DOI: https://doi.org/10.67203/abulj.2019.n13wxodu

A CRITICAL ANALYSIS OF THE PREVAILING DICIAL POSITION ON THE DETERMINATION OF PI ELECTION MATTERS IN NIGERIA

By
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Abstract

Internal party democracy still remains a source of concern in Nigeria as political party primary elections are often marred by acrimonies due to manipulation of results, allegation of exclusion of aspirants as well as substitution or changing the lists of delegates. This paper therefore analyzed the role court on the determination of such pre-election matters in Nigeria. Doctrinal method was adopted for this research, and accordingly, legal and judicial instruments on the primary elections were analyzed. The paper specifically finds among others that the limited jurisdiction granted to the Courts by Section 87 (9) of the Electoral Act in the determination of pre-election matters cannot really enhance and consolidate intra-party democracy in Nigeria. Secondly, the Supreme Court as a policy court rarely invokes its inherent jurisdiction to intervene in a pre-election matter of urgent importance where there is no legal provision governing such subject matter. Consequently, often time, damage would have been done to the internal cohesion of political parties before the law is amended to address the problem. The paper therefore recommends that Section 87 (9) of the Electoral Act should be amended to extend the jurisdiction of Courts to pre-nomination disputes such as those arising from disqualification of aspirants that have been screened, cleared and picked nomination forms to contest. Furthermore, the Supreme Court as policies court needs to use its inherent jurisdiction to intervene in pre-nomination disputes since there is no law readily available in this respect. This will enhance internal democracy within political parties. It will also afford the Supreme Court the opportunity to set precedent for the lower courts to use their intellectual capacity and authority to prevent abuse of franchise by political party leaders.

Keywords: Internal democracy, pre-election matter, judicial review, political question, primary elections

1.1 Introduction

Judiciary is one of the foundation upon which democracy grows and develops as it is the major organ that deals with the dispensation of electoral justice.[1] However, while aggrieved candidates who lost at general elections in Nigeria can easily approach the courts to seek redress, the position is not straight forward with pre-elections matters.[2] This is because Section 78 (9) of the Electoral Act[3] only allows the Court to entertain a pre-election matter if there is manifest non-compliance with the provisions of the Act and the political party's guidelines for primary elections. This provision is supported in *Hon. (Mrs.) Dorothy Mato vs. Hon Iorwase, H. Hember & Ors*[4], where the Supreme Court observed that any violation of the Electoral Act and the 2nd Respondent's Constitution regarding the conduct of primary elections is a ploy to negate due process of law to which the courts will intervene to prevent arbitrariness.

The challenge however is that even if these conditions are met to warrant the Court to intervene, most political parties' Constitutions[5] make it an offence punishable by expulsion for aggrieved aspirants to resort to court first without exhausting the internal mechanisms within the party. If an aggrieved aspirant won at the Tribunal but was expelled from the Party for insist on adjudication against the requirement of the Party Constitution, the Court cannot make further consequential Order compelling the party to sponsor and support the aspirant. Such victory at the Tribunal will be of little or no political significance to the aspirant. The option of submitting the grievance to internal mechanism within the political party also does not necessarily guarantee effective resolution. The problem is that often time, party leadership deliberately delays the process as a ploy to frustrate aggrieved aspirants and make their petitions belated.[6] By this, the

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[1]Obiyan, A. S., and Oluwole I. O. "Electoral Conflicts, the Judiciary, and Democratic Consolidation in Nigeria." In: Obiyan, A. S., and Kunle, A., (2013) *Nigeria's Demcoratic Experience in the Fourth Republic since 1999 - Policies and Politics*, Plymouth, University Press of America, p.158.

[2]Omenma, J. T., Ibeanu, O. O., and Onyishi, I. E. (2017), "Disputed Elections and the Role of the Court in Emerging Democracies in Africa: The Nigerian Example", *Journal of Politics and Democratization*, Vol. 2-1, p.29.

[3]Electoral Act, 2011 (as Amended).

[4](2018) 5 NWLR (Pt. 1612) 258 at 295 D – H.

[5]Article 21 (d) (v), Constitution of the All Progressive Congress (APC), 2015.; Article 21 (1) (c), Constitution of the All Progressive Ground Alliance, (APGA), 2012.; and S. 58 and 59 of the Constitution of People Democratic Party (PDP), 2012 (as Amended).

[6]Lydia. A. N., (2016), "Dispute Resolution and Electoral Justice in Africa: The Way Forward", *Africa Development*, Vol. XLI. No. 2. p. 97.

ordeal of such aspirant is further compounded as election is time bound and there is no provision in law for independent candidacy that can accommodate the political aspiration of the person if the matter defies such political solution.

Another unfortunate implication of Section 78 (9) of the Electoral Act[7] is that the Court's jurisdiction in pre-election matter can only be activated after primary elections. In other words, an aggrieved aspirant who was excluded from participating in primary election cannot approach the Court for remedy. Worst still, candidate so excluded is most likely not to have any good remedy from the internal dispute resolution within the party. In the height of this confusion, some aspirants resort to conducting their own primaries or decamping to other political parties.[8] In the interest of consolidating internal democracy, one wonders the lack of Courts' foray into the policy arena on this matter. While the Court has at different times expressly acknowledged the importance of staying within its role in the context of pre-election matters as contemplated under Nigerian political jurisprudence,[9] it is doubtful whether that has really enhanced clear and transparent internal democracy within political parties. One question which has become imperative in this respect is whether the role of court in pre-election disputes should revolve around giving voice to the choices of the people or bowing to precedent. The challenging and compelling character of this issue pitched against the current breadth of judicial responses, has made the search for expanding the scope of Courts' intervention in the internal affairs of political parties necessary and timely. The aim of this paper therefore is to examine the role of courts in given effect to the legal framework for the determination of pre-election matters, and identify the challenges with the view to making recommendations to enhancing internal democracy in the country.

1.2 Clarification of Terms

Before going into the substantive subject issues of this paper, it is imperative to provide a conceptual clarification of terms that are central to this discourse which do not have a common meaning or whose meaning have the possibility of being misunderstood. This has become necessary because the same words may have different meaning to people, especially if they work in various disciplines. These

[7] Electoral Act, op.cit,

[8] Omenma, J. T., Ibeanu, O. O., and Onyishi, I. E. (2017), "Disputed Elections and the Role of the Court in Emerging Democracies in Africa: The Nigerian Example", *Journal of Politics and Democratization*, Vol 2-1, p.29.

[9] Sambo, A.O. (2019), "Legal Implications of Judicial Review on Political Disputes", *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 10 (2), p.87.

terms are operationally defined or explained in the context of this paper. Of particular importance are:

1.2.1 Internal Democracy or Intra-Party Democracy

Internal democracy or intra-party democracy has been defined as the mechanism for ensuring that both party leadership and ordinary members of the party are engaged in serious discussion and debate concerning policies and programs of the party.[10] It is the capacity of a political party to engage its members in deliberations, decision making and action of party affairs and enforce the transparency and accountability of office bearers to its rules of governance.[11] Put simply, internal democracy encourages the application of openness and integration of all stakeholders in the conduct of party affairs, especially in setting-policy agenda and the selection of party flag bearers for election. It means that a political party has impersonal rules and procedures to avoid the arbitrary control of internal elections and party functioning by individual leaders or cliques.[12]

The above definitions show that internal democracy is not only about electing or selecting of both candidates and party officials on periodic basis, rather it is far beyond that. It involves discussion and debate concerning policies and programs of the party. This paper however is only concern with the narrow meaning of the term. It is only restricted to the process of candidates' selection based on popular and acceptable electoral process. In the context of this paper therefore, internal democracy is simply the process of nomination or selection of candidates on periodic basis, based on the rules and regulations of the party constitution and the constitution of the land. It is the application of openness and integration of all party members in the conduct of free, fair and credible primary elections to determine the flag bearers of the party for general elections.

1.2.2 Pre-Election Disputes or Matter

Pre-election matter has been defined as conflict involving members of the same political party arising from the pursuit of incompatible political goals or arising from the decision of some party members to influence the decision making

[10]Lamidi, K.O. (2015), "The Character of Party Politics and the Conduct of Primary Elections in Nigeria's Fourth republic", In: Habu Mohammed (eds.) *The Patterns and Dynamics of Party Politics in Nigeria's Fourth republic, Kano*, Hallmark Publishing Nig. Ltd.

[11]Omilusi, M., (2016), "An Assessment of Political Parties and Democratic Consolidation in Nigeria's Fourth Republic",*European Journal of Research in Social Sciences*, Vol. 4 No. 1, p.36.

[12]Kura, S.Y.B.,*Institutional Design and Political Party Formation in Nigeria*, In: Ogundiya, I.S (2011) *Political Parties and Democratic Consolidation in Nigeria*, Codat publication, University of Ibadan, p.32.

process of the party to their advantage.[13] This definition view pre-election disputes broadly to include such disputes arising from the pursuit of incompatible goals or decision making process perhaps, on issues such as recruitment of new members, campaign, fees, among others. This paper however adopts the definition of pre-election matter as provided under Section 285 (14) of the Fourth Alteration Act to the Constitution.[14] Here, "pre-election matter" are categories into three namely, any suit by

1. An aspirant who complains that any of the provisions of the Electoral Act or any Act of the National Assembly regulating the conduct of primaries of political parties and the provisions of the guidelines of a political party for conduct of party primaries has not been complied with by a political party in respect of the selection or nomination of candidates for an election;
2. An aspirant challenging the actions, decisions or activities of the Independent National Electoral Commission in respect of his participation in an election or who complains that the provisions of the Electoral Act or any Act of the National Assembly regulating Elections in Nigeria has not been complied with by the Independent National Electoral Commission in respect of the selection or nomination of candidates and participation in an election and;
3. A political party challenging the actions, decisions or activities of the Independent National Electoral Commission disqualifying its candidate from participating in an election or a complaint that the provisions of the Electoral Act or any other applicable law has not been complied with by the Independent National Electoral Commission in respect of the nomination of candidates of political parties for an election, timetable for an election, registration of voters and other activities of the Commission in respect of the nomination preparation for an election.

1.2.3 Judicial Review

Judicial review is the exercise of the court's inherent power to determine whether an action is lawful and the award of suitable relief. It is the power of the courts to scrutinize and declare as unconstitutional any type of legislation, original or delegated, or state's conduct that infringes on rights or that otherwise offends against provisions of the Constitution.[15] The term implies a review of the manner

[13]Momodu, A. J. and Matudi, G. I., (2013), "The Implications of Intra-Party Conflicts on Nigeria'Democratization", *Global Journals of Human Social Science*, Vol. 13 Issue 6, p.3.
[14]Constitution of Federal Republic of Nigeria, Fourth Alteration Act, No.21, 2017.
[15]Olayinka, O., (2018), "Judicial Review of Ouster Clause Provisions in the 1999 Constitution: Lessons for Nigeria".*Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 9 (1), p.139.

in which a decision was made and does not cover the merit of a case.[16] Judicial review can also be seen as is the court's endorsement or overturn of the action of the legislature or the executive.[17] In the context of this thesis therefore, the term judicial review is used to mean legal way in which the court controls or overturns the actions of the political parties, or decides disputes arising from the exercise of powers and functions by the political parties particularly as it relates to the conduct of primary elections.

Generally, judicial review aims at attaining reliefs from outside the legislative and executive chambers, otherwise known as the political channels.[18] It aims at ensuring that an individual received a fair treatment under judicial, quasi-judicial or administrative proceedings to which the individual has been subjected.[19] In other words, judicial review is designed to protect the enjoyment of human rights, particularly, when the political channels become unavailable, ineffective, inaccessible or insufficient. The exercise of the power of judicial review by the court is in line with the provisions of Section 6 (6) of the Constitution[20]under which the courts are expected to keep the state and its officials within the bounds of their powers and to protect citizens from excesses of power. In addition, the power of judicial review is derived in the main, from the unlimited original jurisdiction of the Courts. It is trite that the jurisdiction of a court is conferred by statute and a court lawfully exercises jurisdiction in relation to an action before it, if certain conditions deducible from the enabling statute are conjunctively met.[21]

1.2.4 Political Question

Political question be defined as question which the courts will refuse to take cognizance or to decide on account of their purely political character or because their determination would involve an encroachment upon the executive or legislative powers.[22] Simply put, political questions are matters which the

[16]Cora, H., (2012) *Administrative Law in South Africa*, (2nd Ed), Claremont, JUTA & Co., p.588.
[17]Louis, F., (2001) *American Constitutional Law*, (4th Ed), Carolina: Academic Press, p.35.
[18]Stewart, L. (2009) "Adjudicating Socio-Economic Rights Under a Transformative Constitution", *International Law Review*, 20, p.506., and Carol, C. N., (2014), "Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection: The Obligation to Take Other Measures", *African Human Rights Law Journal*, 14, p.660.
[19]Elijah, A. T., (2009) "Judicial Review of the Impeachment Procedure in Nigeria", (3)(2), *Malawi Law Journal*, p.256.Barak, A., (2006), *The Judge in a Democracy*, Princeton University Press, Princeton, p.177.
[20]Constitution of Federal of Nigeria, Cap.C23, LFN, 2004 (as Amended).
[21]Barak, A., (2006), *The Judge in a Democracy*, Princeton University Press, Princeton, p.177.
[22]Zachary, B. S., (2016), "The Political Question Doctrines: *Zivotofsky vs. Clinton* and Getting Beyond the Textual–Prudential Paradigm", *The Georgetown Law Journal*, Vol. 104, p.1004.

constitution or the law has given its determination to the political class.[23] From the above definitions, it can be deduced that issues falling within the purview of political question are many. They include but not limited to any matter which have been constitutionally or statutorily allocated to the legislative or executive branches of government for resolution, as well as matters which, in the opinion of a court, would not be inappropriate for resolution through the judicial process; and matters which a court considers itself functionally incompetent to resolve or enforce. [24] In the context of this paper however, political question is used mainly in the context of the internal power of political parties to nominate their candidates for elections.

1.3 The Trajectory and Scope of Judicial Intervention in Pre-Election Disputes

The courts have been classically viewed as neutral umpire with no role in resolving political disputes.[25] They are expected to resolve disputes observing separation of powers and avoid dabbling into political question.[26] Even judges share this opinion of the nature of judicial powers.[27] The doctrine of political question can be traced to the case of *Marbury vs. Madison*[28]. In that case, the Courts held that a matter might be dismissed as a "political question" when the Constitution delegates judgment on that question to a particular branch of government. In *Baker vs. Carr*[29], the US Supreme Court articulated the following formula to determine the issues that fall within the ambit of the doctrine: (1) whether there is a constitutional requirement that the issue be determined by a political department; (2) whether there is a lack of judicial standards for resolving the issue; (3) whether there is an impossibility of deciding the matter based on an initial policy of judicial non-intervention; (4) whether there is an impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; and (5) whether there would be embarrassment from many decisions by various departments on one question.

[23]Jaffe, J. (2011), "The Political Question Doctrine: An Update in Response to Climate Change Case Law",*Ecology Law Quarterly*, Vol. 38, Issue 4, p.1038.

[24]Abdulkadir, B A., (2012), "Ouster Clauses, Judicial Review and Good Governance: An Expository Study of the Experience in Nigeria and Malaysia", *International Journal of Sustainable Development*, 5, (9), p.102.

[25]Bittner, A., (2011) *Platform or Personality, the Role of Party Leaders in Elections*, Oxford, Oxford University Press, p.21.

[26]Shamrahayu, A.A. and Sambo, A.O., (2011), "Internal Affairs of Political Parties and Judicial Review: An Expository Study of the Experience in Nigeria and Malaysia", *Journal of Applied Sciences Research*, 7 (13), p.2258.

[27]Streinz, R., (2014), "The Role of the German Federal Constitutional Court Law and Politics", *Ritsumeikan Law Review*, No. 31, p.96.

[28]5 U.S. (1 Cranch) 137, 177 (1803).

[29] 369 U.S. 186 (1962).

Based on these criteria, the US Supreme Court in *O'Brien vs. Brown*[30], declined to make an order in a case brought to challenge delegates from Illinois and California on the ground that the matter can only be determined by political party concern.

The above decisions show that it is the duty of the courts to say what the law is. This statement establishes seemingly limitless constitutional authority in the Supreme Court. Thus, it is the Supreme Court's province and duty to answer all constitutional questions with finality. This is the path of judicial review.[31] The power of judicial review rests ultimately upon the constitutional duty of the judiciary to say what the law is. That is, to exercise its independent judgment in finding, interpreting and applying the law (including the law of the Constitution) whenever the decision of a case and controversy should depend on it.[32] To acknowledge that the courts might be free to disregard this duty by treating a "political" determination as conclusive of some questions of law would destroy the assumption of a judicial duty which is fundamental for the classical theory.[33] On the other hand, the political question doctrine can also be understood as a command of the Constitution that the courts are called upon to determine whether the Constitution has committed to another agency of government the autonomous determination of the issue raised.[34]

Though, experts have criticized the doctrine of judicial non-intervention in political question. It is argued that concern for the Court prestige seems to be misplaced as failure to intervene in political questions often produced the same detrimental effect on internal democracy.[35] The Court certainly did not satisfy the contesting parties by its refusal to decide the case.[36] Consequently, a US Court held in *Wigoda vs. Cousins*[37] that once nominated, any question arising from such process is beyond the authority of party functionaries; it is a legal right properly

[30]409 U.S. 1, 3-5 (1972).

[31]Po Liang Chen and Jordan, T. W., (2017); "Can the Japanese Supreme Court Overcome the Political Question Hurdle?", *Washington International Law Journal Association*, Vol. 26 NO. 2, p.350.

[32]Ongoya, E.Z., (2013), "The Role of Institutions in the Resolution of Election Disputes in Kenya", in: *Handbook on Election Disputes in Kenyan: Contexts, Legal Framework, Institutions and Jurisprudence*, Law Society of Kenya, p.151.

[33]Hein, M. and Ewert, S. (2016), "How Do Types of Procedure Affect the Degree of Politicization of European Constitutional Courts? AComparative Study of Germany, Bulgaria, and Portugal", *European Journal of Legal Studies*, Vol. 22, p.35.

[34]Mak, E., (2015) "Case Selection in the Supreme Court of the Netherlands-Inspired by Common Law Supreme Courts?" *European Journal of Current Legal Issues*, 21(1), p.22.

[35]Sandri, G. and Von Nostitz, F.C., (2015) "Are they in or are they out: The diversity of forms of political participation and its regulation across party organizations", Paper presented at APSA Annual Conference, September 3-6, San Francisco CA, United States, p.11.

[36]Jaffe, J. (2011), "The Political Question Doctrine: An Update in Response to Climate Change Case Law", *Ecology Law Quarterly*, Vol.35, Issue 4, p.1038.

[37]Wigoda v. Cousins, 14 11. App. 3d 460, 476, 302 N.E.2d 614, 628 (1973).

protected by the courts. Similarly, in Canada, the Court has shown caution in declining to address political question. In its decisions, the Court has appeared content to address the suitability of political questions for decision by the general test of whether the controversy has a sufficient legal element. Thus in *Reference re Canada Assistance Plan (British Columbia*[38]*)* the Canadian Supreme Court observed that the Court can address political question if it had legal component to justify intervention by the "judicial branch" of government.

The rationale behind such decision may not be far fetch. In legal and political terms, the rights acquired and the duties imposed by the primary election laws are valuable and important not only to those who acquire them under the law, but to the entire citizens. The nominees though members of a particular party, they are however the legal representatives of the people at the general elections.[39] Thus, the court found judicial intervention necessary to protect the state's interest in its own election laws. The interest of the state in protecting the right to participate in primaries is superior to whatever other interests the party itself might wish to protect.[40] Such interest is of sufficient gravity to justify judicial intervention into nomination disputes. Furthermore, since the nation establish the election laws under which candidates are selected, they have an obvious interest in preserving the integrity of the laws and resisting unlawful activity by political parties.[41] That is why sometimes it seems more of an irony that political parties, in their role as nominators of public officials are allowed to determine disputes arising from such nomination which in some instances result in violating the electoral rights of the citizens as well as the integrity of the electoral process.

1.4 Judicial Approach to Pre-Election Disputes in Nigeria

Judicial power in Nigeria is conferred on the Courts and Tribunals established under Section 6 (6) (b) of the Constitution.[42] This power extends to the determination all matters between persons or between government or authority and any person in Nigeria and to all proceedings for the determination of any question as to the civil rights and obligations of that person.[43] By implication, this

[38](1991) 2 S.C.R. 525, at 559.

[39]Bolleyer,N, Nostitz, F.C., Smirnova,V. (2016) "Conflict Regulation in Political Parties: An Account of Tribunal Decision-Making", *Party Politics*, Vol.1, p.15.

[40]Ibid.

[41]Abdulfatai, O. S., and Shamrahayu, A. A., (2012), "The Court; Insulating Itself from Politics through the Doctrine of Political Questions: A Critical Exposition", *Journal of Law, Policy and Globalization*, Vol. 4, p.7.

[42]S. 6 (6) (b) of the Constitution of Federal Republic of Nigeria, Cap. C23, LFN, 2004 (as Amended).

[43]Ibid.

provision has conferred on the courts unlimited powers with which it could determine matters within the internal affairs of political parties such as nomination disputes. In fact, now that the US principle of constitutional democracy and determination of political questions have traveled across the world to Nigeria, we are in an era in which by that model, one of the most important question the court are often called to determine in the political Nigeria is who should be nominated to govern? In recent times, the Court has availed itself as the appropriate institution for the resolution of such question. This has contributed in enhancing intra-party democracy.[44] However, there are still challenges some of which if not effectively addressed, could impact negatively on democratic consolidation within political parties and the country in general. These challenges are highlighted below as we examine the trajectory of judicial approach to pre-election disputes in Nigeria.

1.4.1 Early Judicial Approach to Pre-Election Disputes in Nigeria

The early phase of judicial approach to pre-election disputes in Nigeria was one of non-interference in such disputes. Thus, almost all the decisions that were reached in this area by the courts before 2007 denied judicial interference with the decisions of the political parties.[45] The doctrine of judicial non-intervention in political question came to limelight in Nigeria's political jurisprudence in the case of *Onuoha vs. Okafor.*[46] In that case, the plaintiff together with other members of the parties contested the primary election of the Owerri Senatorial District, Imo State of Nigeria under Nigerian Peoples' Party (NPP) after paying the required non-refundable fee and was declared the winner since he had the highest number of votes. The third defendant who also participated in the primaries alleged irregularities in the election process. The party therefore appointed a panel to investigate the allegation where the contestants were given opportunity to be heard. The party resolved the issue in favour of the third defendant and the plaintiff brought an action asking the Court to nullify the Panel's decision and declare that his nomination was valid and subsisting and an injunction restraining the party from submitting the name of the third defendant or any other name to FEDECO. The Court granted the claims of the plaintiff. The Court of Appeal set aside the decision of the High Court and dismissed the claims on the ground that

[44]Olawale, O.A., (2016), "The Role of the Judiciary in the Application of Peace-building Theory and Methods to Election Dispute Resolution in Nigeria", *Journal of Law, Policy and Globalization*, Vol.45, p.138.

[45]Maduekwe, V. C., Ojukwu, U. G. and Agbata, I. F., (2016), "Judiciary and The Theory of Separation of Powers in Achieving Sustainable Democracy in Nigeria (The Fourth Republic)", *British Journal of Education*, Vol.4, No.8, p.88.

[46](1983) 14 NSCC 494.

the matter was not subject to judicial review as selection of the candidate for sponsorship was the prerogative of the political parties and the decision of the party was binding on the members. The Supreme Court unanimously affirmed the decision of the Court of Appeal on the ground that the matter falls under political question not subject to judicial review.

It could also be remembered that the Court adopted this approach in *Alhaji Balarabe Musa vs. Peoples Redemption Party.*[47] In that case, the applicant, a state governor, and a member of Peoples Redemption Party (PRP), together with eight other governors, had been attending joint meetings in various parts of the country to discuss common problems. His party objected to these meetings and passed a resolution forbidding the applicant from attending. The applicant applied under Section 42 of the Constitution[48] for an order to quash the resolution as constituting an infringement on his fundamental rights as contained in the Constitution. The court dismissed the application saying in effect that it had no jurisdiction to entertain the application at all.

Curiously, there was no law supporting the Court to take such decision, rather it appears the Court's position was contrary to Section 6 (6) (b) of the Constitution[49] which on it the general powers to the determination all matters between persons or between government or authority and any person in Nigeria and to all proceedings for the determination of any question as to the civil rights and obligations of that person. Be that as it may, the implication of these decisions is that as a voluntary association, political parties have the right to lay down its decisions even when they are unreasonable. They should be obeyed or the member in disobedience is entitled to quit. The party is in its own right supreme over its own affairs. These cases established the principle that the court has no jurisdiction to entertain nomination disputes as it cannot compel a political party to sponsor one candidate in preference for another in the same political party as this would amount to managing the political party for the members. In effect, the Court believed that issue of who should be a candidate of a given political party at any election is clearly a political one, to be determined by the party itself. It is thus a domestic issue and not such as would be justiciable in a court of law. In fact, the Court did not provide any exception, meaning that as the *Balarabe Musa'* case has shown, even where there is a breach of fair hearing in the process of settlement through political party mechanisms, the Court will is still not intervene as it is a matter within the internal affairs of political parties.

[47](1981) 2 NCLR. 734

[48]1979. Now Section 40 of the Constitution of the Federal Republic of Nigeria, Cap. C23 LFN, 2004 (as Amended).

[49]S. 6 (6) (b) of the Constitution of Federal Republic of Nigeria, Cap. C23, LFN, 2004 (as Amended).

Supreme Court jurisprudence as seen above was fairly characterized as exhibiting judicial restraint. In the peculiar circumstance of the *Onuoha*' case, it is worrisome that the court could take such a decision. One would have expected the court to simply go through the Party's Election Guideline and also review the decision of the Panel so as to make a definite decision on who should be the flag bearer of the party. Curiously, this was not the position especially considering that there was no law which expressly barred the courts from reviewing matters that bordered on internal affairs of political parties. This was a self-restraint measure by the court because the courts were of the view the matters were political in nature and therefore not fit for judicial intervention. Though, as time went by, it became obvious that the principle of judicial non-intervention in pre-election matters as relied upon in *Onuoha's* case could not effectively served as good precedent considering the desperation among politicians in Nigeria resulting in substitution and imposition of candidates.[50] With this trend, it was clear that whatever might have been the importance of this principle in the past, it has for all practical purposes, outlived its usefulness and became a clog in wheel of democratic consolidation in the country.

1.4.2 Courts' Approach to Pre-Election Matters in the Fourth Republic in Nigeria

At the beginning of the Fourth Republic, the position of the Nigerian Courts on pre-election matters has not really changed as could be exemplified by the case of *Dalhatu vs. Turaki*[51] where the Supreme Court relying on *Onuoha* case, reiterated the non-intervention stand. The Court in trying to justify the rationale for the principle of law that court cannot be involved in the domestic affairs of the political party, was of the firm view that since persons have freely given consent to be bound by the rules and regulation of the political party, they should be left alone to be governed by such rules and regulations. In other words, persons have freely mortgaged their consciences to a situation; a court of law should not intervene.[52]

However, from 2007 there is a change in attitude of the courts to the issue of determination of pre-election disputes. The paradigm shift was due largely to change in the law. For instance, Section 34 of the Electoral Act[53] provides that:

[50]Muinat, A. A. (2017), "Party Primaries, Candidate Selection and Intra-Party Conflict in Nigeria: PDP in Perspective", *Covenant University Journal of Politics & International Affairs*, Vol. 5, No.1, p.25.
[51](2003) 15 NWLR (Pt.843), 300.
[52]Ibid., p.310.
[53]Electoral Act, 2006.

> Any political parties intending to change any of its candidates for any election shall inform the Commission of such change in writing not later than 60 days to the election. (2) Any application made pursuant to subsection of this section shall give cogent and verifiable reasons. (3) Except in the case of death, there shall be no substitution or replacement of any candidates whatsoever after the date referred to in subsection (1) of this section.

Section 34 of the Electoral Act was specifically designed to combat the undemocratic practices of unilateral substitution or replacement of candidates by party leaders. It was as a result of the alleged violation of this legal provision that the Supreme Court for the first time intervened in this respect in its wisdom deemed it imperative to invoke its inherent and express jurisdiction[54] to intervene in *Ugwu vs. Ararume.*[55] In that case, the Court of Appeal set aside the decision of the trial Court and allowed the appeal on the ground that the trial Court failed to consider all aspects of Section 34(1) and (2) and that the trial Court decision does not meet the justice of the case.[56] On further appeal to the Supreme Court, the Court rejected the argument that the Court cannot review the decision of the political party changing its candidate as this is a matter within the internal affairs of the party. The Supreme Court accordingly held that such argument no longer has any support under any law in the Country's present dispensation and the action is therefore well justiciable.[57]

Similarly, in *Rt. Hon. Rotimi Chubuike Amaeachi vs. Independent National Electoral Commission*[58], the appellant together with seven other members of the Peoples' Democratic Party (PDP) were aspirants during primaries of the party for the Governorship seat of Rivers State. The appellant won the primary election. His name was consequently submitted to INEC as the party's candidate for the election but was subsequently substituted with the name of the 2nd respondent who never contested the primary election. The party did not state any cogent and verifiable reason for so doing. The trial Court reviewed the purported substitution on the ground that it could not hold because it was done during the pendency of the suit. The Court of Appeal rejected this contention on

[54] S. 6 (6) (b) of the Constitution of Federal Republic of Nigeria, Cap. C23, LFN, op.cit.
[55](2007) 12 NWLR (Pt.1048) 365.
[56]Ibid.
[57]Ibid.
[58](2007) 18 NWLR (Pt.1065).

the ground that it is within the power of the political parties to substitute it candidate and that the substitution was in compliance with the law. The Court of Appeal appears to be swayed away by the Respondents application urging the Court of Appeal to strike out the matter for lack of jurisdiction because on 10th April, 2007 the Appellant had been expelled from the party thereby rendering the appeal if eventually heard and in the event of the appeal succeeding, becomes a mere academic exercise. The Court was therefore of the view that the expulsion of the Appellant from the party has taken life out of the appeal and the court no longer had jurisdiction to entertain the matter. On appeal to the Supreme Court, the Court held that the appellant is the proper candidate of the PDP and therefore ordered him to be sworn in.

In the above cases, the Court had no difficulty in holding in the manner it did because of the party's failure to comply with Section 34 (2) of the Electoral Act[59]. Before then, the parties enjoy absolute right to substitute their candidates because there was no law restricting such.[60] While it could be argued that the Court adopted this position based on supporting legal provision, however, the decision appeared to have chatted the way forward in the determination of pre-election matters. The decision has given the Court impetus to go little beyond the issues contemplated under Section 34 (2) of the Electoral Act. For instance, the Court of Appeal in the case of *Saidu vs. Abubakar*[61] was of the view that whether the appellant was validly nominated and sponsored by the 3rd respondent/appellant in the circumstances of this matter is a very serious constitutional issue actionable in connection with the election either at pre-election stage or after the election depending on when the constitutional disability came to the knowledge of the party seeking to challenge the qualification of the contestant relevant to the office of the declared winner of the election.[62]

1.4.3 The Prevailing Legal Position on Courts' Jurisdiction in Pre-Election Disputes in Nigeria

The prevailing legal and electoral jurisprudence show that the Courts have been given specific limited jurisdiction on pre-election matters. By virtue of Section 285 (10) (12) of the Fourth Alteration Act[63], such matters must be filed within 14 days from the date of the declaration of results and must be determined within 180

[59]Electoral Act, op.cit.
[60]Nwagboso, C. I., (2011), "Elections and Electoral Tribunal in Nigeria", *African Research Review, An International Multi-Disciplinary Journal, Ethiopia,* Vol. 5 (2), Serial No. 19, p.47.
[61](2008) 12 NWLR (Pt.1100) at 265.
[62] Ibid.
[63]Constitution of Federal Republic of Nigeria, Fourth Alteration Act, No.21, 2017.

days. Any appeal is also to be determined within 60 days. To further enhance speedy dispensation of electoral justice, Section 285 (8) of the Fourth Alteration Act[64] requires that preliminary objection or any interlocutory issue touching on the jurisdiction of the Tribunal or Court in any pre-election matter or on the competence of the petition itself is raised by a party, the tribunal or Court shall suspend its ruling and deliver it at the stage of final judgment. Provisions like this can help in reducing delays in the determination of pre-election matters. Prior to this, election tribunals had unlimited time to determine pre-election matters such as disputes arising from candidate selection or primary elections. In fact, sometimes such matters could remain at the tribunal until the tenure of the office runs out.[65]

Though, while Section 285 (10) (12) of the Fourth Alteration Act[66] grants the Court jurisdiction on pre-election matters, Section 87 (9) Electoral (Amendment) Act[67] further reaffirmed it, but limited the circumstance the Court can intervene. Incidentally, this limitation is in line with what constitutes pre-election matters as defined under Section 285 (14) of the Fourth Alteration Act to the Constitution.[68] Section 87 (9) Electoral (Amendment) Act[69] for instance, provides that:

> Notwithstanding the provisions of this Act or rules of a political party, an aspirant who complains that any of the provisions of this Act and the guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court or the High Court of a State or FCT, for redress.

Section 87 (9) of the Electoral Act aims at ensuring that political parties do not go beyond the confines of the Electoral Act or their own electoral guidelines in making their choice of candidate for elective office. However, while the Section recognize that a member of the political party can approach the courts to challenge the emergence of another Aspirant as candidate of his party, Two

[64]Ibid.
[65]Gberevbie, D. E. (2014), "Democracy, Democratic Institutions and Good Governance in Nigeria", *Eastern Africa Social Science Research Review*, 30 (1), p.141.
[66]Constitution of Federal Republic of Nigeria, Fourth Alteration Act, No.21, op.cit.
[67]S.87 (9) Electoral Act, 2010 (as Amended).
[68]Constitution of Federal Republic of Nigeria, Fourth Alteration Act, No.21, 2017.
[69]S.87 (9) Electoral Act, op.cit.

major conditions precedent must exist to give the Court jurisdiction to entertain a pre-election matter. For instance, the aggrieved Party member must have participated in the primaries election as a member of the political party concerned; and the primary election must have been conducted by National Executive Committee or National Working Committee of the Party or by authorized Election Committee set up by the two bodies mentioned.

In *Joseph Hemen Boko vs. Benjamin B. Nungwa & Ors,*[70] the appellant, a member of the 2nd respondent (PDP), contested the primary election for the Benue State House of Assembly election scheduled for 2015. The appellant alleged that he scored the highest number of votes at the primary election and was declared the winner of same. He was thereafter issued with 3rd respondent's Form for nomination of Member of State House of Assembly and Affidavit in support of personal particulars of persons seeking election which he filled and submitted to the 2nd respondent. The 2nd respondent transmitted them to the 3rd respondent. To his surprise, the name of the 1st respondent was substituted for his name. The 1st and 2nd respondents on their part contended that although appellant was alleged to have had the highest number of votes by the primary election committee of the 2nd respondent, the 1st respondent petitioned against the result on the ground that the appellant did not have the highest number of lawful votes. The 2nd respondent's appeal committee upheld the petition of the 1st respondent and subtracted the unlawful votes, resulting in the 1st respondent scoring the highest number of votes. The National Working Committee of the 2nd respondent accepted and ratified the report and that the name of the 1st respondent was forwarded to 3rd respondent as its candidate. Dissatisfied, the appellant appealed to Federal High Court. The trial Court confirmed the decision of the 2nd respondent's appeal committee and dismissed the case of the appellant. On further appeal to the Court of Appeal, the Court reversed the decision of the trial Court. In absence of violation to the Electoral Act and 2nd Respondent's Constitution and scored the highest valid votes, the Court declared the appellant winner of the election. The 1st respondent was accordingly ordered to pay to the appellant all the allowances and salaries he received as a member of the House of Assembly, Benue State, from the date of his swearing in to the date of his vacation of the seat.

In Nigerian context, intervention by court in pre-election matters enhances internal democracy. The merit of this approach is that would be completely absurd to allow a party to make and enforce unreasonable decisions on the basis that it is supreme over its own affairs. If a party subverts its candidate in an election, such conduct robs it of the legitimacy which a political party must have

[70](2019) 1 NWLR at 423.

to qualify it for serious contention and responsible governance. The court therefore frowns at such conduct. In *Hon. (Mrs.) Dorothy Mato vs. Hon Iorwase, H. Hember & Ors*[71], the Supreme Court observed that the Electoral Act and the 2nd respondent's constitution make provisions for the manner by which primary elections are to be conducted. Any contravention of the Act and constitution of the party in this regard would be taken as a ploy to negate the principle of due process of law to which the courts will intervene and wield the big stick to prevent arbitrariness. The case of *Hon. Bassy Etim vs. Akpan & Ors,*[72] also provide another example in this regard. In that case, the parties contested the primary election conducted for the purpose of fielding a candidate for the Senatorial seat of Akwa Ibom North East Senatorial District Election of 7th December 2014. After primaries however, two results emerged one claiming the 1st Respondent (now the Appellant) as the winner of the Primaries while the other result claimed the Appellant (now the 1st Respondent) the winner and the candidate of the party. On appeal, while the appellant established that he took part in the election conducted by the National Working Committee of the 2nd respondent, he could not establish that the result is indeed the authentic result sheet issued by officers appointed by the 2nd respondent's National Working Committee to conduct the primary election he claimed to have won. It was established that the returning officer who submitted the appellant result does not have any letter of appointment and is not a member of the National Executive Committee responsible for conducting the primaries of the senate. The Court therefore held that the evidence adduced have rendered appellant's case untenable. It established the appellant is not entitled to the declaratory reliefs he sought which the trial Court found he does.

The implication of the above decisions is that even political parties themselves lack the competence or authority to ignore or swap the results of primary election conducted for the election of their candidate to the prejudice of the candidate who was so elected. This line of reasoning is better because it is common in Nigeria for aspirants who seek to challenge some decisions of political parties to be expelled from the party.[73] While the issue of determining the unreasonableness of political parties may place the court in the difficult position consideration the voluntary nature of such associations. Political parties in Nigeria are meant to be regulated. This is particularly because they serve as vehicle for democratic consolidation in the country and their activities are supposed to be in

[71](2018) 5 NWLR (Pt. 1612) 258 at 295 D – H.
[72](2019) 1 NWLR (Pt.1654) 457 at 469.
[73]Sambo, A.O. (2019), "Legal Implications of Judicial Review on Political Disputes", Nnamdi *Azikiwe University Journal of International Law and Jurisprudence*, 10 (2), p.88.

tandem with the developmental objectives of the government.[74] To this end, the courts are in better position to determine whether or not their activities are unreasonable and in line with such objectives. With this, one can safely say that political parties are amenable to judicial supervision in Nigeria though, it seems only to a fair extent. There are other fundamental issues arising from internal affairs of political parties which the courts are yet to take decisive step to address. This has left party members and citizens squarely at the mercy of political parties. These issues are examined here below.

1.5 The Implication of Section 87 (9) of the Electoral Act on Internal Democracy in Nigeria

An obvious implication of Section 87(9) of the Electoral Act[75] is that it has given limited jurisdiction to the Court to entertain pre-election matters. Going by this Section, the Court only has jurisdiction to entertain petition of a member of a political party who participated in the primaries conducted by the authorized organ of the party. Thus, as aspirant who has been screened and cleared by his political party to buy nomination form, but was unilaterally denied by the party from participating in the primaries, has no remedy in court. By virtue of Section 87(9) of the Electoral Act[76], such aspirant lacks the *locus standi* to invoke the court to intervene. In *Wushishi vs. Imam,*[77] the appellant was a member of APC who desired to contest nomination of the party as the gubernatorial candidate for Niger State Governorship Election of 2015. He was screened and subsequently made the necessary payments for the expression of interest and nomination form. However, the appellant was not issued with the forms to enable him participate in the party's primaries for the nomination of its governorship candidate. Consequently, the appellant instituted an action in Federal High Court, Minna for his wrongful exclusion from the primaries. In its judgment, the trial court held that since the petitioner did not contest his party's primaries, he therefore lacks the *locus standi* to invoke the court to intervene. The petitioner appealed. The Court of Appeal and the Supreme Court respectively affirmed the decision of the trial court and accordingly dismissed the appeal. The Supreme Court categorically held that in the instant case, the appellant fell in the category of those who were excluded from contesting the primaries and the court could not entertain the

[74]Tochukwu, J. O., Okechukwu, I. and, Ike E. O., (2017) "Disputed Elections and the Role of the Court in Emerging Democracies in Africa: The Nigerian Example", *Journal of Politics and Democratization*, Vol. 2, 1, p.31.
[75] Electoral Act, op.cit.
[76]Ibid.
[77](2017)18 NWLR (Pt.1597) P. 175

action, hence, the trial court and the Court of Appeal were right to decline jurisdiction.[78]

Decisions like these only seem to provide additional motivation for executive high handedness within political parties. It wasn't surprising therefore when the 2018 pre-election by various political parties was marred by undemocratic practice where some aspirants who have been screened and cleared to pick nomination forms where unilaterally denied participating in the primaries. Democratic dispensation can only work effectively where every aspirant for political office, who is qualified to contest an election, is given an even playing field.[79] The failure of internal democracy is one of the reasons why the courts' dockets are congested with pre-election disputes. And failure of the court to use its power of corrective justice to right this political anomaly would eventually leads to instability in the entire political system.[80]

Furthermore, internal democracy flourishes when the right to vote is enhanced and protected by the court.[81] In Nigeria today, the contribution of the courts toward protecting this right is in greater demand. However, there are certain happenings that seem to suggest that the Court is not always tilting toward that direction. Sometimes, due to undemocratic actions of party leaders or other unforeseen occurrence, the Court could make decisions that directly impact on the electorates and citizens' rights to vote. The case of *Wada vs. Bello*[82] readily comes to mind in this regard. It would be recalled that Kogi State gubernatorial elections of 2015 was declared inconclusive. However, before the rescheduled election, Prince Audu Abubakar the candidate of the APC died. The APC substituted the late Prince Audu Abubakar with Yahaya Bello who eventually won the election when the votes scored by the deceased candidate were added to his. The appellant filed a petition against declaration of Bello as the winner. The Tribunal dismissed the petition on the ground that it has no power to hear matters which took place before the conduct of the election. On appeal, the Court of Appeal affirmed the decision of the trial tribunal. On further appeal to the Supreme Court, the Court also affirmed the previous concurrent judgments, adding that a political party is allowed to change or substitute its candidate whose name has been submitted pursuant to section 31 of the Act in the case of death or withdrawal by the candidate. At the detriment of the electorates, this decision has

[78]Ibid.

[79]Ibrahim I., Sambo, A.O., Egbewole, W., and Abdulkadir, A.B., (2011), "Judicial Activism and Intervention in the Doctrine of Political Questions in Nigeria: An Analytical Exposition", *African Journal of Law and Criminology*, Vol. 1 Number 2, p. 51

[80]Ibid.

[81]Lawrence I. E., (2017), "Politics of Defection and its Implications on Nigeria's Democracy", *Global Journal of Human-Social Science*, Vol. 17, Issue 1, p.4.

[82](2016) 17 NWLR (Pt. 1542) 374.

supported a candidate to reap where he has not sown. Though, an amendment to the Electoral Act[83] was done to cure this situation (inherited votes), however, it was the Court that had the opportunity to remedy this wrong, curiously, it never utilized it. It could be argued that punishing a party for non-compliance during primaries could serve as deterrent for future occurrence, but that should not be at the expense of the interests and rights of the majority of members and other citizens. One believes that it would have been safer to go for punishment that protects the rights of the party members and adequately serve as deterrent for party officials. The failure for this resulted in some electorates having their votes transferred to someone they would not have voted for. Similarly, in *Senator Kabiru Garba Marafa & Ors vs. Sanusi Liman Dan Alhaji & Ors*[84] the appellant brought an appeal against the Ruling and Judgment of the High Court of Zamfara State wherein the Court gave judgment in favour of the Respondents and directed INEC to accept the names of the Respondents as the candidates for election to the offices of Governor, National and State Assembly elections fixed for 2019. The Appellants contended that after two unsuccessful attempts to conduct primary elections, they could not proceed to conduct primaries. The Respondents argued that the APC conducted primaries on the 3rd and 7th October, 2018 but it was the electoral officer who for some reasons best known to him refused to submit the list of winners of the primary elections to the INEC. The Court found merit in the appeal and therefore set aside the judgment of the trial Court. On further appeal to the Supreme Court, the Court reversed judgment of the Court of Appeal and accordingly declared the Respondents the winners of the elections.

Thus, by implication, candidate who scored over 500,000 votes lost while the one that scored little above 100,000 votes was declared the winner. This democratic irony was allowed to stand because few persons made APC primary election in the state defective.[85] The unfortunate incident that resulted in such defective primaries may not be unconnected to Section 87 (1) of the Electoral Act[86] which requires political parties to conduct primary election themselves. Considering the desperation of some politicians in Nigeria, one can easily guess that Section 87 (1) of the Act would occasionally provide a leeway for non-

[83]S. 10 of the Electoral (Amended) Act 2017 provide that a political party whose candidate dies after commencement of an election and before the declaration of the result of that election has a 14 days window to conduct a fresh primary in order for INEC to conduct a fresh primary in order for INEC to conduct a fresh election within 21 days of the death of the party's candidate.

[84](2019) LPELR-47012(CA), CA/S/32/19.

[85]YIAGA AFRICA, (2018) "The Legality Of INEC Decision to Bar The All Progressive Congress (APC) from Fielding Candidates in the 2019 General Election in Zamfara State", Discussion Paper Issue 3, p.3., and also, *Senator Kabiru Garba Marafa & Ors vs. Sanusi Liman Dan Alhaji & Ors* (2019) LPELR-47012(CA), CA/S/32/19.

[86]Electoral Act (as Amended), op.cit.

compliance with Section 31 (1) (2) of the Electoral Act[87]. And rightly so, the APC in Zamfara State contravene this Section. For ease of reference Section 31 (1) (2) of the Electoral Act[88] provides that:

> Every political party shall not later than 60 days before the date appointed for a general election under the provisions of this Act, submit to the Commission in the prescribed forms the list of the candidates the party proposes to sponsor at the elections. (2) The list or information submitted by each candidate shall be accompanied by an Affidavit sworn to by the candidate at the High Court of a State, indicating that he has fulfilled all the constitutional requirements for election into that office.

However, for the purpose of protecting the sanctity of the right to vote however, one wonders if this is the best the Court should have done in the circumstance. This is particularly so if account is taken of Section 38 of the Electoral Act[89] which requires that: "where at the close of nomination there is no candidate validly nominated, the Commission shall extend the time for nomination and fix a new date for the election". This Section provides the opportunity for political parties who missed an earlier dateline for submission of candidates to do so. It also ensures that the electorate and the aspirants are not disenfranchised. Be that as it may, the decision seems to suggest that in the circumstance such as the one in Zamfara State, it is the Court that determine who becomes a Governor not the electorates.

1.6 Suitability of Resolving Pre-Election Disputes through Political Party Mechanism

Limiting the jurisdiction of the Court in pre-election matters under Section 87(9) of the Electoral Act[90] implies that the Section intends pre-nomination disputes to be dealt with by party mechanism being matters falling within the internal affairs of political parties. To reinforce this, Article 21 (d) (v), of the Constitution of the All Progressive Congress (APC)[91]; Article 21 (1) (c), Constitution of the All

[87]Electoral Act, 2010.
[88]Electoral Act, 2010.
[89]Ibid.
[90] Electoral Act, op.cit.
[91]APC. 2014.

Progressive Ground Alliance, (APGA)[92], and Section 58 and 59 of the Constitution of People Democratic Party (PDP)[93] for instance, make it an offence punishable by expulsion for aggrieved aspirants to resort to court without exhausting the internal party mechanism for dispute resolution. The problem however is suitability of resolving pre-election disputes through such party mechanisms. For instance, it is difficult for a candidate deliberately excluded to have any good remedy from the party. With this, aggrieved aspirants hardly have trust and confidence in the system. Furthermore, an aggrieved aspirant who stick with the party's internal avenue for disputes resolution and was eventually dissatisfied, by the time he would exercise his right to refer the matter to court, a lot of time would have been wasted so much that it would be practically difficult to settle the matter in a timely manner to allow his name to be included in the candidate lists ahead of general election.

Another problem is the suitability of resolving pre-election disputes through such party mechanisms especially when human issues are involved. This particularly bothers on the right to franchise. Once an aspirant is cleared by the party and he picked nomination form, unilaterally excluding him from contesting automatically raises the issue of his right to be voted for. This therefore call to question the appropriateness of allowing political parties to resolve such disputes which they often know the final decision even before commencing. It is agreed that this is a political matter, but it has a fully charged legal implication on some members' fundamental right. Under this setting, it is almost certain that abuse of the right to franchise is inevitable. Another point worthy of note is the fact that effective resolution of pre-election disputes is necessary for survival and consolidation of democracy. Thus, members of the public have a sustained interest in how these disputes are resolved. This in itself would therefore make it somewhat in appropriate to allow such disputes to go through a process that could be based on the whim and caprices of some party power brokers.

1.7 Necessity of Judicial Review and Activism in the determination of Political Questions

The court deals with corrective justice while the legislature and executive deal with distributive justice. [94] Though one understands that the court is expected to shields itself from partisan contest to regain the neutrality and independence to settle disputes between the contestants. A partisan court loses the credibility and

[92]APGA. 2012.
[93]PDP, 2012 (as Amended).
[94]Garoupa, N. and Ginsburg, T., (2015) *Judicial Reputation: A Comparative Theory*, Chicago, University of Chicago Press. p.21.

legitimacy to settle disputes between politically misaligned individuals and entities in the society.[95] However, in critical situations where human right especial right to fairness is involve, the Supreme Court as policy court is inherently endowed with the power and authority to do justice and to ignore law when it is technical and would create injustice, and to avoid at all cost a mechanical approach to the interpretation of the law. The idea of public interest litigation has shifted the role of judges from merely declaring the rights of contestants to legislating rules that should guide social interaction and distributive justice in society. This has shaped the court as a political institution, albeit one that acts impartially and on principles and reasoned elaborations.[96]

In matter of election therefore, the Supreme Court is also by implication expected to be a political institution, an unusual political institution. It is unusual because it is non-partisan and expected to arrive at decisions not necessarily based on tradition or precedent that does not support the growth of internal democracy and democratic consolidation in the country. In the 2018 primary elections, there were instances where desperate politicians set aside the rules and some party officials aided in the imposition of candidates. Some of these unpopular candidates cynically challenged the other candidates to go to court, imagining that the arm of the court is too short to retrieve these stolen mandates in electoral matters.[97] One expects that the desire to prevent nomination disputes from degenerating into national crisis is what should have motivated the Court as a political institution to intervene in such disputes especially where there is no legal provision regulating the issue. A close reading of the judicial interpretation of the political question doctrine shows that rights to franchise appear fatal to limited judicial review.[98] The importance of this issue in electoral process suggests that whenever it is in contention, the Supreme Court as a policy court ought to assume jurisdiction and not to demand that internal mechanism must be exhausted first. Breach of fundamental human rights is enough to confer jurisdiction on courts despite any legislative or constitutional ouster clauses. Regrettably, sometimes, attempt by lower courts to correct such anomaly through judicial activism is horridly classed as judicial rascality. Painfully, to consider the Supreme Court only as a legal institution is to underestimate its significance in the Nigerian political system.

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[95]Peri, A., (2012) "Judicial independence vs. judicial accountability: judicial selection models for constitutional courts: a comparative analysis", *Comparative Law Review*, 3/1, p. 10.

[96]Tushnet, M., (2011) "The rise of weak form judicial review", in: Ginsburg, T. and Dixon, R. (2011) *Comparative Constitutional Law*, Research Handbooks in Comparative Law Series, p.322.

[97]YIAGA AFRICA, op.cit.p.4.

[98]*Shamrahayu, A.A. and Sambo, A.O.* (2011), "Internal Affairs of Political Parties and Judicial Review: An Expository Study of the Experience in Nigeria and Malaysia", *Journal of Applied Sciences Research*, Vol. 7(13), p.2257.

It was in an attempt to avoid situations such as the above that a passionate appeal was made to the Supreme Court in *Turaki's* case to re-amend its position on pre-election matters in Nigeria pending a comprehensive legislative intervention in that regard. It could be recalled that in that case, the All Nigeria Peoples' Party (ANPP) scheduled all its primary elections to hold on 3rd of January, 2003. The primary of Jigawa was to hold in Dutse, Jigawa State. A committee with chief Nnoruka as the Chairman, Hajiya Nihibi as a member and Arc Joseph as secretary conducted the screening and primary election in Kano in which the first defendant did not take part. Only the appellant did and was declared the winner by the committee. Meanwhile, another primary election was conducted in Dutse in which the 1st defendant participated and the appellant did not. The 1st defendant was also declared as the winner. ANPP recognized the last primary election and the appellant brought an action challenging the recognition in Court. Holding in favour of the plaintiff, the High Court observed that there is no doubt that the court has no duty to nominate or elect a candidate for a political party, as it cannot campaign for the candidate. But where as in this case, the party had encouraged and permitted an individual to strive toward the realization of his constitutional right as a citizen to vote and be voted for through the acceptance of prescription fee, processed nomination forms, and to further screen him for that purpose to stand for the election and win, yet the political party is allowed to turn its back against all the obvious solid grounds that entitles him to be the candidate of the party now for the post he is seeking, my view is dishonest and fraudulent, and contravenes item 15(5) of the 1999 Constitution... The purported recognition of the 1st defendant by ANPP is illegal going by the evidence before the court. The Court of appeal allowed the appeal against the judgment of the lower Court. However, a further appeal to the Supreme Court was dismissed based on the authority of the *Onuoha's* case. Incidentally, today, the decision of the lower Court in *Turaki's* case represents the current electoral jurisprudence on pre-election matters in Nigeria. Thus, it is still imperative for the Supreme Court in view of the present realities, to effectively put into use it powers of judicial review and activism.

1.8 Conclusion

This paper analyzed the prevailing judicial position on the determination of pre-Election Matters in Nigeria. It has been shown that our legal and electoral jurisprudence expressly empowers the Courts to intervene in pre-election matters where political parties violate the provisions of the Electoral Act and their Constitutions in the conduct of their party primary elections. In the exercise of this power, the Courts have played (and are still playing) significant role in the

determination of pre-election matters in the country. This has relatively enhanced the practice and consolidation of internal democracy within political parties in the land. Nonetheless, there are still challenges particularly due to the peculiar circumstances of our democratic experience. The paper specifically finds that:

1. The limited jurisdiction granted to the Courts by Section 87 (9) of the Electoral Act cannot really enhance and consolidate intra-party democracy in Nigeria.
2. Conduct of primary elections by political parties and the enormous powers they enjoy in that respect makes abuse of such process by party leaders almost inevitable.
3. The Supreme Court as a policy court rarely invokes its inherent jurisdiction to intervene in a pre-election matter of urgent importance where there is no legal provision governing such subject matter. Consequently, often time, a lot of damage would have been done to the internal cohesion of political parties before the law is amended to address the problem.

Accordingly, the paper recommends that Section 87 (9) of the Electoral Act should be amended to extend the jurisdiction of Courts to pre-nomination disputes such as those arising from disqualification of aspirants that have been screened, cleared and picked nomination forms to contest. This will come with a number of benefits. First, it will regulate the practice where political party leaders sometimes unilaterally disqualify some aspirants in order to give others automatic tickets as the Courts will insist that without cogent and verifiable reasons, such disqualification is null and void. Secondly, disputes arising from pre-nomination processes will be better handled by courts as such disputes often time involved the denial of the aggrieved person's right to franchise. This being a fully charged legal issue, it would not be appropriate to be determined by the political party responsible for the violation as this contravene the cardinal principle of fair hearing.

Secondly, Section 87 (1) of the Electoral Act should be amended to require INEC itself to conduct primary election using direct method. Given the desperation for political power in Nigeria, this recommendation will reduce manipulation of primary election results by party leaders. It will also automatically take care of the problem of failure to submit lists of candidates not less than 60 days to elections as such list is already with the INEC. Furthermore, the amendment will make it easier for the Commission to implement Section 38 of the Electoral Act when the need arises. For example, if the INEC conducts primary elections, it will be easier for the Commission to know whether or not a candidate is validly nominated. If no candidate was validly nominated due to

violence or any act of God, it will also be easier for the Commission to extend the time for the nomination and fix a new date and venue for the election. Legislative intervention in this respect as recommended will reduce to the barest minimum the acrimonies that often characterize primary elections in Nigeria. Though, since direct primary election method is recommended, it also means that there will be need to ensure that only card carrying members of political parties are allowed to vote. Furthermore, the number of political parties in the country needs to be streamlined in order for the recommendation to work effectively.

Finally, the Supreme Court as policies court needs to use its inherent jurisdiction to intervene in pre-nomination disputes since there is no law readily available in this respect. This will enhance internal democracy within political parties. It will also afford the Supreme Court the opportunity to set precedent for the lower courts to use their intellectual capacity and authority to prevent abuse of franchise by political party leaders. Retaining the prevailing position of court's non-inference in pre-nomination disputes will only further give desperate politicians the opportunity to frustrate the process of democratic consolidation within political parties and in the country in general.