. Request for mediation may be informal or, in a court-connected centre, by submission of Dispute Resolution Forms, which is provided by Multi-Door Courthouse. Upon filing of the duly completed request forms, and sufficient number of copies for the parties, a brief statement of issues required to be settled, the case is assigned to an Administrator who promptly schedules a preliminary meeting. At the meeting, the Administrator explains the issues at stake to the parties and assists in choosing the most appropriate ADR mechanism.

Where there is no submission to mediation, any party may request the centre to invite the other party to join in suggesting a more feasible mechanism to settlement.

7.4.1.2 **Selection of a Mediator**

The centre provides the parties with a short list of mediators and their respective biographical data. The parties are instructed to study the data and inform the Administrator of their choice of mediator.

7.4.1.3 **Preliminaries of Mediation**

The centre facilitates and generally brainstorms the settlement process. When the parties agree on a settlement door and terms, the centre proceeds to record and produce a draft mediation agreement for perusal and execution by the parties. The mediator then ensures that the terms of the settlement agreement are respected to the latter by all the parties.

The centre arranges an appropriate time and location for the exchange of case summaries between the parties and the Mediator. The parties shall collectively deposit with the centre the cost of mediation and all appropriate expenses of the proceedings.

7.4.1.4 **The Mediation Session**

The mediation session usually begins with an initial joint session between the parties and the mediator. The mediator explains the procedure and ADR rules, order of presentation, decorum, use of caucuses and confidentiality of the proceedings and gives each party an unfettered opportunity to be heard.

After these preliminaries, the parties express their respective views. The initiating party opens the discussion regarding the issues, facts and circumstances surrounding the dispute and ends with a reasoned proposal for settlement. The other party then responds and makes similar presentation to the mediator.

After a session of clarification and opening discussions, the mediator may arrange a separate meeting with each party privately or may even arrange caucus meeting with some other stake holders in the subject of the dispute to explore settlement opportunities with them.

During caucus meeting, the mediator expatiates each party's version of the case, the priorities, positions and explores alternative solutions, and seeks possible trade-offs. Even if the mediator is a legal practitioner, he or she serves as a peace maker divorced of all legal technicalities and bureaucracies. As soon as the parties reach a common ground, another mediation session is scheduled to narrow down the differences between the parties, and brainstorm further progress to gain full agreement.

7.4.1.5 **The Settlement**

If the parties fail to reach a settlement of any or all of the disputed issues, they may resort to going to another settlement door like arbitration or another suitable ADR process.

When the parties reach an agreement, the terms of settlement are drafted with the assistance of the mediator. Once reduced to writing and signed by the parties, it becomes legally binding by the doctrine of estoppel.

Should the parties so require, the agreement reached may be filed at the Multi-Door Courthouse and once endorsed by the ADR Judge it becomes a consent judgment.

7.4.1.6 **Follow Up**

On conclusion, the centre will furnish the parties with an invoice of the total expenditure and make refunds of excess payments, if any.

The dispute resolution officer will issue a questionnaire to the parties after the settlement of the dispute, to strategise future improvements as a means of quality control by assessment of the skills of the mediators used.

7.5. **Conciliation**

Conciliation is a generic term, which is commonly used to describe a form of dispute intervention, or conflict management that is less formal than

mediation. One may say that it is the most informal method of dispute settlement and is normally applied in minor disputes or disagreements.

7.6 **Early Neutral Evaluation**

Early neutral evaluation is a process in which the parties or their counsel present a summary of their case to a neutral third party for an opinion as to the likely outcome if the case were to be adjudicated in the law court. However, the opinion of the evaluator is not binding on the parties unless they so agree.

The evaluator helps the parties to clarify and appraise issues and evidence, and identifies the relative strengths and weaknesses of the parties' respective positions, and makes a non-binding assessment of the merit of the case.

7.7 **Facilitation**

Facilitation is a process in which a neutral facilitates disputant to reach an agreement or consensus on controversial issues. Facilitators do not usually involve themselves in the substantive aspects of the matter under discussion but focus on the process of bringing the parties to together towards a decision making.

7.8 **Med-Arb**

This is a combination of mediation and arbitration. In this arrangement, parties agree in advance that if they are unable to resolve their dispute through mediation, they will arbitrate and abide by the arbitral award on all or part of the issues that were not resolve through mediation.

The med-arb process has some advantages over mediation or arbitration alone. There is need for the parties to co-operate in the mediation stage of the process to avoid prolonging the settlement process by arbitration which is the fall-back position. Similarly, mediating a dispute before arbitration affords the parties the opportunity to settle promptly by their own self-built process.

7.9 **Arbitration**

Arbitration is simplified version of a trial involving no discovery and simplified rules of evidence, the choice of neutral/arbitrator is that of the parties and the decision (award) of the neutral may be binding or non-binding depending on the prior election of the parties.[400]

[400] Aina, K, 'The Multi-Door Courthouse: a Return to the Basics' sent to hussein_mukhtar@yahoo.com and downloaded from kennyaina@aol.com

The parties to an arbitral agreement may choose to make it binding or nonbinding and have the exclusive right to appoint an arbitrator or panel of arbitrators or neutrals. An arbitration clause in any agreement automatically ignites into operation as soon as dispute arises between the parties thereto. In other words, any dispute arising from an agreement is referred to an arbitrator under the arbitration clause, which binds the parties.

Arbitration is also practiced as settlement mechanism by judiciaries with court-connected ADR outfits like the Lagos and Abuja Multi-Door Courthouses with the view to decongesting the courts. It is the process of resolving disputes between people or groups by referring them to an arbitrator or a panel of arbitrators usually chosen by the parties or provided by a court-connected ADR Centre. Arbitration is a reference of a dispute to a neutral person or persons, called arbitrators for a decision or an award based on evidence and argument canvassed during the arbitral proceedings.[401]

An arbitration agreement must be written and duly signed by both parties. It may also be agreed through correspondence or by non-denial. The Arbitration and Conciliation Act[402] has aptly so provided[403] thus:

[401] http://Encarta.msn.com/encyclopedia761561497/Arbitration html.
[402] Cap A18 L.F.N 2004
[403] Section 1(1) (a), (b) and (c), *ibid*

Every arbitration agreement shall be in writing contained-

in a document signed by the parties; or

in an exchange of letters, telex, telegrams or other means of communication which provides a record of the arbitration agreement; or

in an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and not denied by another.

Any reference made to an arbitration in a written agreement such as to incorporate it therein, tantamount to an arbitration clause.[404] Unless a contrary intention is expressed therein, an arbitration agreement is irrevocable except it is otherwise agreed by the parties or by leave of court.[405]

When any party to an arbitration agreement dies, the agreement survives and shall be enforceable by or against the personal representatives of the deceased.[406]

A court before which an action that is the subject of an arbitration agreement is brought shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings

[404] Section 1(2), *ibid*
[405] Section 2, *ibid*
[406] Section 3, *ibid*

and refer the parties to arbitration.[407] Arbitral proceedings may be commenced or continued, even where an action has been instituted in a court and an award may be made by the arbitral tribunal while the matter is pending before the court.[408]

If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement, any other party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings and refer the matter to arbitration.[409]

A court to which an application for stay of proceedings is made may, if satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement and that the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

[407] Section 4(1), *ibid*
[408] Section 4(2), *ibid*
[409] Section 5(1), *ibid*

7.9.1 **Composition of Arbitral Tribunal**

The parties to an arbitration agreement have the right to determine the number of arbitrators to be appointed under the agreement. However, where no such determination is made, the number of arbitrators shall be deemed to be three.[410]

The parties may specify in the arbitration agreement the procedure to be followed in appointing an arbitrator. In the event of failure to specify the procedure for appointment of arbitrators, the following procedure has been adopted:

In the case of an arbitration with three arbitrators, each party shall

appoint one arbitrator and the two thus appointed shall appoint the third, so however that-

(i) if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so by the other party; or

(ii) if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointments, the appointment shall be made by the court on the application of any party to the arbitration agreement[411];

[410] Section 6, *ibid*
[411] Section 7(2), *ibid*

Where the parties fail to agree on the arbitrator, in the case of a singular arbitrator, the appointment shall be made by the court on the application of any party to the arbitration agreement, which must be filed within thirty days of such disagreement.[412]

If, under an appointment procedure agreed upon by the parties, a party fails to act as required under the procedure or the parties or two arbitrators are unable to reach agreement as required under the procedure or a third party, including an institution, fails to perform any duty imposed on it under the procedure, any party may request the court to take the necessary measure, unless the appointment procedure agreed upon by the parties provides other means for securing the appointment.[413] Any decision of the court regarding the appointment procedure is not appealable.[414]

The court in exercising its power[415] of appointment shall have due regard to any qualifications required of the arbitrator by the arbitration agreement and such other consideration as are likely to secure the appointment of an independent and impartial arbitrator. Any person who knows of any circumstance likely to give rise to any doubt as to his impartiality or uprightness shall, when approached in connection with an appointment as

[412] Section7(2)(b), *ibid*
[413] Section 7(3), *ibid*
[414] Section 7(4), *ibid*
[415] Section 7(2) and (3) of thee Arbitration and Conciliation Act, Cap A18 LFN 2004

arbitrator, forthwith disclose such circumstance to the parties and accordingly disqualify himself. The statutory duty to disclose shall continue even after a person has been appointed as an arbitrator and will subsist throughout the arbitral proceedings unless the arbitrator had previously disclosed the circumstances to the parties.[416]

An arbitrator may be challenged if there is any justifiable doubt as to his impartiality or independence or if he does not possess the qualification agreed by the parties.[417] The parties may determine the procedure to be followed in challenging an arbitrator.[418] Where no specific procedure is laid, a party who intends to challenge an arbitrator shall, within fifteen days of becoming aware of the constitution of the arbitral tribunal or becoming aware of any relevant circumstance, send to the arbitral tribunal a written statement of the challenge with the reasons there for.[419] Unless the arbitrator who has been challenged withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.[420]

[416] Section 8(2), *ibid*
[417] Section 8(3), *ibid*
[418] Section 9(1), *ibid*
[419] Section 9(2), *ibid*
[420] Section 9(3), *ibid*

7.9.2 **Termination of Arbitrator's Appointment**

An arbitrator's appointment or mandate automatically terminates by one of the following three ways[421]:

(a) if he withdraws from office; or

(b) if the parties agree to terminate his appointment by reason of his inability to perform his functions; or

(c) if for any other reason he fails to act without undue delay.

Where the mandate of an arbitrator terminates for any reason whatsoever, a substitute arbitrator shall be appointed in accordance with the same rules and procedure that applied to the appointment of the arbitrator being substituted.[422]

7.9.3 **Jurisdiction of Arbitral Tribunal**

An arbitral tribunal is competent to rule on questions pertaining to its jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement.[423] An arbitration clause which forms part of a contract shall be treated as a distinct agreement independent of the other

[421] Section 10(1), *ibid*
[422] Section 11, *ibid*
[423] Section 12(1), *ibid*

terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not legally affect the validity of the arbitration clause.[424]

In any arbitral proceedings a plea that the arbitral tribunal does not have jurisdiction should be raised not later than the time of submission of defence and no party is precluded from raising such plea by reason that he has appointed or participated in the appointment of an arbitrator. The arbitral tribunal's jurisdiction may also be challenged on the ground that it is exceeding the scope of its authority during the proceedings,[425] and the arbitral tribunal may rule thereon either as a preliminary question or in an award on the merits and such ruling is final and binding.[426]

7.9.4 **Arbitral Proceedings**

The bedrock of arbitration is fair hearing. In any arbitral proceedings, the arbitral tribunal shall ensure that the parties are accorded equal treatment and that each party is given full opportunity of presenting his case.[427]

The procedure contained in the Arbitration Rules set out in the First Schedule to the Arbitration and Conciliation Act governs arbitral proceedings.[428] However, where the rules contain no provision in respect of any matter related to or connected with particular arbitral proceedings, the arbitral

[424] Section 12(2), *ibid*
[425] Subsection (3), *ibid*
[426] Subsection (4), *ibid*
[427] Section 14, *ibid*
[428] Section 15, *ibid*

tribunal may conduct its proceedings in such a manner as it considers appropriate so as to ensure fair hearing. This power conferred on the arbitral tribunal includes the power to determine the admissibility, relevance, materiality or weight of any piece of evidence placed before it.[429]

Unless it is otherwise agreed by the parties, the place and language[430] of the arbitral proceedings is determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.[431] The arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property.[432]

The claimant opens the trial proceedings by stating the facts supporting his claims, within the period agreed upon by the parties or determined by the arbitral tribunal. He substantiates the points at issue and the relief or remedy sought by him. The respondent shall then state his points of defence in respect of those particulars, unless the parties have otherwise agreed on the elements of the points of claim and of defence.[433]

[429] *Supra*
[430] See Section 18, *ibid*
[431] Section 16, *ibid*
[432] *Supra*
[433] Section 19, *ibid*

If the claimant fails to state his claim, the arbitral tribunal shall terminate the proceedings[434] as the matter tantamount to a nonstarter. Where, however, the failure is on the part of the respondent to state his defence as similarly required, the arbitral tribunal shall continue the proceedings without treating such failure as an admission of the claimant's allegations.[435]

Default of appearance at hearing by any party or failure to produce any document will not stop the arbitral tribunal from continuing with the proceedings and making the necessary award[436] based on the available evidence. It is submitted that this procedure tantamount to adopting section 167(d) of the Evidence Act[437], which provides thus:

> The court may presume-
>
> the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case, and in particular the court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;
>
> that a thing or state of things which has been shown to be in existence within a period shorter than that within which

[434] Section 21(a), *ibid*
[435] Para. (b), *ibid*
[436] Para. (C), *ibid*
[437] Evidence Act 2011, H.B 214

such things or states of things usually cease to exist, is still in existence;

that the common course of business has been followed in particular cases;

that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

The arbitral tribunal, may in relation to some pieces of evidence like forensic evidence and so on, appoint one or more experts to report to it on a specific issue to be determined by the arbitral tribunal.[438] The arbitral tribunal may require a party to give to the expert any relevant information or to produce or provide access to, any documents, goods or other property for inspection.[439] Any expert so appointed shall, after delivering his written or oral report, participate in a hearing where the parties shall have the opportunity of putting questions to him and presenting expert witnesses to testify on their behalf on the points at issue, if so requested by a party or considered necessary by the arbitral tribunal.[440]

The arbitral tribunal shall decide in accordance with the terms of the contract taking into account the usages of the trade applicable to the transaction.[441]

[438] Section 21(1)(a) of the Arbitration and Conciliation Act.
[439] Para. (b), *ibid*
[440] Section 22(2), *ibid*
[441] Section 22(4), *ibid*

Since an arbitral tribunal has no coercive powers, it has to resort to using a regular court of law to *subpoene* the necessary witnesses before the arbitral tribunal.[442] The court may also order the issuance of writ of *habeas corpus ad testificandum* to bring up a prisoner for examination before it.[443] The relevant procedure applicable in the Federal High Court or High Court of a State relating to the service or execution outside jurisdiction of any such *subpoena* or order for the production of a prisoner issued or made in civil proceedings shall be adopted by the court or judge.[444]

7.9.5 **Making of Award and Termination of Proceedings**

In an arbitral tribunal comprising more than one arbitrator, any decision of the tribunal shall be made by a majority of its members, unless otherwise agreed.[445] The presiding arbitrator may, if so authorised by the parties or all the members of the arbitral tribunal, decide questions relating to the procedure to be followed at the arbitral proceedings.[446] If, during the arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the arbitral proceedings, and shall, if requested by the parties record the settlement in the form of an arbitral award on the agreed terms.[447] Any award made on settlement terms has the same status

[442] Section 23(1), *ibid*
[443] Subsection (2), *ibid*
[444] Subsection (3), *ibid*
[445] Section 24(1), *ibid*
[446] Subsection (2), *ibid*
[447] Section 25(1), *ibid*

and effect as any other award on the merits of the case.[448] Any award made by the arbitral tribunal shall be in writing and signed by the arbitrator or arbitrators.[449] Where the arbitral tribunal comprises of more than one arbitrator, the signatures of a majority of all the members of the arbitral tribunal shall suffice if the reason for the absence of any signature is stated.[450] The reasons upon which the award is based shall be stated by the arbitral tribunal, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms as explained above. The arbitral tribunal shall also state the date it was made and the place of the arbitration as agreed or determined by the tribunal, which shall be deemed to be the place where the award was made.[451] Each party will then be given a copy of the award, made and signed by the arbitrators.[452]

The arbitral proceedings terminate when the final award is made and an order of the arbitral tribunal issued to each party. An order for determination of the arbitral proceedings will then be issued by the arbitral tribunal, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute or the parties agree on the termination of the arbitral proceedings; or the

[448] Section 25(2)(b), *ibid*
[449] Section 26(1), *ibid*
[450] *Subsection (2), ibid*
[451] Subsection (3), *ibid*
[452] Subsection (4), *ibid*

arbitral tribunal finds that continuation of the arbitral proceedings has for any other reason become unnecessary or impossible.[453]

The arbitral tribunal's mandate ceases on termination of the arbitral proceedings.[454] However, a party may, within thirty days of the receipt of an award and with notice to the other party, request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or errors of a similar nature or to give an interpretation on a specific point or part of the award.[455] If the arbitral tribunal considers any such request to be justified, it shall, within thirty days of receipt of the request, make the correction or give the interpretation, and such correction or interpretation shall form part of the award. The arbitral tribunal may also *sua motu*, within thirty days from the date of the award, correct any such error as aforesaid.[456] Unless otherwise agreed by the parties, a party may within thirty days of receipt of the award, request the arbitral tribunal to make an additional award as to the claims presented in the arbitral proceedings but omitted from the award.[457] If the arbitral tribunal considers any request to be justified, it shall, within sixty days of the receipt of the request, make the additional

[453] See Section 27(1) and (2), *ibid*
[454] Subsection (3), *ibid*
[455] Section 28(1), *ibid*
[456] Subsections (2) and (3), *ibid*
[457] Subsection (4), *ibid*

award.[458] The arbitral tribunal may, if it considers it necessary, extend the time limit within which it shall make a correction, give an interpretation or make an additional award.

7.9.6 **Recourse Against Award**

A party who is aggrieved by an arbitral award may within three months from the date of the award or from the date the request for additional award is disposed of by the arbitral tribunal, by way of an application for setting aside, request the court to set aside the award.[459]

The court may set aside an arbitral award if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of the submission to arbitration so however that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted may be set aside.[460] The court before which an application is brought may, at the request of a party where appropriate, suspend proceedings for such period as it may determine to afford the arbitral tribunal an opportunity to resume the arbitral proceedings or take

[458] Subsection (5), *ibid*
[459] Section 29(1), *ibid*
[460] Subsection (2), *ibid*

such other action to eliminate the grounds for setting aside of the award.[461]

The court may on the application of a party set aside the award if it is satisfied that an arbitrator has misbehaved, or where the arbitral proceeding, or award, has been improperly procured. In fact, an arbitrator may on the application of any party be removed by the court for misconduct.[462]

7.9.7 **Recognition and Enforcement of Awards**

An arbitral award shall be recognised as binding and shall, upon application in writing to the court, be enforced by the court.[463] The party relying on an award or applying for its enforcement must supply the following documents to the court as necessary evidence attached to the supporting affidavit:

the duly authenticated original award or a duly certified true copy thereof, and

the original arbitration agreement or a duly certified true copy thereof.

Once the court makes an order granting leave to register the arbitral award, it may be enforced in the same manner as a judgement of the court.[464] The irony of it is that even after finishing the arbitral process, any of the parties

[461] Subsection (3), *ibid*
[462] Section 30 (1) and (2), *ibid*
[463] Section 31(1), *ibid*
[464] subsections (2) and (3), *ibid*

to an arbitration agreement may request the court to refuse recognition or enforcement of the award[465] and no court can intervene in any matter governed by the Arbitration and Conciliation Act, except as may otherwise be provided by the Act.[466]

7.10 **Conciliation**

The parties to any agreement may resort to an amicable settlement of any dispute in relation to the agreement by conciliation, notwithstanding the other provisions of the Arbitration and Conciliation Act.[467] Conciliation is initiated by a party wishing to initiate same by sending to the other party a written request to that effect[468] containing a brief statement setting out the subject of the dispute. The conciliation proceedings commence on the date the request to conciliate is accepted by the other party without much ado.[469] Once the request to conciliate has been accepted, the parties shall refer the dispute to a conciliation body, which must consist of one or three conciliators. The conciliation body is appointed jointly by the parties. In the case of one conciliator, he or she is appointed jointly by the parties and in the case of three conciliators, one conciliator is appointed by each party,

[465] Section 32, *ibid*
[466] Section 34, *ibid*
[467] Section 37, *ibid*
[468] Section 38(1), *ibid*
[469] Section 39, *ibid*

and the third one jointly by the parties.[470] This is unlike an arbitral tribunal where the two appointed by the parties appoint the third member.

As soon as the conciliation body is put in place, it shall acquaint itself with the details of the case and procure such other information it may require for the purpose of settling the dispute.[471] Without much ado, the conciliation process commences by the appearance of the parties either personally or by legal representation.[472] As soon as the conciliation body has heard the parties and examined the case, it shall submit its terms of settlement to the parties for their perusal and necessary input. If the parties agree to the terms of settlement submitted, the conciliation body shall proceed to draw up and sign a record of settlement.[473]

In case of disagreement, with the terms of settlement, the parties may only resort to one of two options either submit the dispute to arbitration in accordance with any agreement between them or take any action in court.[474] Nothing done in connection with the conciliation proceedings shall affect the legal rights of the parties in any submission to arbitration or any action taken.[475] The provisions of the Arbitration and Conciliation Act

[470] Section 40, *ibid*
[471] Section 41(1), *ibid*
[472] Subsection (2), *ibid*
[473] Section 42(1) and (2), *ibid*
[474] Subsection (3), *ibid*
[475] Subsection (4), *ibid*

relating to International commercial arbitration and conciliation are irrelevant for the purpose of this research work, the scope of which is limited to the role of tribunals and dispute resolution centres in the administration of justice in Nigeria.

CHAPTER EIGHT

SUMMARY AND CONCLUSION

8.1 **Summary**

The Military tribunals like the General Court Martial and Special Court Martial that try members of the Armed Forces, by their laws both substantive and procedural and their approving authority, have paid the least respect to fundamental right to fair hearing and the rule of law. This calls for transformation of the Armed Forces and Military laws to conform the basic tenets of democratic principles.

Happily democracy is taking a very stronghold in Nigeria as is the case with many other African countries like Ghana, South Africa, etc. One would equally be delighted that the present leadership in the military is not letting this opportunity pass by. Now, civilian legal practitioners appear very often in Courts-Martial. Their sittings are no longer shrouded in secrecy and mystery, contrary to the clear provisions of the AFA and the Constitution.

On the other hand, the AFA itself is not perfect because it was drafted by mortals who are themselves imperfect. Law is dynamic just as society. For

it to meet the ever changing needs and aspiration of the society, it has to adjust in direct proportion to the changes in society.

It is submitted that every Court Martial should be presided over by a military lawyer or at least include a lawyer in its membership. The judge advocate's office is akin to that of a prosecutor and should be removed from the membership of the Court Martial. This will enhance fair hearing and prevent a situation where a party has been a prosecutor and at the same time participate in adjudication in utter contravention of the principles of *nemo judex in causa sua* and the clear provision of section 36 of the 1999 Constitution.

For a more effective military, good laws that ensure separation of powers and adequate protection of human rights' provisions in the Constitution are imperative. The quality of the military capability of a country is a reflection of the quality of its personnel. There is also the need for an improved manpower development in the military. It is only the constant training and retraining of military personnel that can bring about the effective performance of their constitutional duties. Manpower development equally keeps the military abreast with globalization and puts it in a good stand to confront any likely challenge.

The contribution of troops to foreign missions under the African Union (A.U.) and the United Nations (UN) is a welcome development in this country. It has exposed our military to modern day strategies in peace keeping. Their interaction with soldiers from other countries also impacts on them positively. It equally exposes them to the practical aspect of several conventions and treaties of world bodies to which Nigeria is a signatory. Back home, this will certainly impact positively on their human rights and international humanitarian law (IHL). Capacity building in the art of modern warfare should equally go together with education on the need to adhere strictly to the rule of law, observance of human rights and respect for international conventions relating to combat and non-combat situations.

The requirement of every law is discipline, willingness and strength of character to abide by it. This import was not lost on then Greek Philosopher, while admonishing soldiers of the United Kingdom stated that:

> You know, I am sure, that not numbers or strength brings victory in war, but which ever army goes into battle stronger in soul; their enemies generally cannot withstand them.[476]

[476] Xenophon (430 -355 B.C)

The disposition of the present military leadership should be one that is geared towards re-positioning and re-strategizing the military towards a more effective and efficient discharge of its constitutional duties. The respect for rule of law and human rights, especially the right to fair hearing, will go a long way to put in place a world-class disciplined army for Nigeria. With this will, zeal, sincerity, dedication, discipline and determination nothing, one dare says, could hinder the attainment of the aforementioned noble and lofty objectives.

8.2 **Observations and Findings**

The problems identified and findings made regarding administration of justice by various tribunals and dispute resolution centres in Nigeria as critically examined in the foregoing chapters has been reappraised with a view to making specific findings thereon, proffering solutions and capping it with necessary recommendations thereto. The lacunas in the various laws have been identified and necessary amendments suggested. It has been pertinent to identify the problems or lapses in the relevant laws not only with a view to proffering solutions but also to enhance the quality of justice administered by the respective tribunals and dispute resolution centres. The bottom line of what is sought to be achieved is to provide and enhance a system of justice delivery, which is very easy, smooth, fast and user

friendly to fast-track trials and settlement of disputes in civil actions and ensuring proper and unqualified respect for fundamental rights in criminal proceedings so as to reduce, as much as possible, delay in trial proceedings.

Virtually all the tribunals and dispute resolution centres in Nigeria are fast-tracked through their procedural laws, thereby realising the essence of time and meeting the needs of the parties. Justice delayed has always been considered as justice denied.

The military tribunals, by their nature, are fast tracked and as such justice is hardly delayed in their adjudicative process. While this promotes one aspect of the right to fair hearing, there are so many aspects of the Armed Forces Act[477] (AFN) that impair or even out rightly deny such fundamental right.

While an accused has 3 months after being sentenced before confirmation to submit to the confirming authority his petition against the conviction and sentence, in many cases like **Lt. Col. A. Akinwale v Nigerian Army**[478] where the law was seemingly observed in the breach. In his lead judgment, Suleiman Galadima, JCA stated as follows:

[477] Hereinafter referred to as "the AFA"
[478] (2001) 16 NWLR (part 738) 109

It is most improbable whether a proper confirmation and review could be completed within only a day in view of the fact that the petition on behalf of the appellant by his counsel was written and dated 16th August 1996. This is the very day the court martial delivered its sentence, confirmed and promulgated it. It is clear that the appellants' petition against his conviction and sentence was not received, considered and judiciously reviewed before confirmation. These shoddy proceedings in my respectful view make mockery of the independence and impartiality provided and guaranteed by the Constitution of this country.

One could be most shocked and greatly disturbed by the fact that the conviction, sentence and confirmation were done on the same day the decision of the General Court Martial was delivered thereby denying the convict his right under the law to complain against the conviction and sentence.

The Military case law is fraught with numerous instances of infractions of accused persons' fundamental rights under the Constitution by misapplication of the law or polluting it with Military flavour.

The Military regimes seem to be the darkest in legal history. It was a period when private legal practitioners were not welcome in the halls of Courts

Martial, let alone being granted audience. It was equally a period when the military lawyers were too cautious not to run afoul of the expectations of their superior officers in defending an accused person, knowing the implication of putting "too much" defence for an accused[479]. Members of the Courts Martial were equally not insulated from the atmosphere of fear that then pervaded the country during such trials, especially, coup trials.

The chances of a member or even a presiding officer of a Court Martial becoming an accused was not farfetched. Therefore the Courts Martial either in their bid to play safe or show absolute loyalty to their superior officers or both paid little or no attention to the letter and intendment of the AFA, the Evidence Act and/or even the Constitution. The result was the avalanche of upturned cases emanating from Courts Martial. It portrayed the AFA as being inherently faulty.

The draftsmen of the AFA failed incorporate several offences therein as if they cannot be committed by military personnel. For example it failed to notice the offence of conspiracy. This is a serious oversight on the side of the draughtsmen. It is hard to believe that in the military there is no agreement between two or more persons to do an illegal thing or even lawful thing by unlawful means. Otherwise, how does one explain all the failed and

[479] Akin K, The Military Law in Nigeria , *supra*

attempted coups? One may say without mincing words that every coup emanates from conspiracy.

It is equally curious that several other serious crimes like murder, manslaughter, robbery and arson are conspicuously missing. These are grievous offences that carry harsh punishments and ought not be omitted from military legal system.

The AFA, to all intents and purposes, seeks to balance two basic interests: fighting war and the desire for an efficient, but fair system for maintaining good order and discipline based on Rule of Law and Human Rights in order to remove some worrisome features of administration of justice by Courts Martial, which include the following:

Non-observance of the principles of fair hearing or rule of law;

Courts Martial working as prosecutors;

Oaths are not administered properly; and

Rules of evidence not properly observed.

A fair system is only maintainable under military justice if those entrusted with adjudication could adorn the garment of fairness by working in line with constitutional provisions as regards fair hearing. Granted that the AFA as it

presently is, in the light of globalization, technological advancement and democratisation needs some amendments, one would humbly opine that the challenges of the Act are more or less with those empowered to administer it than with the Act itself. It is therefore the duty of Courts Martial to ensure fairness[480] and also to construe military laws in a way as to do minimal damage to human rights.[481]

The principle of the rule of law is paramount in every legal system. It will tantamount to a clear violation of a principle of rule of law for a Court Martial to descend into the arena by doing the job of the prosecutor as aptly pronounced in the case of **Zuru v Chief of Naval Staff**[482] where the Court of Appeal stated thus:

> To say the least, the court descended into the arena during the trial of the appellant and this fact is also evident in its judgment. It is manifest from the records that the court virtually took over the prosecution of the case by asking questions which tend to establish or provide answers to implicate the appellant. The examination of PW2 by the court took four pages that of PW5 took eleven pages, PW6 examination by court took six pages and PW7 took five pages. I have no doubt in my mind that the lengthy interrogation or examination of witnesses by a trial court so as to get answers violates the elementary standards of fair trial.

[480] Akono V. Nigerian Army (2000) F.W.L.R. (part 28) 2212
[481] Navy V. Lambert (2007) 11 M.J.S.C. 1
[482] (2004) All FWLR (part 237) at page 522

Apart from the above reason, this case was set aside for the absence of any convening order, in addition to the absence of the administration of oath in accordance with the provisions of the AFA.[483]

A Court Martial should equally ensure that it complies with the rules of evidence. In the case of **Nigerian Army v Col. Umar Mohammed**[484] Belgore, JSC (as he then was) in his lead judgment stated thus:

> The president of the General Court Martial no doubt went to town virtually finding the respondent guilty before the end of the trial. Several documents received in evidence ought not to have been admitted in view of the Evidence Act, section 2. The respondent never had a fair trial and the judgment amounts to miscarriage of justice. The Court of Appeal was perfectly right to allow the appellant's appeal.

One wonders how the presiding officer of he General Court Martial worth his salt could ever have convicted an accused person through chats in officers' mess or elsewhere in town when the case was still *subjudice.*

Elections are hotly competed, as if it were a matter of life and death. Wild controversies take their root right from primary elections intra-party which most contestants consider as a critical success factor. Elections have always been badly contested as a matter of life and death. There is a widespread

[483] See Sections 133-135 & 138 (1) of the AFA respectively
[484] (2002) FWLR (part 129) 1555

belief that the society has become so corrupt that elective offices are merely bought. Such manoeuvres and malpractices have been visited with expressions of dissatisfaction and anger by the electorate, which more recently escalated into civil disorders and rampages in many parts of Nigeria. That political jinx was broken, for the first time, in the general elections held from April 2007 to date in states like Bauchi, Cross River, Kano, Kogi, Sokoto, and more recently in Nasarawa State. It was one of the most credible elections ever conducted in history in Nigeria, except perhaps the controversial June 12th election held in 1993, where the electorate took all necessary measures to jealously guard their votes and kept sharpened eyes on ballot boxes and physical counting of the ballots to ensure the that the candidates they voted for were duly so returned, using the Hausa slogan "*a kasa, a tsare, a raka*." Meaning "keep sharpened eyes on the balloting process from voting through counting and announcement of election result." That strategy is aimed at eliminating election malpractices through which some politicians claim false victory. Most politicians consider public office as the quickest means of acquiring wealth and power. It is therefore hard to eliminate false election results unless that sort of rat-race is eliminated or tremendously reduced at the least. The same strategy has, in some states, led to announcement of actual

results as expected by the electorate, whereby Governors like Malam Isa Yuguda and Malam Ibrahim Shekarau were returned as duly elected in Bauchi and Kano States respectively and recently Akwe Doma and Al-Makura in Nasarawa State. This development in Nigeria's electoral process points at one obvious conclusion that political malpractices and election problems in Nigeria are unfortunately manufactured by the political class and INEC officials who, rather than being objective referees manoeuvre the electoral process at their whims and caprices. The Election Tribunals have kept the hopes of Nigerians alive and taken the bull by the horn to bring about changes in more States like Anambra, Edo, Ondo, and Rivers. One learned scholar[485] observed thus:

> The Court in the past has been touted as the last hope of common man. Permit me to say however that such saying is antithetical to the body, soul and spirit of the Constitution. The provision of the Constitution provides open access to the court and by so doing render the court as the last hope of everyone, the high and the low. To term the court as the last hope of common man is to limit and curtail the open accessibility to all, which the Constitution confers on the court.

Election matters are, however, *sui generis* in a class of their own and they are so treated by the courts. The fire brigade approach in management of

[485]Fagbenmi, L. O, 'Judicial Activism' (Essays in Honour of Hon Justice Idris Legbo Kutigi, CJN), UpThrust (2009) p. 45

election disputes clearly testifies to the special importance and precedence accorded to electoral cases.

It is quite worrisome that Election Tribunals' proceedings in most cases suffer long delays notwithstanding their uniqueness as *sui generis* and the special treatment accorded to them over regular cases. Hearing of an election petition is supposed to be conducted on daily basis including Saturdays and Sundays if circumstances so dictate and permit. Article 24(1) of the first schedule to the Electoral Act, 2006[486] provides thus:

> No formal adjournment of the tribunal or court for the hearing of an election petition shall be necessary, but the hearing shall be deemed adjourned and may be continued from day to day until the hearing is concluded unless the tribunal or court otherwise directs as the circumstances may dictate.

The law is very glaring on the need to handle election matters expeditiously and no *sine die* adjournment is allowed. The law further provides[487] as follows:

> After hearing of an election petition has begun, if the inquiry cannot be continued on the ensuring day or, if that day is a Sunday or a public holiday, on the day following the same, the hearing shall not be adjourned sine die but to a definite day to be announced before the rising of the tribunal or court and notice of the day to which the

[486] See Article 25(1) of the First Schedule to the Electoral Act 2010
[487] Article 25 (1) and (2) of the 1st Schedule to the Electoral Act 2006; Section 26 of the Electoral Act 2010

> hearing is adjourned shall forthwith be posted by the secretary on the notice board.
>
> The hearing may be adjourned on a Sunday or a public holiday if circumstance dictates.

Motions and other time-waste processes are taken by the chairman singularly with powers similar to that of a Federal High Court judge.[488] Notwithstanding these expedient provisions in the law, many election petitions suffer inordinate delays. In **Buhari v Obasanjo**[489] General Muhammadu Buhari and the A.N.P.P. in their petition challenging the election of Chief Olusegun Obasanjo as the President of the Federal Republic of Nigeria joined 267 other respondents most of whom were INEC officers. A total of 471 witnesses were called and 311 exhibits were tendered and admitted, apart from 294 photographs exhibited by the petitioners and 377 photographs exhibited by the respondents. This proliferation of parties, witnesses and exhibits was acknowledged by Tabai, JCA (as he then was) in the lead judgment when he observed thus:

> The trial culminating in this judgment today has been acknowledged by the learned leading senior counsel for the 1st and 2nd respondents, Chief Afe Babalola as the longest in the legal history of Nigeria (see page 1 of his written submission). And I think it is truly the longest in terms of the man-hour of both the bench and bar, the number of witnesses and exhibits. Some 355 witnesses

[488] Article 26 (1), *ibid*
[489] (2005) 5 NWLR (pt. 910) 241

were called and 311 exhibits admitted in evidence. The case was first mention on the 23rd May 2003 and the last witness RW 166 testified on the 7th October 2004 and learned leading senior counsel for the 3rd – 268th respondents formally announced the closure of their case on Saturday the 9th day of October 2004. With leave of court learned counsel for the parties submitted typed written submissions spanning through nearly 800 pages. They made their oral submissions on the 10th November 2004. It has been quite a monumental experience. The petition itself was amended twice, the second and last being that filed on the 8th October 2004. It is a 294 – paragraph document... the 1st and 2nd respondents filed their 158 paragraphs reply on the 13th June 2003. The 3rd - 26th respondents filed theirs of 219 paragraphs on the 11th May 2003.

The President of the Court of Appeal Honourable Justice Umaru Farouk Abdullahi similarly observed thus:

There is no gainsaying the fact that this case has attracted a lot of attention both nationally and internationally thus bringing it to the level of a high profile case. This is natural because of some obvious factors some of which are the personalities involved and also the time it took to reach this point today. The large number of witnesses called by all the contending parties can rationally explain the long period of time it took to reach this stage. The petitioner called a total of 139 witnesses. The first set of respondents called a total of 100 witnesses, while the 2nd set of respondents called a total of 116 witnesses altogether making a grand total of 355 witnesses, not to talk of over 311 exhibits tendered in the course of the proceedings,

> that is in long hand. Be that as it may, today we are closing the chapter at this level.

The case of **Ngige v Obi**[490]was similarly one of the most protracted election cases. R.D. Muhammad, JCA delivering the lead judgment observed as follows:

> After a marathon trial, spanning over two years, a total number of 482 witnesses testified before the tribunal. The petitioner called 45 witnesses. The 1st respondent called 425 witnesses while the 2nd respondent called 12 witnesses. The tribunal delivered its judgment on 12th day of August 2005 in which it held that the petitioner has proved his case and was accordingly entitled to the reliefs sought in its judgment of over 700 pages.

In **Ngige's** case[491], the several appeals filed by different respondents against the same judgment had to be consolidated by the Court of Appeal for easier and quicker disposition and due to the interwoven issues in the various appeals. His lordship R.D. Muhammad, JCA further observed thus:[492]

> We therefore have five appeals arising from the judgment of the tribunal. The appeal filed by Dr. Chris Nwabueze Ngige is No. CA/E/EPT/5A/2005, INEC's appeal is No CA/E/EPT/5B/2005; the appeal filed by the returning officer Anambra East Local Government Area and 182 others is No CA/E/EPT/5C/2005. The appeal filed by the

[490] (2006) 14 NWLR (pt. 999) 1 at 95
[491] *Supra*
[492] *Ibid* at p. 96

> returning officer Aguta Local Government Area and 168 others is No. CA/E/EPT/5D/2005, while the appeal of the returning officer Anambra State Gubernatorial election is No CA/E/EPT/5E/2005. At the hearing of the appeal, with the consent of all the counsel to all the parties, these appeals were consolidated.

The swearing in to office of Governor Peter Obi of Anambra State, who actually won the election in 2003, only at the tail end of the year 2006 was sequel to the time wasted in the hearing and determination of the election petition. In **A.N.P.P v Bony Haruna & Ors**[493] respondents, witnesses and exhibits were proliferated in respect of Adamawa State Governorship election petition, which involved 2,188 respondents. The resultant effect of this was to put the entire trial proceedings at the whims and caprices of the respondents, who enjoy the offices challenged by the petitioners and whose motive was in most cases to persistently delay the trial to last as long as the length of their tenure and defeats the very essence of the petition. It also results in unduly retaining a wrong person in a public office contrary to the basic tenets of democratic governance. In **Buhari v Obasanjo,**[494]Belgore JSC (as he then was) aptly observed thus:

> The petition perhaps holds record for its number of respondents, witnesses, exhibits and length of time taken to hear and determine it. I think this is due mainly to the

[493] (2003) 15 N.W.L.R. (pt. 841) 546
[494] (2006) 11 NWLR (pt.990) 65

> electoral Act, 2002 which is riddled with ... anomalies, and several inconsistencies making it the clumsiest Electoral Act ever in the history of this county. But that was the only statute to work with apart from aid from the Supreme Law, the Constitution. The election tribunals were no doubt confronted with very difficult task; they had little room for abridging time or number of parties and witnesses. However it may be mentioned for posterity that the trial took fifteen months with one hundred and thirty nine witnesses by petitioners, one hundred for 1st and 2nd respondents and one hundred and sixteen for 5th and 6th respondents.

Pats-Acholonu, JSC (of blessed memory) in one of his last pronouncements in **Buhari's** case[495] expressed similar concern as follows:

> The very big obstacle that anyone who seeks to have the election of the President or governor upturned is the very large number of witnesses he must call due to size of the respective constituency. In a country like our own, he may have to call about 250,000 – 300,000 witnesses. By the time the court would have heard from all of them with the way our present law is couched, the incumbent would have long finished and left his office and even if the petitioner finally wins, it has been an empty victory bereft of any substance.

In some cases statues are misinterpreted, at times to the extent of defeating the very essence of the statute itself or reducing the parties' fundamental rights to insignificance. The canon of statutory interpretation is that courts must ascertain the scope and parameters of the law within the statute

[495] *Supra*

itself. One of the greatest jurists ever produced globally Uwais, CJN in the case of **Attorney General Lagos State v Attorney General of the Federation**[496] aptly observed thus:

> Well established rules of interpretation require that the meaning and intention of the framers of the Constitution must be ascertained from the Constitution itself.

The learned jurist further stressed the need to do substantial justice devoid of all forms of technicalities when he observed that "in interpreting the Constitution the court should avoid technicalities, and aim at doing substantial justice."

The controversial section 133(2) of the Electoral Act 2002 was removed by reducing the number of unnecessary respondents especially INEC officials who need not be joined once INEC is a respondent. Section 144(2) of the Electoral Act 2006[497] provides as follows:

> The person whose election is complained of, is in this Act, referred to as the respondent, but if the petitioner complains of the conduct of an Electoral Officer, a Presiding Officer, a Returning Officer or any other person who took part in the conduct of an election, such officer or person shall for the purpose of this act be deemed to be a respondent and shall be joined in the election petition in his or her official status as a necessary party:

[496] (2004) 18 NWLR (Pt. 904) 1 at 142 to 143; at page 362, *infra*
[497] See also section 137(3) of the Electoral Act 2010

> Provided that where such officer or person is shown to have acted as an agent of the commission, his non-joinder as aforesaid will not on its own operate to void the petition if the commission is made a party.

Legislature had in the past stepped its bounds and regulated the internal business of the courts which were normally regulated by the rules of the various courts. Section 129(3) of the Electoral Act 1982, for instance, requires that proceedings in respect of the office of the President, Vice President, Governor or Deputy, or Legislative houses be completed within 30 days from the date of the election. Section 140(2) of the Electoral Act 1982 further provided that any petition which has not been determined within 30 days shall be time barred and it shall be deemed null and void. This has the effect of visiting the fault of the tribunal or court on a petitioner, thereby creating more room for corruption to say the least. A sound petition may be defeated by time-lapse for which the petitioner absolutely has no blame. It also has the effect of coercing the courts to conducting proceedings by operation finish and go manner irrespective of the feasibility or otherwise of so doing. The power of the National Assembly to prescribe practice and procedure to be followed by a court in an election petition does not extend to limitation of time within which the petition must be determined. The provisions were held to be *ultra vires* and amounted to interference with judicial functions. Subsequently the

Supreme Court declared a similar limitation provision[498] which provided conclusion of trial within 90 days as null and void and same was struck out in the case of **Attorney General Ondo State v Attorney General Federation &Ors**[499]. The apex court declared section 26(3) of the ICPC Act as unconstitutional, null and void in the following terms:

> In considering whether the provisions of these sections of the Act violate the provisions of the 1999 Constitution, I will answer issue no (iv) as follows:
>
> Section 6(a) – this power is exercisable in Ondo State in view of the provisions of section 4 subsections (2) and (3) of the Constitution.
>
> 26(3) – the provisions therein infringe on the principle of separation of powers and the subsection is unconstitutional, null and void. See **Unongo v Aku**(1983) 2 SCNLR 332 and **A. G. Abia State v A. G of the Federation &Ors**(2002) 3 S.C 106.

It is rather unfortunate that the rule of law is flagrantly abused by politicians notwithstanding the fact that it is the skeleton upon which democracy is built. In the case of **Attorney General Lagos State v Attorney General of the Federation**[500] Niki Tobi, JSC observed thus:

> In a society where the rule of law prevails, self-help is not available to the executive or any arm of government. In view of the fact that such a conduct could breed anarchy

[498] Section 26 (3) of the Corrupt Practices and Other Related Offences Act 2000
[499] (2002) 6 S.C. (pt. 1) 1 at 32
[500] *Supra* at page 127 paras. E - H.

> and totalitarianism, and since anarchy and totalitarianism are antitheses to democracy, courts operating the rule of law, the life blood of democracy, are under a constitutional duty to stand against such an action.

It is rather incredible that a constitutionally guaranteed right to which every person treading on the Nigeria's soil is entitled *ex debito justitiae* could be denied[501].

The battle between President Obasanjo and Vice President Atiku Abubakar led to some landmark decisions. In **A.C. v INEC**[502] the Action congress conducted its national congress from which the Vice President Alh Atiku Abubakar emerged as the presidential candidate for the party for the presidential election scheduled to hold in April 2007. The Action Congress forwarded the name of Atiku Abubakar to INEC. However, Atiku Abubakar claimed that INEC had planned to disqualify him and some other candidates, through screening exercise. The Supreme Court held that the power to disqualify any candidate under the Electoral Act 2006 is only exercisable by the courts. In arriving at this decision the Supreme Court considered section 137 (1) of the Constitution and paragraph 15 (a) of the third schedule to the Constitution dealing with Federal Executive Bodies, which INEC is one, and also section 32 of the Electoral Act 2006 in contrast

[501] *S*ection 36 of the 1999 Constitution, *ibid*
[502] (2007) 12 N.W.L.R. (PT 1048) 222

with section 21 (8) of the Electoral Act 2002. Delivering the lead judgment, Katsina-Alu, JSC (as he then was) observed thus:

> In my considered view section 21 (8) and (9) is very plain. It is clear and unambiguous. It confers on the defendant the power to disqualify candidates. This power is not in doubt. But then this provision vesting the defendant the power to disqualify candidates was made by the law makers in the Electoral Act 2002. The legal position has since changed with the enactment of the Electoral Act 2006. I do not want to speculate on what informed the action of the law makers but suffice it to say that the law makers in their wisdom took away this power from the defendant. And as it can be seen clearly, this power is now vested in the court by section 32 (4), (5) and (6) of the Electoral Act 2006.

The Investment and Securities Act of 2007, through a regulatory document[503], makes provision for an efficient and speedy machinery to adjudicate disputes in the Nigerian capital market. The realisation of the importance of a vibrant capital market for rapid economic development where long term capital could be processed for developmental purposes made it imperative.

The resolution of capital market disputes by regular courts has been faulted as showing inadequate understanding of the market[504] coupled with the fact that adjudication in already congested courts could drag on for long

[503] The Act establishes the Securities and Exchange Commission as the apex regulatory authority for the Nigerian Capital Market as well as the regulation of the market to ensure protection of investors and operators.
[504] Oba, E, Basic Understanding of Capital Market Operations, CIBN Press (1999), p. 21

without due regard to the sensitivity of the market and the multiplier negative effect it has on the economy. It is for those reasons and others that the Act established a separate dispute resolution tribunal to handle disputes in the industry.

The IST seems to be unnecessarily loath at adjudicating on matters that may likely conflict with administrative decisions of the SEC. In **U.B.N. Plc v S.E.C.**[505] the tribunal did not consider it ridiculous to say that it has difficulty with an order for restitution made by the SEC and declined to make the simple restitution order that was merely consequential.

The IST, like any other court of law, has not only the power but a duty to consider all issues in any case properly brought before it, and decide on all issues raised for determination. It is submitted that restitution order ought to be made only by the tribunal and not the SEC especially in a case in which SEC is a party.

The IST is empowered to hear all civil disputes in both the Capital Market and Pensions administration. Such disputes may be between participants, investors, regulatory organizations and operators as well as the SEC which is the apex regulator in the capital market, and also between the National Pensions Commission and other parties involved in any pension dispute.

[505] *Supra*

The jurisdiction of the IST is therefore two fold covering both capital market and appeals in respect of pension matters.

The Act gives very wide powers to SEC to protect investors and maintain the integrity of the capital market. So far the APC has been carrying out its duties in terms of resolving capital market disputes between an investor and a capital market operator as can be seen in cases such as **Doherty v BGL Securities Ltd**[506]. In this case, a client paid the sum of N=3.3 million Naira to BGL Securities. The firm neither purchased the said shares for the client nor did they return the money. The APC directed BGL to pay to the complainant the sum of N=5.1 million Naira as full and final settlement. The APC further directed that BGL pay N=4.3 million Naira to SEC as penalty.

It is pertinent that appeal in respect of the decisions of the tribunal lies to the Court of Appeal only on points of law. This leaves the IST as the final court on points of fact. This brings out a double edged sense. First it limits the grounds for appeal thereby making the tribunal more efficacious as an arbiter in the capital market. Secondly it makes more sense that the technical nature of knowledge required to determine the facts is safeguarded, in the stead of the regular courts substituting their limited

[506] Unreported case No. APC/4/2002

knowledge for those of the experts.[507] It is pertinent to observe that decisions of the IST on points of law ought to be opened to the test huddles of appellate process. It only behoves the Federal Judicial Service Commission[508] and the National Judicial Council[509] to appoint capital market experts to the appellate courts like the Supreme Court and the Court of Appeal just like experts in Islamic and customary laws are.[510]

In consonance with international best practice, the tribunal encourages and supports parties by providing a reliable and expedient dispute resolution mechanism for investors through the mutual settlement of alternative dispute resolution mechanisms or mutual settlement of disputes between parties to an investment dispute.[511] This means that the tribunal understands the legal concept that justice delayed is justice denied. All over the world, investors need to be assured that their disputes would be resolved expeditiously. This is a critical success factor for investment in the capital market. If dubious stockbrokers are not punished timeously, they would have wrecked serious havoc on their clients and generally to the Nigerian Stock Exchange before they are punished in the long run. These

[507] Procter & Gamble v HM Customs (2009) ECWA Civ. 407
[508] Hereinafter referred to as "FJSC"
[509] Hereinafter referred to as the "NJC"
[510] See Section 247(1) (a) and (b) of the 1999 Constitution (as amended)
[511] Igwe, J.U.K. at p 41, *op cit*

administrative tribunals dispense justice in a speedy and expert like manner dealing with every situation adequately.

It is also important at this juncture to mention the expansive jurisdiction of the Investment and Securities Tribunal with the inclusive of provisions in the Pensions Reform Act 2004 which confers jurisdiction in pension matters on the tribunal[512]. Any person or a body corporate may refer any such matter to the Investment and Securities Tribunal.

There is the issue of jurisdictional competition or superiority struggle between the Investment and Securities Tribunal and the Federal High Court *vis-a-vis* the 1999 Constitution particularly Section 6 (6) (b) of the 1999 Constitution wherein the superior courts of record are listed. The list does not include the IST. The IST is, therefore, not a superior court of record notwithstanding the provision giving it exclusive jurisdiction and stating that its judgment is to be executed like Federal High Court judgment. Although, the IST is vested with jurisdiction to hear and determine matters in respect of Investments and the operation of the capital market in Nigeria, section 251 1999 Constitution provides extensively for the exclusive jurisdiction of the Federal High Court in the operations and management of the Companies and Allied Matters Act. The IST in the case

[512] *Supra*

of **FIS Securities Ltd v Securities and Exchange Commission**[513] on the other hand has held that the tribunal has jurisdiction to deal with matters specified in the Companies and Allied Matters Act 1990 in so far as it deals with quoted companies, securities, transactions in those securities. There are numerous cases where the Federal High Court has asserted jurisdiction over exactly the same issues as the tribunal did.[514]

There is also the issue of the wide powers conferred on the IST, which is still a mere administrative tribunal. The IST should ideally be a regular court and incorporated as a superior court of record under section 6 of the 1999 Constitution. There is an urgent need to include this in the on-going amendment to the 1999 Constitution particularly with a view to vesting the tribunal with the inherent powers of a superior court of record to resolve disputes within its jurisdiction effectively. This can also help resolve the problem of competition for jurisdiction with Federal High Court.

Recent case law jurisprudence has come up with pronouncements in an attempt to resolving the apparent inconsistencies in approach to jurisdiction between the IST and the Federal High Court. In the case of **Cadbury (Nigeria) Plc v SEC and APC**[515] the Court of Appeal, relying on

[513] (2004) 1 NISLR 165
[514] E. P. Investment Ltd & Anor v BGL Ltd & 22 Ors., Suit No FHC/L/CS/1298/09
[515] Unreported Appeal No CA/A/105/M/08 delivered on the 10th July 2009.

sections 242, 243, 284 (1), 294 and 295 of ISA 2007, held that the Court of Appeal cannot exercise appellate jurisdiction on a matter emanating from the High Court which has no jurisdiction *ab initio* over a decision of SEC or APC, which is only appealable to the Investment and Securities Tribunal and not by a fresh action before the Federal High Court as was done in this case. The Court of Appeal held that jurisdiction resided in SEC with appeal to Investment and Securities Tribunal whilst the jurisdiction of the Federal High Court or any other court of first instance has been effectively excluded. The Court of Appeal further noted that it can only entertain an appeal on such matters emanating or originating from the Investment and Securities Tribunal, which is the appropriate forum after SEC decision and not the Federal High Court.

Another critical issue is the mode of appointment of the IST Chairman and members as against that of the Federal High Court. While the members of the IST are appointed by the Minister of Finance, the judges of the Federal High Court are appointed by the President of the Federal Republic of Nigeria on the recommendation of the National Judicial Council[516]. It is instructive to note that the same Minister appoints the officials of the SEC

[516] Section 250 1999 Constitution; Section 5 Investments and Securities Act, 2007.

and CBN and to this extent one may say that the contention that partiality cannot be ruled out in such circumstances[517] is well founded.

The power of the Minister of Finance to appoint Capital Market experts as members of the IST seems to be too absolute and unquestionable irrespective of whether or not the person(s) he appointed was or were qualified under the law. It reduces the provisions in the law that provided for membership qualification and composition of IST to insignificance. One may submit that any failure to comply with the provisions of the law was tantamount to affecting the jurisdiction of the IST and ought to have been open to a legal attack by an aggrieved party. The Minister, with respect, lacked such an absolute or supreme power to do right or wrong in the performance of his public duty. The competence of the IST, it is further submitted, includes the composition and qualification of the Chairman and members as provided by its enabling law. Once the IST is not duly constituted, it lacks the competence to adjudicate and any proceedings conducted thereby will tantamount to nullity.

The IST has both original and appellate jurisdiction in respect of capital market disputes.[518] The law, however, fails to make a clear distinction between

[517] See the Scottish case of **Starrs v Ruxton** (2000) J.S. 208 where the decision was based on the temporary nature of the Sheriffs position and how his re-appointment was at the discretion of the lord Advocate. This case promulgated the need to change the law of Scotland by setting up an independent commission to appoint sheriffs.

capital market disputes falling under the original jurisdiction of the IST and those in respect of which the tribunal could only exercise appellate jurisdiction. This uncertainty is given statutory flavour whereby a person aggrieved by a decision of the SEC is given the option to either institute a new action in the IST or alternatively appeal against such decision. It is submitted that the decision of the SEC being *quasi*-judicial and appealable, could be properly appealed against because filing a new action on the same cause of action and between the same parties will not only proliferate capital market disputes but will also offend the *res judicata* rule.

Alternative dispute resolution (ADR) mechanisms seem to be quite imperative to disputes resolution in the capital market. It is pertinent to analyse the critical success factors of the application of ADR mechanisms in resolving capital market disputes.

Trials by the Code of Conduct Tribunal are criminal nature but the same accused person may be subjected to separate trial, for the same offence, in a regular court. The justification for this double criminal trial is that the ingredients of the two sets of offence are not the same, e.g. the fact that the offender is a serving or retired public servant is immaterial in criminal trial while it is a necessary ingredient to the trial by the Code of Conduct

[518] Section 284 of the Act, *op cit*

Tribunal since the jurisdiction of the tribunal is limited to cases of contravention of the Code of Conduct. However, the status of the accused person ought not be a ground for proliferating criminal trials against the same accused person as it unnecessarily subjects the accused person already tried by the tribunal to double criminal trials.[519]

In practice cases of contravention of code of conduct, which more often than not involve financial crimes are prosecuted directly in the Federal High Court without any form of recourse to the Code of Conduct Tribunal and thereby rendering the tribunal even more redundant. This, it is submitted amounts to an undue usurpation of the powers and jurisdiction of the tribunal. The cases of some former State Governors and other public office holders in States like Plateau, Bayelsa, Delta, Jigawa, Ekiti, Edo, etc may be good examples of abandonment of violation of the Code of Conduct by public office holders without prosecuting same before the Code of Conduct Tribunal. None of these governors is yet convicted by the Federal High Court or any other conventional court of law.

In fact even accused persons prosecuted before the Code of Conduct Tribunal are hardly convicted, the work of which is further reduced to insignificance

[519] See Section 36(9) of the 1999 Constitution (as Amended)

by the establishment of the Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt Practices Commission (ICPC).

8.3 **Recommendations**

A Court Martial should not have the same officer as the convening officer and at the same time the confirming officer. These two steering positions should be separated to avoid tyranny and misuse of power.[520] It is tantamount to contravening the fair hearing principle.

There is no doubting the fact that the exigencies of the military require a system with adequate machinery for expeditious disposal of cases, so as to enable a serviceman return to his duty post. This factor cannot and ought not to be used as an excuse to either short-circuit or ignore those basic principles of fair hearing as enshrined in the Constitution. Courts martial should always confine themselves within the rule of law. The 1999 Constitution which brought into existence the AFA is founded on the rule of law. Rule of law simply means that things should be done in accordance with the law. The Constitution guarantees fair hearing of an accused person[521] and that fundamental right cannot be compromised.

[520] Lt. Col. Paul O. Ihianle vs. The Nigeria Army (2002) 22 WRN 121
[521] Section 36 (4) of the 1999 Constitution (as Amended)

The Code of Conduct Tribunal should have been conferred with jurisdiction to turn the other side of the coin by imposing every necessary sanction provided by the penal laws applicable under proper criminal trials. This will ensure a once and for all trial of accused persons before the tribunal and remove the cumbersome provision in the law that requires a second trial and punishment for the same offence.

The Code of Conduct Tribunal and even the IST need a reorganization and proper positioning in the hierarchy of superior courts of record like the National Industrial Court. It is not only the surest means of restoring the much needed discipline in the public service but will also properly position those crippled tribunals that ought to function as superior courts of record. It will also require, apart from the necessary constitutional amendment, the promulgation of an Act by the National Assembly to regulate the necessary logistics necessary for this much needed transformation.

Military Courts have from their antecedents and decisions proved to be the fastest but least observer of human rights provisions in the Constitution and the rule of law. The commonest is the General Court Martial (GCM) and the Special Court Martial (SCM). The law proceeds to make provision for officers authorized to convene a GCM and a SCM separately.

Delay in election petition proceedings in courts and tribunals is one evil that has to be eliminated not only by way of legislation but also by the manner in which the tribunals are constituted. It is submitted that the reduction in number of tribunal members from five to three may do a lot of good by using the same number of judges participating in hearing and determination of election cases to establish more tribunals and thereby dispose of more cases within a shorter time frame. One learned Jurist[522] has aptly observed thus:

It is submitted that it only goes to waste man-power for a Tribunal to composed of five members. Thus, in an election year, the Judiciary of this country is virtually paralysed because of the large number of judges taken away to sit in Election Tribunals and the routine cases inevitably suffer delays. One may suggest a constitutional amendment to reduce the number of members of the Tribunal to three.

If this is done, the President of the Court of Appeal can even create a Tribunal for each Senatorial District of the country so that petitions can be more rapidly disposed of.

[522]Ogebe, J.O, 'Commentary on Delay in Election Tribunal Proceedings' being a paper delivered at the 2009 All Nigeria Judges Conference held at NJI Abuja on 23rd-27th November 2009.

The learned Jurist[523] further suggested reducing the number of political parties as a means of minimising election petitions and eventually reducing delays in election petitions proceedings.

A major suggestion for reducing delays in proceedings of the Election Tribunals is to minimise the number of petitions filed. One of the ways to do this is to peg the number of political parties in Nigeria to only three parties with provision for independent candidates who may not fit into any of the political parties. It is submitted with respect that any form of proliferation of contestants will eventually take us back to square one. Moreover, three political parties in Nigeria may disintegrate the country into North, West and East as it was immediately before and after independence.

One may however, suggest that the Tribunals be automated to reduce the lengthy period spent in long-hand recording of proceedings. Filing and service of processes may also be done on-line including payment of necessary fees by internet banking, interswitch, mastercard, verve, visa, quickteller and other similar electronic devices of online payment. These are some of the critical success factors to fast-track and achieve easier and more civilised system of dispensation of justice.

[523] *Ibid*

The Uwais Committee recommendations should also be implemented to the latter to usher in the much needed political reforms for more transparent and acceptable elections in Nigeria. This is quite feasible especially with the new INEC leadership and the calibre of leadership in both the Federal and State Judiciaries who recognise the ills of the system and have the courage to face them squarely and the capacity and vision to tackle and cure them in the interest of judicious administration of justice and dignity of judges at all levels.

The Judicial Officers must also strive to achieve excellence in their onerous task of adjudication with transparent honesty, competence, inspiration and commitment in the hearing and determination of all cases with particular reference to election matters without fear or favour, affection or ill-will, and recognise that judicial office is both an honour and a trust.

Recent amendments to the Constitution have introduced more fast-tracking provisions that guarantee a timeous disposition of election petitions by Election Tribunals including appeals. The innovation introduced by the Constitution of the Federal Republic of Nigeria (Second Alteration) Act 2010 includes the establishment of a stand-alone Governorship Election Tribunal for each State of the Federation with exclusive original jurisdiction to hear and determine election petitions as to whether any person has

been validly elected to the office of Governor or Deputy Governor of a State. Section 9 thereof sets out a time table for presentation and determination of election petitions and appeals. It stipulates that election petitions be presented to the relevant election tribunal within 21 days from the date of announcing the election result.[524] The tribunal has 180 days to determine the petition. If there is an appeal, the Court of Appeal must determine the appeal within 60 days from the date the judgment appealed against was delivered. Ironically this provision does not only allow for computation of time in advance from a moment when the appeal is non-existent, but it also fails to consider the built-in periods for filing necessary processes, including extensions, before the appeal becomes matured for hearing. Experience has shown that time extensions were sought for and obtained within as short as 48 to 72 hours before the expiry of 60 days in governorship appeal in which the Court of Appeal is **not the final appeal court**. Yet decisions of Court of Appeal including full reasons thereof must be rendered within the stipulated time frame of 60 days otherwise it has been null and void, notwithstanding the clear provision of section 294(5) of the Constitution (as amended) which saves decisions of courts delivered outside the time limit set by the Constitution. Such decision shall not be set aside or treated as a nullity solely on the ground of pronouncement after

[524] See Section 29(1)(e) of the Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010

the expiry of the time frame for so doing unless the court exercising jurisdiction by way of appeal from that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason of the delay.

It is submitted that the intention of the law makers must be ascertained from within the law and not outside it. Section 294(5) is the only singular provision that deals with late delivery of judgment. It therefore ought to apply in ascertaining the validity or otherwise of the similar provision in section 285 of the Constitution as amended by section 9 of the Constitution (Second Alteration) Act 2010.

The erstwhile position of the law was that the courts did not have jurisdiction in pre-election matters as held in many cases like **Chibok v Mohammed Bello**[525]; **Ikuomola v Ige**[526] and **DoukkPolopha v George**[527]. There are, however, areas where the conducts of our politicians compel the courts including the Supreme Court to make safeguarding interpretation that hardly conforms to the clear and unequivocal provisions of the law. One example is disqualification on the basis of indictment for embezzlement by an administrative panel of enquiry set up by the Federal or State Government as the case may be and duly accepted by such government.

[525](1993) 1N.W.L.R. (pt 267) 109 at 117
[526](1992) 4 N.W.L.R. (pt. 236) 511 at 532
[527](1992) 4 N.W.L.R. (pt 236) 444 at 458

The courts viewed the use of indictment as a means of eschewing political opponents which led to a twisted interpretation beyond the clear scope of the law. In **A.C. v INEC** (supra) the Supreme Court held that trial and conviction by a court is the only constitutionally permitted way to prove the criminal offences of embezzlement or fraud. The apex Court further observed thus:

> It seems ... that once a person is accused of a criminal offence, he must be tried in a court of law where the complaint of his accusers can be ventilated in public and where he would be sure of getting a fair hearing... no other tribunal, investigating panel or committee will do.

The clear constitutional requirement however, is that a candidate may be disqualified on mere indictment by an administrative panel, if such indictment is accepted by the Government setting up the panel. The clear intention of the legislature here is that an accusation for embezzlement, if confirmed by an administrative panel which duly investigated the accusation is enough to becloud the character of a person wishing to contest the office of the President or Governor of a State and renders the character of such person questionable. That much is enough to disqualify such a person from contesting an election to any of those exalted offices. In other words, the Constitutional provisions intend that the offices of the President or Governor of a State are only contestable by persons of

unquestionable integrity. Of course the law is trite that no one may be found guilty or punished for any offence except upon due trial and conviction by a court of competent jurisdiction. Indictment however, simply questions the character of a candidate. It is submitted that mere indictment should suffice to disqualify a candidate as provided by the Constitution[528]. For the avoidance of doubt the relevant provisions state as follows:

> (1) A person shall not be qualified for election to the office of President if-
>
> He has been indicted for embezzlement or fraud by a Judicial Commission of Inquiry or an administrative Panel of Inquiry or a Tribunal set up under the tribunal of Inquiry Act, a Tribunal of Inquiry Law or any other law by the Federal or State Government which indictment has been accepted by the Federal or State Government, respectively.
>
> 182 (1) No person shall be qualified for election to the office of Governor of a State if-
>
> He has been indicted for embezzlement or fraud by a Judicial Commission of Inquiry or an administrative Panel or Inquiry or a Tribunal set up under the Tribunals of Inquiry Act, a Tribunals of Inquiry Law or any other law by the Federal or State Government which indictment has been accepted by the Federal or State Government.

[528] See Sections 137(1) (i) and 182(1) (i) of the 1999 Constitution

These controversial provisions have both been repealed[529] thereby putting this issue to final rest. The top political office holders have used bitterness to overreach their adversaries rather than being vanguards of electoral reform. A good example was witnessed when the former President Olusegun Obasanjo sought to remove his Vice President Atiku Abubakar from office. The Supreme Court called him to order by holding thus:

> The office of the Vice President is created by the Constitution, his appointment and removal from office is also provided for in the Constitution. Although the President had to nominate him as at the time he wanted to contest for the office of the President, and the Constitution also required that the person nominated should be from the same political party as the President, I believe that the Constitution assumes that the Vice President and the President should maintain the same relationship.[530]

That frosty relationship between the highest people in governance degenerated into ridiculous embarrassment to the nation. The removal of the Vice President could only be done by way of impeachment by the National assembly.[531]

Also in **Ugwu v Ararume**[532] Senator Ararume contested the governorship primaries in Imo state and emerged as the winner of the primaries and his

[529] See Sections 13 and 19 of the Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010
[530] *Ibid* at page 322
[531] See Section 143 of the Constitution.
[532] (2007) 12 NWLR (pt.1048) 364

name was forwarded to INEC as the flag bearer of the PDP in Imo State but was later substituted with another candidate and no reason was adduced for the substitution.

The Supreme Court held that as soon as nomination of candidates is submitted to INEC by a political party, the issue was no longer at the whims and caprices of the parties to change such duly nominated candidates without cogent and verifiable reasons. The apex court stated as follows:

> The Electoral Act and the Constitution of political parties must be seen to be complimenting the Constitution of the Federal Republic of Nigeria in formulating broader rules, regulations and operation mechanisms for both Independent National Electoral Commission and the political parties for administrative convenience. Where any of such enactment, rules or policies comes in conflict with any section of the Constitution, that enactment, rule or policy must surrender to the Constitution.

Not until Ararume's case was decided, the law was that party primary was an intra party affair under the absolute control of the respective political parties. That was the old order as previously decided by the Supreme Court in a plethora of authorities notably **Onuoha v Okafor**[533]and **Dalhatu v Turaki.**[534]

[533] (19830 2 SCNR 244
[534] (2003) 15 NWLR (pt.843) 300

It was rather sad that the PDP had its way of defeating Senator Ararume's victory to turn him into a victim instead by expelling him from the party. Unfortunately every candidate for any election must be sponsored by a registered political party.

The Supreme Court, however, stepped its feet down to protect its judgment in **Amaechi v INEC**[535]wherein the Rt. Hon Rotimi Chibuike Amaechi went to the Supreme Court seeking to stop the PDP from substituting his name with that of Celestine Omechia or otherwise disqualifying him from contesting the governorship election in Rivers State in April 2007.

The trial court set aside the substitution of Amaechi on the ground that it was done during the pendency of the suit. On appeal, the Court of Appeal after waiting for the Supreme Court verdict on similar issue in **Ararume's** case found that the PDP could by giving cogent and verifiable reasons substitute Amaechi's name with that of Omehia provided the substitution is made within sixty days before the election as stipulated under section 34(1) of the Electoral Act, 2006. The Supreme Court decided that a party whose name has been forwarded to INEC cannot be substituted except for cogent and verifiable reasons as required under section 34(2) of the Electoral Act 2006. In particular the Supreme Court per Oguntade, JSC, quoting *inter alia*

[535] (2008) 5 NWLR (pt. 1080) 227 at 317-318

the provisions of sections 6(6) (a) of the Constitution and section 22 of the Supreme Court Act, held thus:

> In view of the above provisions, there can be no doubt that there is a plenitude of power available to this court to do which the justice of the case deserves. It enables a court to grant consequential reliefs in the interest of justice even where such have not been specifically claimed. Having held as I did that the name of Amaechi was not substituted as provided by law, the consequence is that he was the candidate of the PDP for whom the Party campaigned in the April 2007 election not Omaehia and since PDP was declared to have won the said election, Amaechi must be deemed to be the candidate that won the election for the PDP. In the eyes of the law, Omehia was never a candidate in the election much less the winner. It is for this reason that I on 25/10/2007 allowed Amaechi's appeal and dismissed the cross appeal. I accordingly declare Amaechi the person entitled to be the Governor of Rivers State. I did not nullify the election of 14/4/2007 as I never had cause to do so for the reasons earlier given in this judgment.

With respect to the apex court, it is inconceivable that Amaechi who was not a candidate in the 14/4/2007 should ever have been countenanced, let alone be declared the winner of the election. It is submitted that it would, at best only have constituted a case of valid nomination and unlawful exclusion from the election, which would have been a reason for nullification of the election and an order for rerun. It is further submitted that only the Governorship Election Tribunal Election Tribunal has the exclusive original

jurisdiction in such a case. However, the Supreme Court being the final appellate court cannot be faulted. The decision, therefore, represents the current position of the law on that issue.

The time frame for determination of election cases has been given a novel interpretation by the Supreme Court in the case of **Abubakar & ors Vs. Nasamu & ors** No SC/14/2012 delivered on the 24th February 2012 held thus:

> In the instant case the Court of Appeal is not the final court of appeal in governorship election matters and therefore has no power under Section 285 (8) of the 1999 Constitution to give a decision and defer the reasons to a later date let alone to a date outside the sixty (60) days constitutionally assigned for the hearing and disposal of the matter.
>
> However, does the rendering of the decision outside the sixty (60) days necessarily result in the decision being a nullity?
>
> Our attention has been drawn to the provisions of section 294 (5) of the 1999 Constitution which provides as follows:-
>
> > "(5) the decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions subsection (1) of this section unless the court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining

has suffered a miscarriage of justice by reason thereof."

Subsection (1) of the section 294 of the 1999 Constitution, as amended, like section 285 (7) of the said Constitution allots time within which the judgment of a court must be delivered, which, in that case is ninety (90) days, while in section 285 (7) it is sixty (60) days.

The question that necessarily follows is whether the provisions of section 294 (5) of the 1999 Constitution supra applies to the facts of this case or to courts exercising jurisdiction under section 285 of the 1999 Constitution, as amended? I think not.

Section 285 of the 1999 Constitution, as amended is a specific provision which deals with election petition matters which has long been held to be sui generis. On the other hand, section 294 is a general provision dealing with civil proceedings and judgments thereon generally.

One wonders if the legislature really intended that the 60 days for determination of the appeal should be computed from the date of filing the notice of appeal when the appeal was, in fact, non-existent and yet further required the courts to deliver full judgment including reasons within that specified time-frame even when it is not feasible to do so.

Computation of time has been an issue of great concern for the appeal tribunals. This was ignited by Constitutional amendments. Section 29 of the Constitution (First Alteration) Act, that came into force on 16th July 2010, amended section 285 to stipulate under subsection (8) thereof that the

Court of Appeal may, **in all appeals**[536] adopt the practice of first giving its decision and reserving the reasons for the judgment to a later date. The fundamental difference between the two Acts is the amendment of subsection (8) of section 29 of the First Alteration Act to provide in section 9 of the Second Alteration Act that came into force on the 29th November 2010 thus:

> The court, **in all final appeals**[537] from an election tribunal or court may adopt the practice of first giving its decision and reserving the reasons therefor to a later date.

It is submitted, with respect, that a more compelling situation for application of the principle incorporated under section 294(5) of the Constitution exists under section 285 where the time frame for writing judgment in virtually next to impossible, the fact that same provision has not been repeated notwithstanding. Even the Supreme Court has expressed a similar opinion in **Nasamu's** case when it observed per Onnoghen, JSC as follows:

> The National Assembly may, however, in circumstances of this case and those of similar nature, consider amending the constitution by providing a similar provision to Section 294 (5) of the 1999 Constitution, as amended, in section 285 of the said constitution.

[536] Emphasis supplied
[537] *Ibid*

The important consideration, one may submit, is focusing on substantial justice in every case rater allowing technicality to defeat the ends of justice, which is the mischief that section 294(5) of the Constitution aims at removing. It is tantamount to visiting the court's sin on a litigant who obviously should expect nothing less than a verdict squarely based on the merits of his case rather than subjecting him to a technical knockout. If time is not extendable it should run across the board so that every processes filed out time should be regarded as incompetent and struck out.

Computation of time for determination of appeal by the Court of Appeal ought to commence from the date of hearing an appeal, or at least from the date of entering the appeal by compilation and transmission of record of proceedings from tribunal to the court of appeal. In practice, the Court of Appeal hardly has more than a week to hear the appeal and deliver full judgment. An example is the recent Sokoto Governorship Appeal **Yusha'u Muhammed Ahmed & 2 Ors v Aliyu Magatakarda Wamakko & 4 Ors**[538] where the tribunal delivered its judgment on 2nd May 2012, on which day the Court of Appeal's the 60 days for determination of the appeal started running. Both appellant's and respondents' briefs were deemed filed and served on the 20th June 2012 ten days to expiry of the judgment, which was

[538] Unreported Appeal No CA/S/EPT/GOV/1/2012

delivered a week after hearing on the 27th June 2012. In **Alfa Momoh Rabiu & Anor v Zakari Abdullahi Jibo & 3 Ors**[539] the appeal was heard on Friday 13th January 2012 after regularising the belated briefs. That put the Justices on their toes to read the record and briefs and prepare a judgment over the weekend, which was delivered on Monday 16th January 2012. This to mention but a few. The bottom-line point is that the 60 day time frame for the Court of Appeal is actually something between three to ten days. It is recommended that the time frame be made realistically 30 days from the date of hearing the appeal when the court goes in to the business of writing the judgment.

The Securities and Exchange Commission (SEC) should seriously consider the concept of either in-house dispute resolution expert or an external panel of neutrals or a mixture of both of them. The process of "self-regulation" is an organization's industry's control, oversight or direction of itself according to rules and standards that it establishes[540]. It is a very important mechanism of dispute resolution in the capital market because it acts as a complement to an enforcement regime wherein self-regulators are encouraging the use of industry self-regulation to resolve disputes. In line with international best practices many countries and economies are

[539] Unreported Appeal No CA/A//EPT/640/2011
[540] Black's Law Dictionary 8th edition at page 1391

already tilting towards this angle. For example, in Malaysia the MCMC is expressly required under the Malaysian Communication and Multimedia Commission Act to promote and encourage industry self-regulation. This does not interfere with the powers of the regulator to intervene and enforce compliance where parties fail to comply with voluntary rules and where the interest of consumers and competition in the sector is adversely affected.[541]

However, there are certain limitations that exist in view of self-regulation. First, is the issue of pursuit of mutual self-interest by the self-regulator that acts like a cartel by protecting its members instead of calling them to order. Second, is the lack of coercive power of enforcement. Even when the self-regulatory organization SRO has acted properly against its member in defence of the investing public or other capital market operator, the SROs lack the coercive means to enforce their decisions. All dispute resolution processes requires some level of enforcement support from the official sector, whether from the regulator or courts[542].

The main challenge faced by the use of the domestic forum such as APC of SEC is the apparent belief by some people that because SEC exercises

[541] See Effective Compliance and Enforcement Guidelines and Practices, APEC telecommunications and Information Working Group, 31st Meeting, Document no. Tele 31/LSG14, April 2005, at p 5.
[542]Itu, W. B 'Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions' at p 77.

executive, legislative and judicial powers there is no chance of justice within such an absolute concentration of power which is said to likely lead to arbitrariness and abuse of power. Others argue that such concept of super regulator is unconstitutional given the doctrine of separation of powers. Perhaps it is such fears that form the basis for litigant preferring a lot of times to proceed to the courts and ending up spending a long time tied up in a litigation process rather than engage in the domestic dispute resolution mechanism of ISA 2007.

Another challenge is the lack of skilled legal practitioners in this area who have adequate knowledge, skill and training to advice their clients. There is need for lawyers to ensure that they acquire specialized training and skills to better develop themselves in this area of the law including continuous legal and capital market education.

Lastly, a major challenge facing the capital market regulators is the judicious determination of disputes and the limitations on exercise of judicial powers by administrative bodies in the capital market. This is against the undercurrent of jurisdictional conflicts that is perhaps not too obvious but is nevertheless real; in relation to the powers of the court vis-à-vis the powers of capital market institutions such as SEC and IST. Clearly, the institutions (SEC and IST) cannot function effectively in the absence of

certainty that their competence shall not be disturbed. Also, transaction parties and their advisers are considerably weakened in the absence of certainty that an approved deal would not be disturbed or reversed by subsequent judicial order months or years after the deal. For example, a merger transaction which has been completed and parties position irreversibly altered in reliance on its administrative approval would not easily be upset. Where there is no certainty of outcome, it is difficult if not impossible for the private practitioner to advise his client on likely legal outcome in a transaction like a merger transaction. In fact, the need for certainty becomes more urgent in view of a recent decision of the Federal High Court in **Oceanic Int. Bank v Victor Odili & Ors**[543] of 20 July 2007. The case arose from the merger between Oceanic Int. Bank and International Trust Bank (ITB), which merger the Federal High Court (corum: Tijani Abubakar, J.) had sanctioned after approval by SEC in accordance with the provisions of section 100 (3) of the ISA 1999. The merger scheme document had provided that: "the shareholders of ITB has been issued shares of Oceanic Bank in exchange for their shares cancelled in ITB only if the post-merger Oceanic is able to make sufficient recoveries on the risk assets of pre-merger ITB that will cover then negative shareholders' funds of ITB being absorbed by Oceanic". Emphasis supplied.

[543] Appeal number CA/L/171M/08

Subsequent upon the merger and its consummation, some minority shareholders of ITB then applied to the same court and judge that had sanctioned the merger earlier on for a variation of the above provision and substitution of a provision that would allow them receive one Oceanic Bank share for every ITB share that they held. This prayer the judge granted. The matter is still pending on appeal and thus no comment could be made thereon. Suffice it to say that whatever the outcome, it portends serious consequences for the capital market in incalculable proportions especially in relation to mergers and takeovers. The appellant has gone in to another merger with Eko Bank Plc, which now has to be substituted for the appellant who is no longer existing. However, from the point of view of judicial deference to the decisions and authority of the capital market institutions like SEC and IST, the decision may be faulted on the following two specific grounds:

The judge ignored the fact that the scheme document in question and its provisions had been examined and approved by the SEC, upon which the court had previously given its sanction for the merger. Since merger formulae are technical and economic concepts which institutions like the SEC are equipped to handle the decision of the court is extremely troublesome for a private practitioner who wants to advise his clients on a

merger transaction. For instance, the formula for valuation of shares can be complex such as net assets or shareholders fund or net profits over a period or quality of management. Usually, a bouquet of these formulae is used to arrive at ratio of exchange of shares of two companies in a merger situation. For the judge to arbitrarily impose a ratio of one to one is today the economic fundamentals of merger as contained in court sanctioned consensual merger document. This could mean that the court rewrote the contract for the parties; and by revisiting and varying a scheme document which it had earlier sanctioned upon the approval of SEC, the decision also exemplified judicial challenge to the jurisdiction of the IST.

The IST exists to review decisions of SEC in capital market matters. This includes scheme document and formulae for merger. This oversight function of IST is not taken away by the fact that under the ISA 1999 the Federal High Court was required to sanction the merger after it has been approved by SEC, which is the same situation for large mergers under the Act. On a proper and well considered view the role of the court in merger control particularly in relation to court sanction and approval is merely ministerial. This is so having regard to the technical nature of mergers and other forms of business combination, the evaluation of which the traditional courts do not have the capacity to handle. Any challenge on the

substantive and technical aspects of a merger which has been approved by SEC can only be reviewed by the IST and not by a regular court, which on the particular facts of the present case, was *functus officio* anyway. This position was recently confirmed by the Court of Appeal in **Cadbury Nigeria Plc & Ors v Securities and Exchange Commission & Ors**[544] where the court held that any challenge to the decision of SEC should go to IST and that filing an application to stay the decision of SEC at the Federal High Court was without jurisdiction and consequently an appeal against refusal of such stay to the Court of Appeal left the appellate court also without jurisdiction as the court of first instance had no jurisdiction. Alternatively a fresh SEC approval should have been insisted upon on the basis of SEC being the administrative body with specialist knowledge and power of approval under section 100 of the ISA 1999.

The state of dispute resolution in the capital market today appears to create more problems than solutions for the following two reasons: -

First, it seems that competition for jurisdiction between the Federal High Court, the IST and APC has encouraged forum shopping. So if a complaint is made to SEC, the other party goes to court. Also, a litigant who fails at the IST goes to court on the same dispute and frames his claim differently and

[544] *Supra*

even claims lack of jurisdiction on the part of the IST. Even the regulators, with all due respect, are not left out of this confusion. Today, they are at IST and tomorrow at APC. Sadly the APC is almost dead. The court in the **Cadbury's case**[545] discussed above tried to some bit of sanity in capital market cases by respecting the jurisdiction of the APC and IST and protecting them against onslaught by THE Federal High Court but there was a major setback in the **Oceanic Bank case**[546] cited above. In the recent bank crisis cases SEC itself appear to be engaged forum shopping by appearance of its actions. It has for instance abandoned its APC proceedings for IST actions. Whilst this may be a strategy to protect itself against accusation of abuse of process or breach of fair hearing, it has brought uncertainty to dispute resolution in the capital market and perhaps arguably has capacity to reduce the regulatory effectiveness of SEC.

Secondly, the approach of IST to APC in many cases do not follow the English approach in **Proctor Gamble UK v Revenue and Customs Commissions**[547]. Even with restriction on appeals from IST to Court of Appeal on grounds of law only, there is no guarantee that the Court of Appeal will not delve into issues of facts reserved to end at the IST, which in many cases are inseparable with issues of law in water tight compartments. The courts

[545] *supra*
[546] *Supra*
[547] *Supra*. See (2007) ECWA civ.407

should to refer issues of pure facts to specialist tribunals and administrative panels while they focus on the law[548].

8. 4 **Conclusion**

The Military tribunals have, despite the repeal of the various military laws and promulgation of the AFA, which covers the entire Armed Forces, have not yet attained the level of required respect for the rule of law and right to fair hearing. There is however a remarkable improvement under democratic governance. More amendments to the AFA are necessary to give the Military class a world-class right to fair hearing and respect for the rule of law.

Recent amendments to the Constitution have introduced more fast-tracking provisions that guarantee a timeous disposition of election petitions by Election Tribunals including appeals. The innovation introduced by the Constitution of the Federal Republic of Nigeria (Second Alteration) Act 2010 includes the establishment of a stand-alone Governorship Election Tribunal for each State of the Federation with exclusive original jurisdiction to hear and determine election petitions as to whether any person has

[548]Idigbe, A, 'The Interface Between the Judicial and the Quasi-Judicial Power of the Regulator', a paper delivered at the workshop for Judges organized by the Nigerian Electricity Regulatory Commission in Kaduna on the 12th July 2010.

been validly elected to the office of Governor or Deputy Governor of a State. Section 9 thereof sets out a time table for presentation and determination of election petitions and appeals. It stipulates that election petitions be presented to the relevant election tribunal within 21 days from the date of announcing the election result. The tribunal has 180 days to determine the petition. If there is an appeal, the Court of Appeal must determine the appeal within 60 days from the date the judgment appealed against was delivered. Ironically this provision does not only allow for computation of time in advance from a moment when the appeal is non-existent, but it also fails to consider the built-in periods for filing necessary processes, including extensions, before the appeal becomes matured for hearing. Experience has shown that time extensions were sought for and obtained within as short as 48 to 72 hours before the expiry of 60 days in governorship appeal in which the Court of Appeal is not the final appeal court. Yet decisions of Court of Appeal including full reasons thereof must be rendered within the stipulated time frame of 60 days otherwise it has been null and void, notwithstanding the clear provision of section 294(5) of the Constitution (as amended) which saves decisions of courts delivered outside the time limit set by the Constitution. Such decision shall not be set aside or treated as a nullity solely on the ground of pronouncement after

the expiry of the time frame for so doing unless the court exercising jurisdiction by way of appeal from that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason of the delay.

It is submitted that the intention of the law makers must be ascertained from within the law and not outside it. Section 294(5) is the only singular provision that deals with late delivery of judgment. It therefore ought to apply in ascertaining the validity or otherwise of the similar provision in section 285 of the Constitution as amended by section 9 of the Constitution (Second Alteration) Act 2010. This was the view of the Supreme Court per Akintan, JSC in the case of **Attorney General Lagos State v Attorney General of the Federation**[549] where the learned jurist observed thus:

> Well established rules of interpretation require that the meaning and intention of the framers of the Constitution must be ascertained from the language of that Constitution itself.

The former first judicial officer in Nigeria Uwais, CJN in the lead judgment strongly admonished courts to avoid technicalities when his lordship observed that "in interpreting the Constitution, the court should avoid technicalities, and aim at doing substantial justice."

[549] At p. 314 *;* (2004) 18 NWLR (Pt. 904) 1 at 142 to 143, *op cit*

Delay in election petition proceedings in courts and tribunals is one evil that has to be eliminated not only by way of legislation but also by the attitude of counsel before the tribunals. It is submitted that the reduction in multiplicity of interlocutory motions and extensions of time will do a lot of good in meeting in basic tenets and objectives inherent in the sui generis nature of election petitions. The Supreme Court has observed the need for courts to be as brief as possible in election matters in **Nasamu's** case (supra) per Onnoghen, JSC thus:

> To achieve the aim, we need not write lengthy judgments nor consider irrelevant issues. We need to consider the main issues in the case and resolve same in as short a judgment as possible. The real judgment in an election matter is, I strongly believe, that of the ballot box.

One may further suggest reducing the number of political parties as means of minimising election petitions and eventually reducing delays in election petitions proceedings. One of the ways to do this is to reduce the number of political parties in Nigeria.

The Uwais' committee has expressed similar views as follows:

> We should review the inherited multi-party political system especially given the performance if existing fifty (50) parties which has tended to push the country towards becoming a one party state. The views expressed by Nigerians during the public hearings were overwhelmingly

> in favour of reducing the number of political parties to between two and seven. It is not a mere coincidence that the relatively freest elections in Nigeria were those conducted under the two-party system between 1989 and 1993.

One may further suggest that the Tribunals be automated to reduce the lengthy period spent in long-hand recording of proceedings. Filing of processes may also be done on-line. Payments of all fees could be effected electronically on-line, while processes could be served on the parties automatically by the system with a more reliable proof of service. Legal practitioners should be able to sign processes digitally. This will require the collaborative efforts of both the bench and the bar. These are some of the critical success factors to fast-track and achieve easier and more civilised system of dispensation of justice.

The recommendations made by the Uwais Committee on Election Reforms in Nigeria should also be implemented to the letter to usher in the much needed political reforms for more transparent and acceptable elections. These include:

(1) Transformation of the Nigeria's economy so as to improve the welfare and well-being of Nigerians to restore their confidence in government.

(2) Inclusiveness of all major stakeholders like political parties and interest groups in emerging governments.

(3) Elimination of self-succession.

(4) Make military intervention in governance and politics unnecessary and unattractive.

(5) Reorganisation of INEC.

With adequate legislation in this regard, the Nigerian Bar could certainly provide the much required leadership role in political transformation in Nigeria.

Judicial officers must also strive to achieve excellence in their onerous task of adjudication with transparent honesty, competence, inspiration and commitment in the hearing and determination of all cases with particular reference to election matters.

It seems that regular courts world over are unable to offer the speed required not only election matters but also in capital market disputes. It therefore falls on market participants that is, both operators and regulators to continue to innovate on new methods and techniques of dispute resolution

that would meet the market needs whilst complying with relevant constitutional requirements.

The Nigerian capital market is facing one of its most trying times and it needs the assistance of solicitors skilled in capital market laws, rules and regulations to further strengthen the laws that are already on ground and ensure compliance. It is pertinent that compliance has gained ascendancy as much as capital raising in the market as key objectives for regulators in achieving and maintaining market integrity and preventing systemic collapse.

The issue of jurisdictional competition should be looked into to eliminate forum shopping and allow the system to focus on development of serious capital market jurisprudence that would bring legal certainty of outcome in capital market dispute. Such an outcome will further increase confidence in the Nigeria's capital market. A proper regulatory framework should be put in place to give the IST sufficient autonomy from the Federal Ministry of Finance as well as protect it against onslaught from The Federal High Court. Appellate courts also should endeavour to restrict themselves to the issues of law when dealing with reference form capital market tribunals and generally leave issues of fact to the tribunals or administrative panels that have the technical knowledge and skill to determine the complex issues of

facts in capital market disputes. In return IST must raise its level of competence, understanding and performance and respond positively to enhanced responsibility otherwise the courts as the last bastion for the oppressed would continue to intervene in capital market disputes.

Government should also be involved in the process of enhancing the right to private system of justice delivery in the Nigerian capital market as complement to the formal dispute resolution process, so that like in arbitration, the courts (the Federal High Court and states High Courts) will have a limited but supportive role in matters within the jurisdiction of the specialized tribunals.

These are some of the case management the techniques, adopted globally in a bid to expedite the administration of justice. The list is not exhaustive, there are many more techniques utilized in different jurisdictions.

(a) Total case management

(b) Pre-trial hearings or conferences

(c) Time limits for events

(d) Individual Calendars

(e) Settlement conferences

(f) Information technology

(g) Frontloading system

(h) Adoption of an automatic procedure which ensures that in every civil case, pleadings are strictly monitored, discovery begins quickly and is completed within a reasonable time and a prompt trial follows if needed

(i) Good working relationship between the judiciary and the Bar

(j) Firm trial dates and limited continuance policies

(k) Emphasis on old cases

(l) Assignment to management tracks(e.g. expedited, normal and long)

(m) Alternative Dispute Resolution (ADR)

(n) Introduction of various tracking systems

It is pertinent to observe that ADR as an element of a good case management system has an important role which the Lagos and Abuja Multi-Door Courthouses can play in improving the case management system for more enhanced justice delivery.

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