

RIGGING THROUGH THE COURTS: *The Judiciary and Electoral Fraud in Nigeria*

Hakeem Onapajo and Ufo Okeke Uzodike

Hakeem Onapajo is a PhD candidate in the School of Social Sciences,
University of KwaZulu-Natal, South Africa
e-mail: onapajokunle@yahoo.com

Ufo Okeke Uzodike is Professor of International Relations, School of
Social Sciences, University of KwaZulu-Natal, South Africa
e-mail: Uzodike@ukzn.ac.za

ABSTRACT

Since Nigeria's return to democratic rule in 1999 elections in the country have been accompanied by reports of widespread fraud. A number of studies have illustrated the many ways in which electoral fraud is perpetrated in Nigeria. However, there is yet to be a serious study showing the judicial dimension to such fraud. This study reveals the relationship of the judiciary to electoral fraud. Analysing data sourced from written records (newspaper reports, election observers' reports, law reports and political party publications) and interviews, the study argues that the structure and condition of the Nigerian judiciary can help to explain the incidence of electoral fraud in the country. It also makes a new contribution to the existing literature on the nature and causes of electoral fraud, showing that non-electoral institutions, especially the judiciary, and non-political elites can be relevant to the explanation of electoral fraud in a country.

INTRODUCTION

In Nigerian [electoral] politics now, the wisdom is: Don't waste your time campaigning. Don't waste your money printing billboards, handbills or posters. Don't waste your time throwing away money for mobilisation. Just keep your money in the bank and call a very good lawyer and let him tell you the loopholes in the Constitution or the Electoral Act. Memorise the loopholes and give all the money you've saved to a judge. Tell him: 'I have gotten all the loopholes, they [the opponents] have flouted it' [and you shall win at the end of the day].

Adekanbi 2012

Nigeria has earned itself a reputation for 'muddled elections' (Suberu 2007), 'criminal politics' (Human Rights Watch 2007) and 'garrison democracy' (Omotola 2009). Since the democratic transition in 1999 all the elections held in the country – in 1999, 2003, 2007 and 2011 – have been accompanied by reports of widespread electoral fraud. After the 1999 elections, for instance, the Transition Monitoring Group (TMG) – a coalition of local civil society groups – reported that 'the trend of awarding high votes, or votes in excess of the number of accredited voters, which had been observed during the National Assembly elections assumed much greater proportions during the Presidential elections' (TMG 1999).

After the 2003 elections the European Union Election Observation Mission (EUEOM) reported that 'in a number of states the conduct of the elections did not comply with Nigerian law and international standards. Various parties – mainly the established ones – were identified as being involved in malpractice' (EUEOM 2003, p 2). The outcome of the 2007 general elections was considered more fraudulent than the previous ones and, indeed, the worst in the contemporary electoral history of Nigeria (Suberu 2007; NDI 2008 Human Rights Watch 2007; Rawlence & Albin-Lackey 2007). For example, Rotimi Suberu (2007, p 97) argues that 'if the 2003 general elections were "hardly credible", the 2007 balloting was blatantly fraudulent'.

Although there were some positive comments on the outcome of the 2011 general elections, the widespread riots in the northern part of the country, which related to perceptions of electoral fraud in favour of the incumbent president (Goodluck Jonathan), as well as reports of various irregularities, should provide enough reason also to question the credibility of that process (USIP 2011; Project 2011 Swiftcount 2011; International Crisis Group 2011).

Many studies have analysed usefully the types and processes of electoral fraud in Nigeria (Adejumobi 2000; Agbaje & Adejumobi 2006; Ibrahim 2006; 2007). Of these, Ibrahim's study (2006), which identifies the pre-election rigging, polling-day rigging and post-election rigging methods as forms and stages of electoral fraud in the country, appears outstanding. The study shows that the common forms of electoral fraud include multiple and false registration, vote-buying, underage voting, multiple voting, voter intimidation, ballot stuffing and snatching, false declaration of winners and others, at different stages of the electoral process – before, during and after elections.

In addition to these popular forms of electoral fraud there have been increasing numbers of claims in several circles, especially among the political elite and public analysts, that there is indeed a new and sophisticated dimension to electoral fraud in Nigeria. This is the manipulation of the judicial process to produce false winners. These claims are also related to the recent internal wrangling in the hierarchy of the Nigerian judiciary over claims and counter-

claims of fraudulent court rulings on disputed elections. Clearly, the statement quoted above as a background to this article, which was gathered from our interview with a high-ranking politician in Ekiti State in the south-western region of Nigeria, better captures the phenomenon.

Against this background, this article offers a study of the relationship between the judicial system and the incidence of electoral fraud in Nigeria, arguing that the nature of the judicial system in contemporary Nigeria can certainly promote electoral fraud. This study has the potential to contribute in many ways to the general systematic studies of electoral fraud. Firstly, existing country-specific analyses of types of electoral fraud have not really captured the judicial dimension of such fraud. Secondly, current theoretical explanations of the causes of electoral fraud have focused only on the factors of elite competition, sociological conditions and electoral institutions.

The elite competition perspective explains electoral fraud as an outcome of the intense nature of the competition for power in a state (Argersinger 1986; Molina & Lehoucq 1999; Lehoucq & Molina 2002). This perspective oversimplifies electoral fraud by failing to take into account the factors that drive the intensity of the struggle for power among the elite in a state. Besides, the theory only perceives the perpetration of electoral fraud as an act of members of the political elite, without taking into consideration other members of society, including state officials and general members of the electorate.

The sociological explanation – which examines electoral fraud from the perspective of socio-economic inequality (Ziblatt 2009) – fails to account for the character of the state, its potential to shape electoral behaviour and the reason why political actors perpetrate electoral fraud. The institutional perspective only argues that the nature of the electoral system, especially the voting system and the electoral body, can explain the incidence of electoral fraud in a state (Molina & Lehoucq 1999; Lehoucq & Molina 2002; Hicken 2007; Birch 2007, 2008). Clearly, the institutional explanation does not consider other important state institutions such as the judiciary, which also have a relationship with the electoral process.

As its objective has been clearly stated, this study has the potential to address some of the limitations in the existing literature on electoral fraud. In this regard it will demonstrate that other state institutions – the judiciary in this instance – and non-political elites are also important to the explanation of electoral fraud.

It is worthy of note that this study forms part of a wider study of electoral fraud in Nigeria with the special case study of Ekiti State. Ekiti State has been in the news for the intense conflict after the 2007 elections, which saw the judiciary nullify its gubernatorial elections twice – in the 2007 elections and the 2009 re-run elections that followed. The judicial angle to the crisis in the state has been one of the major sources of the credibility crisis in the Nigerian judiciary today. For

this reason, the incumbent governor of the state, Kayode Fayemi, argued that 'Ekiti has become the metaphor for all that is wrong with the [Nigerian] electoral system' (Fayemi 2009).

This article has seven sections in addition to the introduction. The first discusses the concept of electoral fraud and its many forms in different countries, with the aim of highlighting the controversy surrounding the concept and also of demonstrating country-specific research into the problem. The second section discusses the theoretical framework employed for the study, which aims to establish a connection between the judiciary as a state institution and the phenomenon of electoral fraud. The third section provides an analysis of the structure and condition of the contemporary Nigerian judicial system. The section focuses on the role of the judiciary in the electoral process. The fifth analyses the increasing number of cases of a judicial dimension to electoral fraud in Nigeria, while the sixth interrogates this phenomenon in Ekiti State. The final section provides the conclusion of the study and an appraisal of the issue of the judicial dimension to electoral fraud in Nigeria.

ELECTORAL FRAUD IN THE LITERATURE: THE CONCEPT AND ITS FORMS

Judging by comments from election researchers, social scientists seem to be very cautious about studying the phenomenon of electoral fraud (cf Reynolds 1993; Molina & Lehoucq 1999; Posada-Carbó 2000; Lehoucq 2003). The reason appears to be the difficulty in defining fraud and providing evidence of its existence in an electoral system, which is exacerbated by the 'partisan nature of denunciations of fraud' by political actors (Molina & Lehoucq 1999, p 203; Lehoucq 2003, p 234). Although there seems to be no agreement on a universal definition of electoral fraud, attempts in the growing body of work on the subject to define the concept may be classified into two groups: legal and cultural.

The legal definition seeks to make sense of electoral fraud within the context of the existing electoral laws in a given state (Lehoucq 2003; Birch 2007; Minnite 2007; Nwabueze 2008). For example, Minnite (2007, p 6) notes the definition provided by the US Department of Justice: 'conduct that corrupts the process by which ballots are obtained, marked or tabulated; the process by which election results are canvassed and certified; or the process by which voters are registered'. Similarly, Nwabueze (2008, p 1) defines the concept as

palpable illegalities committed with a corrupt, fraudulent or sinister intention to influence an election in favour of a candidate(s) by means such as illegal voting, bribery, treating, and undue influence,

intimidation and other acts of coercion exerted on voters, falsification of results, fraudulent announcement of results, [and] fraudulent announcement of a losing candidate.

In addition, Nwabueze (2008, p 1) suggests that election rigging 'is a subversion of the Constitution and of the democratic form of government instituted by the Constitution'.

Although legal definitions may appear more useful with regard to measuring and easily detecting electoral fraud, there are problems with generalisations, as different states have different legal systems. In this light, Minnite (2007, p 6) argues that 'in fact, there is no single accepted legal definition of voter fraud [a sub-category of electoral fraud]'. In the case of the United States, where she studied, she notes that 'there are different states'. Sarah Birch (2007, p 1534) also notes the conclusion of the United Nations that:

there is no single political system or election method that is equally suited to all nations and their people and that the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each state's sovereign right.

It must have been in recognition of the idiosyncratic nature of electoral systems that the culturalists advance their own argument. This is evident in the work of Ronald McDonald (1972), who postulates that cultural relativity should be central to the understanding of fraudulent and non-fraudulent electoral practices in different political environments. For him, electoral fraud represents a form of electoral control which 'can be rationally designed to influence and perhaps control the political consequences of elections, but like other controls it also can be culturally induced' (McDonald 1972, p 82). Thus, he argues that 'what is an "acceptable" or "fraudulent" practice in one culture need not be so considered in another, especially when environmental, political, and participatory practices vary so widely' (McDonald 1972, p 82).

If one relied only on the cultural explanation of electoral fraud it would be difficult to arrive at a general conclusion about what actually constitutes such fraud, given that acceptable norms usually vary across nations, as mentioned by McDonald himself. In addition, it would be difficult to provide useful criteria with which to measure the concept of electoral fraud even within a society, as norms (which are usually latent) rather than laws are emphasised.

A number of useful studies have further indicated that electoral fraud is, indeed, a common phenomenon which exists in various forms in different

countries, including the contemporary established democracies – especially in their early histories. In the case of the United States, for instance, some studies have noted the phenomenon during the ‘Gilded Age’ (1877-1893), which was notable for high levels of political corruption (Argensinger 1986; Reynolds 1993). Reynolds (1993, p 227) notes that a legislative panel commissioned to investigate allegations of electoral fraud in Jersey City concluded that ‘10 000 fraudulent ballots were cast that year (1889)’, which represented more than one-third of the total votes. Although Reynolds challenges this finding as exaggerated and politically motivated, he shows, using statistical analysis, that there were certainly 1 500 cases of fraudulent votes. Fraud in the United States took the forms of bribery, vote-buying, intimidation, false counting, ballot stuffing, inflation of figures and impersonation.

In the British political system, Phillips (1979, pp 95-99) has reported rampant cases of vote-buying, treating (excess distribution of food and alcohol before and during the poll) and ‘politically-motivated wholesale creations of freemen and honorary freemen’ during the state’s early elections. A market for votes was also reported to have flourished in the urban boroughs when more voters were enfranchised. This lasted until after the establishment of a secret ballot in 1872 in England and Ireland (Lehoucq 2003, p 239). As Phillips (1979, pp 77-89) observes, this development had some relationship with the system of political patronage predominant in the British politics of the period.

Elsewhere in Europe, the case of Germany is also well referenced by scholars (Anderson 2000; Lehoucq 2003; Ziblatt 2009). Electoral fraud was most prevalent in the imperial era, when the sources of wealth and societal prestige were premised on the ownership of land. The ownership structure of land was unequal, which gave landowners the opportunity to dominate society. Being the primary employers of labour, the landowners used coercion to force their subjects to vote for particular candidates and promote their economic interests (Anderson 2000; Ziblatt 2009).

In the category of developing countries, Latin American states have been much referenced in the literature (McDonald 1972; Hartlyn 1994; Molina & Lehoucq 1999; Posada-Carbó 2000; Lehoucq 2003; Kornblith 2005). In the case of Costa Rica, for example, Molina & Lehoucq (1999) offer a study of the country’s electoral process between 1901 and 1948. Examining volumes of petitions alleging fraud, they were able to observe the nature and magnitude of the incidence of electoral fraud in the country during the period. The prominent forms it took include inappropriate exclusion of voters, expulsion of party observers, inflation of votes, underage voting, alien voting, altering of ballots, annulment of votes, and several others (Molina & Lehoucq 1999, pp 218-219).

Similarly, Posada-Carbó studied the 'comparative history of the corruption of suffrage in Latin America' in the period between 1830 and 1930. His study reveals the pervasiveness of fraud in the electoral processes of Argentina, Venezuela, Mexico, Chile and Colombia. In those states authoritarian regimes promoted 'uncontested official candidates', vote-buying, 'electoral tricks', bribery and intimidation of election officers, intimidation of voters and 'written elections' (Posada-Carbó 2000, pp 631-639).

Contemporary events in the region have been studied by Hartlyn (1994), Lehoucq (2003) and Kornblith (2005). Kornblith's work, for instance, concentrated on the elections in Venezuela between 1998 and 2004. He reports the role of the personalised rule of Hugo Chávez in promoting 'official manipulations' and 'stonewalling tactics' that frustrated voters in the country (Kornblith 2005, p128).

Arguably, quality scholarship on the incidence of electoral fraud in other regions with developing countries, especially Asia and Africa, is still evolving. Thus, these regions of the world are less mentioned in specialised review works on the universality of electoral fraud (Posada-Carbó 2000; Lehoucq 2003). Only a handful of studies is available on the prevalence and dimensions of fraudulent activities in the electoral processes of some countries of these regions. For the Asian countries, the studies of Callahan & McCargo (1996) on Thailand, Zafarullah & Akter (2001) on Pakistan and Bangladesh, and Wang & Kurzman (2007) on Taiwan, are noteworthy.

Callahan & McCargo (1996) shed some light on the frequency of vote-buying in elections in Thailand. Zafarullah & Akter (2001) advance a comparative study of the incidence of electoral corruption in Pakistan and Bangladesh. Their study presents the cases of these countries as a prime example of how military regimes in Third World nations employ unethical means to 'civilianise' their governments upon promises of return to civilian democratic rule. In these cases, different levels of restrictions, manipulation and intimidation are usually instituted in the electoral process, which eventually produces 'installed civilian' governments (Zafarullah & Akter 2001, p 90). The study of Wang & Kurzman (2007) demonstrates two issues surrounding electoral fraud in Taiwan: the prevalence of electoral clientelism and obstacles to non-compliance with clientelistic mobilisation in elections.

In the case of African countries, Adejumobi (2000) has commendably illustrated fraud in many flawed electoral processes on the continent. His study exposes the mechanisms of rigging by the regimes he has assessed. These usually take the form of manipulation of the established electoral laws and intimidation of political opponents (Adejumobi 2000, pp 66-70). The specific cases of Zimbabwe (Makumbe 2002), Kenya (Lafargue 2008), Madagascar (Marcus & Razafindrakoto 2003) and Nigeria (Ibrahim & Egwu 2005; Agbaje & Adejumobi 2006; Ibrahim

2006; 2007; Human Rights Watch 2007; Rawlence & Albin-Lackey 2007; Suberu 2007) have featured prominently in the literature.

In the Nigerian case – which is central to this study – studies have generally shown that central to its flawed elections is electoral fraud. There are clear similarities among the malpractices revealed in all the elections staged in the country since 1999. These include ballot box stuffing, snatching of electoral materials, underage voting, vote-buying, smashing of ballot boxes, inflation of votes, election violence and poor voter registration, among others.

It may be deduced from the examination of country-specific studies that the literature does not include much information about a judicial dimension to electoral fraud – probably because the phenomenon is rare in many parts of the world. Even specific studies of the Nigerian experience with electoral irregularities and fraud have not really captured the judicial angle (Agbaje & Adejumo 2006; Ibrahim 2006, 2007; Collier & Vicente 2008; Bratton 2008; Omotola 2010). In the light of this, this study makes a significant contribution to the existing literature.

THE LOGIC OF STATE INSTITUTIONS AND ELECTORAL FRAUD

With the publication in 1985 of the book *Bringing the State Back In*, there was a remarkable resurgence of the state as a central unit of analysis in the social sciences. The principal authors of the book, Peter Evans, Dietrich Rueschemeyer and Theda Skocpol, aimed to advance a new theory of socio-political analysis that would be anchored in the centrality of the state.

They first came on to the scene with a critique of the society-centred approaches predominant in the 1950s and 1960s, especially the neo-Marxist class analysis of the state. They advance the argument that the state cannot simply be regarded as ‘an arena for competing social forces’, but rather as ‘a set of organizations claiming control over territories and people’ (Skocpol 1985, p 9; 2008, p 110). They further argue that the state is independent of other social forces and is able to make autonomous decisions. This suggests that the state has the capacity to formulate and pursue its goals without reflecting the interests of some social groups (Skocpol 1985, p 9). Another important element of their argument is predicated on the belief that states do not only matter because of their goal-oriented capacities, but also because of their ‘organizational configurations, along with their overall patterns of activity, affect political culture, encourage some kinds of group formation and collective political actions’ (Skocpol 1985, p 21).

In their useful contribution, Joel Migdal, Atul Kohl and Vivienne Shue led a scholarly project in 1994 to provide a critique of the state-centred approach. Although they concur with the position of state-oriented theorists on the significance of the state to social and political analysis, they argue that statist

scholars have overestimated the capacity and autonomy of the state (Migdal, Kohn & Shue 1994, p 14).

For them, it is not enough only to consider the organisational configuration of the state to explain politics and society. It is also important to consider the societal context in which the state operates. Hence, they argue that the state and society, notwithstanding their posture as independent entities, are interdependent (Migdal, Kohn & Shue 1994; Migdal 2001). With this argument the proponents of this perspective, otherwise known as the *state-in-society* approach, suggest that state institutions do not operate in isolation, they are also driven by some social factors that can determine the nature of the outcomes.

In this study we are especially attracted to the argument of the dynamics of state institutions and their relationship with political patterns and processes. In this case, we are interested in studying the relationship between the Nigerian judicial system and the phenomenon of electoral fraud in the country. It should be acknowledged that some empirical research has clearly demonstrated the link between electoral institutions and the incidence of electoral fraud (cf. Molina & Lehoucq 1999; Agbaje & Adejumobi 2006; Hicken 2007; Birch 2007, 2008; Omotola 2010). For example, Sarah Birch (2007) has shown that the electoral system of a country matters in explaining electoral fraud. She found that there is a higher likelihood of electoral fraud in single member district (SMD) electoral systems than in proportional representation (PR) systems, owing to their different requirements.

Similarly, Hicken (2007, p 47) has argued that electoral institutions have direct, 'predictable and discernible' links to electoral fraud. With particular reference to vote-buying, he proved that electoral systems dictate the kind of strategies political actors adopt to win votes. Omotola (2010, p 535) has proved that elections in Nigeria have been characterised by malpractice, largely because of 'the weak institutionalization of the primary agencies of electoral administration, particularly the Independent National Electoral Commission (INEC) and the political parties'.

While the judiciary plays an important role in the electoral process in a country, given its relevance to the settlement of electoral disputes, the institution is clearly still missing from the existing literature. Thus, we are concerned with studying the nature of the Nigerian judicial system with respect to elections and its potential to contribute to the explanation of the problem of electoral fraud. This study is not limited to the tradition of the existing analyses, which only focus on the institutional arrangements without interrogating the formation of the institutions themselves and how this can improve an understanding of their link with the phenomenon of electoral fraud. We are interested in examining the factors that inform the current judicial system in Nigeria and its present formation to find an explanation of the contribution of the judiciary to electoral fraud.

THE CONTEMPORARY NIGERIAN JUDICIAL SYSTEM

Modern Nigeria is a product of decades of military rule. Besides its previous experiences with military regimes it was, for 16 years, under the rule of a series of military governments before its return to democracy in 1999.¹ Given this fact, it cannot be gainsaid that the current institutional configuration of Nigeria not only derives its source from a militarised state, it is also a reflection of the major trappings of the politics of military regimes.

Certainly, the first step for military governments upon their seizure of power from civilian governments is the 'suspension, abrogation or modification' of the constitution, while giving primacy to their own formulated decrees (Oko 1997, p 259). For example, the Constitution Decree No.1 of the first military regime in 1966 (which was repeated by other military regimes) explicitly stated that:

[T]his constitution shall have the force of law throughout Nigeria, [provided] that this Constitution shall not prevail over a Decree, and nothing in this Constitution shall render any provision of a Decree void to any extent whatsoever.

Cited in Oko 1997, p 259

This step affects, in no small measure, the existing political institutions in the state. Surely, political parties and 'para-political associations' are usually abolished in order to prevent political opposition and to legitimate military rule (Dudley 1982, p 85). The judiciary, ostensibly left to operate, is usually crippled and converted into an instrument for the perpetuation of the government.

In his useful study, Oko (1997, pp 267-286) illustrated clearly three salient institutional measures employed by the military to cripple the judicial system. Firstly, it established special tribunals with judicial powers, to duplicate the functions of the courts. These tribunals, consisting largely of military officers, not judges, had jurisdiction over a number of issues deemed to be serious and taken out of the regular courts, including corruption, armed robbery, examination malpractice, arson, civil disturbances, and treason. The tribunals undermined the regular courts as they introduced tougher penalties for offences and circumvented normal judicial procedures.

1 After the overthrow of the democratic government of Shehu Shagari in 1983, the Muhammadu Buhari-led military regime ruled between 1983 and 1985. The government of Ibrahim Babangida followed and ruled between 1985 and 1993. Following the 12 June 1993 presidential election crisis the military government installed a short-lived and controversial interim government led by Ernest Shonekan, which lasted for three months (27 August-17 November 1993). General Sani Abacha's regime succeeded the interim government and ruled from 1993 until 1998, when Abacha died suddenly. Abdulsalami Abubakar's regime followed and handed over power to the democratic government of Olusegun Obasanjo in 1999.

Secondly, the military promulgated *ouster clauses*, which 'remove jurisdiction from the courts and curtail judicial review, in order to bar the courts from reviewing executive and legislative acts' (Oko 1997, p 274). With these in place, the courts were stripped of the power to adjudicate on matters concerning the decrees promulgated by the military governments.

Thirdly, the military established *retroactive laws*, which gave the special tribunals the power to deal with past issues and impose their accompanying new stiffer penalties, even though the laws had not been in effect when the acts were committed. Oko (1997, p 285) argues that this step

reflects the military regime's authoritarian posture, its desire to advance social and political goals through the criminal law in contravention of established legal traditions, and its lack of respect for the rights of its citizens.

Apart from these measures, Olowofoyeku (1989, p 61) has added that the military rulers habitually dismissed judicial officers at will, especially when they were perceived to be too radical.

Not surprisingly, this created a judicial system that was not only incapacitated but was also subservient to the leadership of the military government. In this regard, Nwakwo (1997, pp 359-360) noted some interesting instances, including the shutting down of all the high courts in Lagos State to allow judges to pay a condolence visit to a certain military governor who lost his wife in 1990. In another incident, an acting chief judge of Lagos State referred to President Ibrahim Babangida as *Kabiyesi* (His Majesty, the Unquestionable One) when delivering judgement on a ruling affecting the legitimacy of Babangida's government in 1989, a clear indication of his subservience to the military leader.

Of course this sets the background for a judicial system that would be more vulnerable to manipulation by the political elite in the democratic era, which is still dominated by the military elite that dominated politics during the military era.²

The military-led constitution-making process in preparation for the present democracy further facilitated the creation of a judicial system which is prone to political manipulation. The process, which, it has been argued, was 'imposed, elite-driven, top-down and non-participatory', produced a Constitution that cannot 'serve as [an instrument] for guaranteeing the operations of a democratic order' (Ihonvbere 2000, p 346).

2 For example, Adejumbi (1999, p 9) notes that '[i]t is estimated that no less than 130 rich, and influential retired military officers are members of the People's Democratic Party (PDP), the current ruling party in Nigeria at the Federal level.'

Ihonvbere (2000, p 346) further notes that:

In an open demonstration of military arrogance and insensitivity to the popular will, the General Abdulsalam Abubakar junta refused to release the constitution even after the military ruling council spent three days 'putting finishing touches' to what was supposed to be a peoples' document and promulgated a decree to give legality to the document.

Similarly, Nigeria's Nobel Laureate, Wole Soyinka, described the current Constitution 'as a military document that was imposed upon the nation, forced down its throat, and was designed to concentrate power' (Soyinka 2006). Clearly, the institutions that would emerge from this controversial process can hardly possess true democratic credentials.

The 1999 Constitution appears to guarantee independence for the judiciary and does display better features than previous constitutions, especially with regard to the appointment, and administration, of the affairs of judicial officers following the innovative creation of the National Judicial Council (NJC). Section 153 of the Constitution created the NJC as one of the Federal Executive Bodies, with the principal objective of promoting the autonomy and independence of the judicial arm. The NJC, which is composed of the chief justice of the country (as the chairman) and 27 other high-ranking judicial persons (see s 20 of the 3rd schedule of the 1999 Constitution), is vested with the powers to make recommendations to the president and governors about the appointment and dismissal of principal judicial officers at both federal and state level. The council is also empowered to punish erring judicial officers and has the power to administer funds from the Consolidated Revenue Fund, including collection and disbursement for the judiciary, and to manage affairs related to the judiciary.

Despite the existence of the NJC, the executive and legislative bodies still have considerable influence over the judiciary. The Constitution empowers the president and the governors to appoint and dismiss judicial officers only with a *recommendation* from the NJC, which is subject to acceptance or rejection by the executive (s 21 of the 3rd schedule, 1999 Constitution). In terms of this statutory condition, the executive could easily appoint or dismiss judicial officers on the basis of primordial and personal interests (Alubo 2006, p 25).

The situation is even worse in the event that a particular party conveniently controls both the executive and the legislature (as has been the case since 1999), given that the Constitution requires the confirmation of the majority in the Senate

for the appointment or dismissal of senior judicial officers.³ The appointment or dismissal process could certainly be driven by the ruling party's interests as well as by those of its patrons. A good illustration is the reaction of President Goodluck Jonathan to the decision of the NJC to reinstate the suspended president of the Court of Appeal, Justice Ayo Salami, following his clash with the then Chief Justice Aloysius Katsina-Alu.

On the basis of the interests of his party, the People's Democratic Party (PDP), the president declined to follow the council's recommendation and, rather technically, forced Salami into retirement, ostensibly because of his rulings on a number of election disputes that had ousted the PDP in some states (Ekiti, Oyo, Osun, Edo and Ondo) in the South.⁴ In its 2012 report on the state of affairs in Nigeria, the US government referred to this particular event and remarked that: 'The case raised questions regarding the partisan nature and level of independence within the judiciary' (US Department of State 2012, p 17).

The financing of the judiciary is another critical area of concern with regard to the autonomy of that branch of government. Although the Constitution provides that funds for the judiciary should be paid directly to the NJC for disbursement to the heads of courts,⁵ there are conflicts in the government over the budgetary allocations to the judiciary. The fact that the Constitution does not state clearly what allocation should be made from the public purse and, at the same time, demands that any withdrawals from the Consolidated Revenue Fund should be subject to the approval of the legislature, in a way hinders the autonomy of the judicial arm.⁶ Illustrating the problems this process generates, the Chief Justice of the Federal High Court in Abuja, Justice Lawal Hassan Gumi, stated that:

currently what happens is when they want to prepare the budget they send out what they call 'Court circulars'; they send them to the

3 See s 231(1) on the appointment of the Chief Justice of Nigeria; s 238(1) on the appointment of the President of the Court of Appeal; s 250(1) on the appointment of the Chief Judge of the Federal High Court; s 256(1) on the appointment of a Chief Judge for the High Court of the Federal Capital Territory; s 261(1) on the appointment of a person to the office of the Grand Kadi of the Sharia Court of Appeal; s 266 (1) on the President of the Customary Court of Appeal; s 271 (1) on the appointment of the Chief Judge of a state; s 276(1) on the appointment of the Grand Kadi of the Sharia Court of Appeal of a state; s 281(1) on the appointment of the president of a state's Court of Appeal.

4 For example, the Osun State branch chairman of the party, Alhaji Ganiyu Olaoluwa, insisted that 'What was done at the NJC meeting of today simply amounts to an affront on the judicial system and the import is that, if members of the Bench could ignore pending court matters, other Nigerians will be right to do so, and the country will surely head for a state of anarchy.' See Chiedozie & Nwogu 2012.

5 Section 81(3) of the 1999 Constitution requires that: 'Any amount standing to the credit of the judiciary in the Consolidated Revenue Fund of the Federation shall be paid directly to the National Judicial Council for disbursement to the heads of the courts established for the Federation and the State under section 6 of this Constitution.'

6 Section 80(4) stipulates that: 'No moneys shall be withdrawn from the Consolidated Revenue Fund or any other public fund of the Federation, except in the manner prescribed by the National Assembly.'

Chief Registrars who are the administrative officers of the Court. The Chief Registrars are now supposed to call in for contributions from the various departments; they collect all these and then they come up and we sit down together and we say for this year we need a certain amount as a budget to run the Court. We now send this to the National Judicial Council (NJC). The NJC is the body now that will go to the National Assembly and negotiate for what is to be given to us. And at the National Assembly, what normally happens is that they give what they call 'an envelope'. If you open it, you find a figure there, so you go and tailor your needs to suit that figure. I find that to be very unsatisfactory.

Odimegwu 2012

Worse still, it is the practice of the executive, especially at the state level, to assume responsibility for administering funds for the judiciary. In all 36 states of the federation the governors determine the budgets of their judicial branches and disburse funds to them accordingly. This practice undoubtedly gives the governors the opportunity to exercise a certain control over the activities of the judiciary, which makes it subservient to them. Justice Jibrin Ndajiwo, then chief judge of Niger State, once lamented 'a situation where the Chief Judge, as the head of the court, will have to go to the executive begging for funds to carry out its functions is most unhealthy, humiliating and unconstitutional' (Dada 2012).

In September 2012 the current chief justice of the country, Justice Aloma Mariam Muktar, also protested that: 'it is regrettable that some state executives treat the judiciary as an appendage of the executive arm' (Adewole 2012). For this reason, the judiciary at the state and federal levels has experienced many strikes over remuneration and poor conditions of service for workers. Unhappy with the situation, the Judiciary Staff Union of Nigeria (JUSUN) announced on 23 October 2012 its decision to file a suit against the 36 governors, as well as federal and state attorneys-general and the NJC over issues relating to the financial autonomy of the judicial arm (Orintunsin 2012).

From these examples it is evident that the current Nigerian judicial system can be penetrated and manipulated to advance political interests. Through institutional procedures the political elite can intimidate, manipulate and, indeed, pressurise members of the judiciary to achieve their aims. This concern has occasionally been expressed by a few audacious judicial persons in a number of forums. For example, the chief registrar of the Lagos State High Court, Ganiyu Safari, revealed at a media roundtable discussion in September 2012 that:

There are serious pressures from prominent Nigerians, including lawyers. How many people can stand face to face with these people[?]

Sometimes when they want to stand surety for their relatives, I asked them to appear personally, but they request that we should interview them on phone ... They will threat [sic] that they will call on the governor who will direct the CJ [the Chief Justice] to influence it.

Benson & Abdullah 2012

Clearly related to this is the threat made against judges by Atiku Abubakar, then vice-president, following the ruling by the election tribunal against his supposed 'political godson' relating to the disputed 2003 gubernatorial election in Adamawa State. Abubakar is quoted as saying: 'if the worst comes to the worst, I will insult any judge. It may not be only insults, but as well as beating up such a judge' (*ThisDay*, March 2004).

The influence of the political class over the judiciary is glaring and so overwhelming that it can sometimes predict the outcome of a judicial process. A prominent senior advocate of Nigeria, Afe Babalola, who is also the chairman of the Chartered Institute of Arbitrators of Nigeria, lamented that: 'Nowadays, politicians would text the outcome of the judgement to their party men before the judgement is delivered and prepare their supporters ahead of time for celebration' (cited in Oyetibo 2012).

This situation has made the judiciary another arena of Nigerian politics. The above-mentioned clash between Justice Salami and Justice Katsina-Alu is illustrative in this regard, especially when seen against the backdrop of the dimension the case later assumed – a PDP versus ACN (Action Congress of Nigeria) party conflict. Already aggrieved by a number of rulings made at the instance of Justice Salami in the Court of Appeal, which apparently affected its fortunes in the south, the PDP was determined to ensure the judge's dismissal and mounted a determined campaign to achieve that objective. The party queried the reasons of its main opposition, the ACN for fighting vehemently for the reinstatement of the embattled judge. At a press conference in May 2012 the PDP stated:

The questions Nigerians must now begin to ask these ACN people are what their interest is in the Justice Salami issue? Why is it that they are the ones defending the suspended judge, organising protests and mobilising media support for him? ... Perhaps, Justice Salami is actually the ACN Deputy National Chairman.

Olayinka 2012

Earlier the PDP had accused the ACN of 'crying more than the bereaved' on the issue (*The Nation* August 2011), to which the ACN responded: 'We are not crying

more than the bereaved. We are actually the bereaved, and we will cry for as long as it takes to restore strict adherence to the rule of law' (*The Nation*, August 2011). In fact, the ACN's response was a result of its conviction that the episode was the outcome of a 'PDP conspiracy', especially after the Court of Appeal under Salami had ruled in the ACN's favour in many states. The national leader of the ACN, Bola Tinubu, argued that: 'Nigerians know this is part of a larger script to end the career of a courageous judge and amputate justice and subvert the rule of law. Here the Presidency and the PDP are culprits' (Adeniji 2012). On 20 August 2012 the ACN urged the National Assembly to compel the president to reinstate the judge, arguing that the presidency had

destroyed the principle of separation of powers as enshrined in our Constitution, reduced the National Judicial Council to an appendage of the executive arm of government and made an imperial President of Goodluck Jonathan in clear violation of the Constitution.

Channels Television 2012

THE JUDICIARY AND THE ELECTORAL PROCESS

As in other democratic settings, the relevance of the judiciary to the electoral process is that it adjudicates disputes arising from that process, particularly those relating to electoral malpractice and violation of electoral procedures. Election petitions, in legal parlance, are considered *sui generis* because of their distinct nature 'compounded largely by issues of fact; with little or no law or the application of legal principles to facts', which makes them different from ordinary civil and criminal proceedings (Nwabueze 1985, p 433; also see Babalola 2007, p 297).

Section 285 of the 1999 Constitution provides for the establishment of special election tribunals to deal with petitions relating to the gubernatorial and legislative (federal and state) elections. However, section 239(1) provides that the Court of Appeal has exclusive jurisdiction over petitions relating to the presidential election. In addition, appeals against rulings by the tribunals (for gubernatorial and legislative house elections) are heard and limited to the Court of Appeal (s 246(3)) while the Supreme Court has the jurisdiction to hear appeals against rulings from the Court of Appeal in relation to the presidential election (s 235).

The fact that the normal courts are required to adjudicate in cases that are strictly political in nature has been a cause for concern in legal circles. Ben Nwabueze (1985, p 435), a prominent Nigerian constitutional expert, argues that

[i]t is not only that the mandate conferred by an election is purely

political, not a legal, right, but also the question as to which of several contestants is entitled to it is so deeply entangled in the politics of the people to an extent that the question of the constitutional validity of a legislative or administrative act is not. It brings the courts into immediate and active relations with party interests and party contests.

Jelili Owonikoko, an expert on election petitions, states that there is the possibility of a conflict of interests between the executive and the judicial arms in this regard because

in the course of, for instance, challenging the election of a President, a vacancy may occur in the Supreme Court or in the Court of Appeal. To fill the vacancy, the law prescribes that a recommendation be made to the President – whose election is being challenged before the Supreme Court – before a substitute for the outgoing Judicial officer is appointed.

Nigerian Law Times, January 2011, p14

With regard to this particular argument, it is interesting that the courts have never ruled against an incumbent president on petitions challenging his election, despite clear and overwhelming evidence of electoral fraud. For instance, despite the fact that the main beneficiary of the 2007 presidential election, Umar Musa Yar'Adua, admitted that the election was generally flawed, the courts did not agree and confirmed his election. In the words of one of the judges:

For the avoidance of doubt, I am not saying by this judgment that all was well with the conduct of the Presidential election conducted in 2007. What I am saying is that there was no evidence before the Court of Appeal to dislodge section 146 of the Electoral Act. In the sum the appeal fails and it is dismissed. Accordingly, Umaru Yar'Adua and Goodluck Jonathan are the President and Vice President of the Federal Republic of Nigeria.

Nigerian Muse December 2008⁷

The judgement should be viewed in the light of the apparent institutional powers of the executive over the judiciary, as discussed above, and some other vexing

⁷ However, it is important to note that the decision in the Supreme Court was split in this particular case. Of seven judges on the panel, only four upheld the election of Yar'Adua. Based on the majority decision, Yar'Adua was confirmed as the truly elected president of the country in spite of the malpractices in the 2007 presidential election.

issues with regard to the structure of election petitioning in Nigeria. In this regard, it is important to mention that the Nigerian courts do not only have the jurisdiction to determine the validity or otherwise of an election, they can also declare the winner in a disputed election.

The controversial matter of *who* actually wins an election is mostly classified in many established democracies as a form of *political question* which is not justiciable. As usefully argued by Nwabueze (1985, p 432), '[a] decision invalidating an election does not constitute the court an arbiter of who should govern; the choice is simply referred back to the electorate in a fresh election.'

Although there was a similar situation in the United States when its Supreme Court declared George Bush (Jnr) the winner against Al Gore in the 2000 American presidential election, American legal experts have argued that

[t]here obviously was no precedent to support the extraordinary ruling by the United States Supreme Court deciding the 2000 presidential election ... this is exactly why *Bush v. Gore* should have been dismissed as a political question.

Chemerinsky 2001, p 1109

In the Nigerian context, many of the prayers made by election petitioners at the tribunals are especially targeted at invalidating the election of their opponents and for their own declaration as the rightful winners. In 2007 five candidates in Rivers (Rotimi Amaechi), Edo (Adams Oshiomole), Ondo (Olusegun Mimiko), Osun (Rauf Aregbesola) and Ekiti (Kayode Fayemi) were declared the rightful winners in their respective gubernatorial elections. A study of 122 post-election petitions (excluding the gubernatorial elections) arising from the 2011 general elections indicates that 32 petitioners at different levels have requested to be declared genuine winners (see EUEOM 2011, pp 92-120). This might generate an unhealthy belief in the minds of some political elites in Nigeria, where politics is seen as a 'do-or-die' affair, that elections which cannot be legitimately won at the polls may be won in the courts with the aid of some manipulation of the judicial process.

The required time for election petitioning and the long delays in the process constitute another problem. Before its amendment in 2010 the Constitution was silent on a timeframe for hearings on election petitions and appeals. The Electoral Act of 2006 merely provided that an election petition should be presented within 30 days after the declaration of the result being contested. For that reason election litigation usually took many years to be settled, with attorneys using legal technicalities to frustrate the process.

Among the extreme cases are: *Buhari v Obasanjo* – 2003 presidential election (from April 2003 to November 2005); *Obi v Ngige* – 2003 gubernatorial election in

Anambra State (from April 2003 to August 2005); *Fayemi v Oni* – 2007 gubernatorial election in Ekiti State (from April 2007 to October 2010); *Ogboru v Uduaghan* – 2007 gubernatorial election in Delta State (April 2007 to November 2010) and *Aregbesola v Oyinlola* – 2007 gubernatorial election in Osun State (from April 2007 to November 2010).

The dangers inherent in overly long election litigation processes are obvious. They allow ‘incumbents’ whose election is being questioned not only to illegally occupy office and enjoy the full benefits of their position, but also to employ state machinery to intimidate or manipulate their opponents as well as the judges hearing the petitions.

In preparation for the 2011 general elections, the National Assembly made a bold move to correct this problem, following the recommendations of the 2008 Uwais Report. Section 285 of the Constitution was amended to introduce specific timelines, whereby tribunals are required to deal with election petitions within 180 days of the date the petition is filed, and appeals arising therefrom must be determined within 60 days. This new regime, although helpful, only has the potential to reduce the long years of litigation, it does not significantly solve the problem of false winners occupying office and using state power to defend their stolen mandates.

It is estimated that it will still take about eight months to deal with petitions. Obviously, this does not sufficiently address the general concern about election petition delays, especially as articulated in the Uwais Report, which explicitly suggested speedy adjudication ‘before swearing-in of winners of the election’ (FGN 2008, p 56).

ELECTORAL FRAUD IN THE JUDICIARY

Many would argue that corruption in the Nigerian judiciary is only a perceived phenomenon and that there is no concrete evidence of it. Understandably, this argument is advanced to protect the integrity of the judicial arm as well as to improve public confidence in that branch of government. For example, Justice Musdapher (then chief justice of Nigeria) said: ‘we got complaints all the time about corruption but we ask for evidence and we don’t get any. You accuse a judge of corruption without presenting evidence, what can we do [?] ... Without the evidence, we do nothing’ (Onabanjo 2012).

Contrary to this perspective, there is ample evidence that there is indeed corruption in Nigeria’s judiciary. The intriguing aspect is that most of the corruption cases are related to election tribunals. Justice Kayode Eso, who is popularly acclaimed as the ‘Father of Judicial Activism’ in Nigeria, lamented in 2008 that Nigeria is now experiencing the emergence of ‘billionaire election tribunal judges’ (*The Punch*, September 2012). Ishola Williams, chairman of

Transparency International in Nigeria, remarked: 'All the Judges are just using the election tribunals to make money. All those who had gone through election tribunals are *millionaires* today. I challenge them to say *No*' (cited in Oyetibo 2012, emphasis added).

Increasing numbers of cases of bribery, aimed at influencing verdicts on election disputes are being reported. In January 2004, for example, the NJC suspended four judges over incidents bordering on the acceptance of bribes in litigation relating to the disputed 2003 gubernatorial election in Akwa Ibom State. Following a complaint from the petitioner, Ime Samson Umana, Nigeria's security agency discovered that the judges sitting on the tribunal received millions of Naira as a bribe from the governor, Victor Attah, whose election was being challenged. Ironically, the NJC also established that a judge from another state served as a conduit for the complainant/petitioner (Umana), offering 60-million Naira (approximately US\$380 458) to members of the tribunal to rule in Umana's favour (CLO 2004, pp 245-246).

In another instance, in May 2005 the president, upon the recommendation of the NJC, dismissed two judges of the Court of Appeal following their acceptance of bribes to rule in favour of a particular candidate in the disputed 2003 Anambra South senatorial election. Upon investigation it was established that the judges received bribes of 15-million and 12-million Naira (approximately US\$95 175 and US\$76 141) respectively to rule in favour of the appellant (Fawehinmi 2007).

In July 2008 allegations surfaced in the news media of an unethical rapport between the members of the election tribunal and the principal attorney for the defendant over the disputed 2007 gubernatorial election in Osun State. *TheNews* magazine, in its edition of 14 July 2008, ran an interesting exposé of numerous telephone conversations (via short messages and voice calls) between the chairman of the tribunal, Justice Naron, and the lead attorney for the defendant, Olagunsoye Oyinlola (the incumbent whose election was being challenged) (Kolade-Otitoju 2008). For this reason, the magazine and the opposition party, the ACN, suspected that the tribunal had been manipulated, especially after its 15 July 2008 ruling favoured the defendant (Ugbagwu, Ikhilae, Yishau & Adeniyi 2008).

Given the apparent connection of this particular magazine with the patrons of the ACN, there might be a reason to suspect that the report was an instrument of political scheming in the struggle between the PDP and the ACN.⁸ However, the fact that an investigation by the Nigerian Bar Association (NBA) showed

8 In the book *Trials and Triumphs: The Story of TheNews*, which details the history of *TheNews* magazine, the author (one of the founding members of the magazine) acknowledged Bola Tinubu's many financial contributions to the magazine, hence his closeness to its management. Therefore, the magazine has established a sort of alliance with him, defending his political interests, especially when he was accused of certificate forgery as a governor of Lagos State in 1999 (see Adebani 2008, pp 187-188). In addition, a former editor of the magazine, Babafemi Ojudu, joined the ACN in 2010 and, on its platform, became the current senator representing Ekiti Central Senatorial District in the National Assembly.

that there was indeed professional misconduct on the part of the lead counsel for the defendant gives the allegation greater credibility (Akeredolu 2011). On 21 February 2013 the NJC announced the compulsory retirement of Justice Naron over matters related to professional misconduct (Ogundele, 2013).

With rampant bribery in the judiciary, especially in election-related cases, there is reason to argue that electoral fraud is also perpetrated at that level. This argument is consistent with the general feelings of Nigerians about the judiciary. The national chairman of the Nigerian Bar Association, J B Daudu, has stated that: 'there is a growing perception backed up by empirical evidence that justice is purchasable and it has been purchased on several occasions in Nigeria' (Nnochiri 2011).

Sam Nda-Isiah, columnist and publisher of *Leadership*, writes:

Had the judiciary in Nigeria been working, people would not be worried as they are today about next year's elections [in 2007]. There is apprehension and disquiet everywhere as we approach another election year. As it stands now, only a fool would proceed to the courts next year after being cheated or rigged out of any election ... The 2003 elections effectively killed democracy in Nigeria, but it was the judiciary that buried it.

Nda-Isiah 2006

Otorofani (2010) stated:

This is the new generation rigging formula invented by the Nigerian judiciary to replace the old generation formula introduced by INEC that seemed to have outlived its usefulness in this digital era. The Nigerian judiciary has invented a modernized version to keep up with the times.

The European Union Election Observer Mission also noted in their report on the 2011 general elections that many complainants chose to lodge their complaints of electoral malpractice with INEC rather than petition the courts, which the observers attributed to the people's 'gradual loss of confidence in the judiciary' (EUEOM 2011, p 44).

A CASE STUDY: THE JUDICIARY AND THE 2007/09 EKITI STATE GUBERNATORIAL ELECTIONS DISPUTE

In my own summary I call it 'judicial mathematical manipulation'.
In pidgin parlance, we call it '*wuruwuru* to the answer'.

Olu-Ojo, July 2012

Let us look at it critically. The judicial arm of government belongs to the Federal Government. The ACN is not at the centre. If there will be any manipulation at all, it should be against not in favour of ACN.

Awe, July 2012

The above statements succinctly sum up the claims and counter-claims over an alleged fraud perpetrated in the courts to produce the current regime in Ekiti State following the state's notorious gubernatorial polls on 14 April 2007. Ekiti State, in Yoruba-speaking south-western Nigeria, since its emergence as one of six newly created states in 1996, has experienced many political crises.

After the PDP ousted the ruling AD (Alliance for Democracy) in all the south-western states (except Lagos State) in 2003, Ekiti State, under the PDP-led government of Ayo Fayose, immediately gained prominence in the media over myriad controversies and political violence. The state especially became known for unimaginable levels of corruption and political assassinations. This contributed to the impeachment of the governor and his deputy by an absolute majority in the state's legislature on 16 October 2006.

The intense crisis that followed the impeachment occasioned the declaration of a 'state of emergency' by President Olusegun Obasanjo on 19 October 2006. It was in the midst of this highly charged political atmosphere that the 2007 gubernatorial elections were held. It was also a period of an extreme power struggle between the PDP and the AC (which metamorphosed from the AD and is now the ACN) over control of the south-western region. For these reasons the governorship elections were keenly contested by Segun Oni of the PDP and Kayode Fayemi of the AC as the main candidates (see *Sahara Reporters* October 2006; Adaramodu & Jamiu 2011, pp 21-28).

In an election reportedly marred by violence and irregularities, the PDP candidate was declared winner, having polled 177 780 votes against his main opponent in the AC, who polled 108 305 votes (Adaramodu & Jamiu 2011, p 75). Fayemi, the AC candidate, immediately cried foul, claiming that the election was anything but free and fair and that he had been robbed of his mandate by the PDP in collaboration with INEC. In one of his post-election interviews in the media, Fayemi alleged that on election day,

by 9a.m., voting had been completed in several parts of Ekiti. The papers had been thumb-printed. All thumb-printed PDP, before the election. And I had international observers with me. They could see. They were shocked. I was shocked. In other places where they could not do that, they had carted away the ballot boxes.

Asoya & Olaosebikan 2007, p 28

Favemi formally declared that he would contest Oni's election before the tribunal. In a petition filed on 11 May 2007 Fayemi requested the tribunal to re-examine and re-count the lawful votes, which would clearly indicate that he was the legitimate winner of the gubernatorial election. This move set in motion a tortuous judicial journey that lasted for three years. In summary, four different phases characterised the process:

- The Bukar Bwala-led Elections Petitions Tribunal (May 2007 to August 2008). This tribunal upheld Oni's election on the grounds that he polled 135 400 against Fayemi after a re-count of the general votes cast during the elections. Fayemi's petition was dismissed and Oni was returned as the duly elected governor.
- The first Court of Appeal phase (September 2008 to February 2009) following the appeal by Fayemi against the preceding tribunal's ruling. The court unanimously ruled that there was enough evidence to prove non-compliance with the Electoral Act in 10 of 16 local governments in the state, and that Fayemi legitimately polled 78 799 votes against Oni's 66 834 votes, after the re-examination of the votes in the non-contested voting units. For this reason a re-run was ordered in the 10 contested local governments within 90 days of the ruling.
- The Hamman Barka-led Election Petitions Tribunal (August 2009 to May 2010) which sat over the petition filed by Fayemi against his opponent. In a split decision, three members of the five-man panel ruled that the petitioner could not sufficiently substantiate his claims of electoral malpractice, while the two other members of the tribunal ruled in favour of Fayemi. Given the majority decision, Oni was returned as the duly elected governor of the state.
- The second Court of Appeal phase (June 2009 to October 2010) against the backdrop of another appeal filed by Fayemi given the preceding judgement on the re-run election. It was at this stage that the court unanimously pronounced Fayemi the legitimate winner of the gubernatorial election, having won both the 2007 election and the re-run, held in 2009.

see Olayinka, Olaniyi, Makinde & Aborishade 2008, p 7; Akaeze 2009, pp 19-21; Gbadamosi 2010, p 42; Oni 2010, p 25; Addeh 2010, p 6

An examination of the interactions between the contending parties during and after the judicial process indicates some attempts by both of them to manipulate

the process and influence court rulings in their favour. In November 2007 the parties accused each other of undue interference in the activities of the Bwala-led Elections Petitions Tribunal. The AC claimed in its press release on 9 November 2007 that the PDP, with the aid of a prominent lawyer in Ekiti State (also a PDP member), influenced the removal of two uncompromising judges from the panel. The party further argued that there was increased lobbying and pressure from the PDP on the NJC to transfer and replace some of the more inflexible judges (Akinmade & Falade 2007, p 4).

On the other hand, the PDP claimed that there was 'some close collaboration' between the AC and the tribunal, given the party's prior knowledge of many activities of the tribunal. One of its members asked:

Why was it only the AC that is in the know of the internal workings of the tribunal? Are we to conclude that the AC was crying foul because it had already compromised the transferred judges and was now worried that its 'friends' were being transferred?

Adeolu 2007, p16

Furthermore, Oni, in March 2011 (after the declaration of his opponent as the winner of the election), filed a new suit in the Court of Appeal asking that the court decision that removed him from office be reversed given that there was 'close affinity' between the members of the judicial panel, especially the President of the Appeal Court (Justice Salami), and the leaders of the ACN. Oni supported his application with a sworn affidavit by Senator Umaru Dahiru (chairman of the Senate Committee on the Judiciary), wherein the latter affirmed that Bola Tinubu (the national leader of the ACN) had once approached him to facilitate the appointment of Justice Salami as President of the Appeal Court during his screening by the National Assembly.

Oni also provided evidence to show that Tinubu had exchanged several telephone calls with Justice Salami while the election litigation was ongoing. Thus, Oni claimed, the October 2010 judgement ousting him was biased in favour of Fayemi of the ACN (*Nigerian Compass* June 2011; Irekpen 2011, p 22).⁹

The Ekiti State experience shows that Nigeria's political elites, given their capacity to manipulate the judicial process and the rate of corruption in the judiciary, have developed a distrust of decisions of the judiciary relating to election

9 It is important to note that Oni's application for a review of the October 2010 ruling, in which he alleged that the judiciary was biased against him, was dismissed by the Court of Appeal on 27 February 2012. He headed to the Supreme Court for a review of the verdict of the Court of Appeal on the matter. On 31 May 2013 the Supreme Court ruled that it had no jurisdiction to hear the appeal. For details, see Ojo 2012; Chiedozie 2013; *The Punch*, 1 June 2013.

disputes. For example, the August 2008 ruling of the Bwala-led Elections Petitions Tribunal, which went against the AC, was described in a pro-AC report as 'judicial magic' because 'it ran contrary to legal expectations' (Adaramodu & Jamiu 2011, p 128). Similarly, Yinka Odumakin of the Yoruba socio-political group, *Afenifere*, ostensibly in support of the AC candidate, stated after the same ruling that 'the judgement confirmed that a lot more went on in the tribunal than Nigerians cared to admit' (Olayinka, Olaniyi, Makinde & Aborishade 2008, p 7).

However, after the October 2010 Appeal Court ruling, which favoured the party, one of its prominent members (Rauf Aregbesola, who later became governor of another state) remarked that 'by this judgement, our faith has been rekindled in the capacity of the judiciary' (Aregbesola 2010). Similarly, the PDP, when it benefited from the early rulings, maintained that 'we remain steadfast in our conviction in the integrity of the judiciary' (PDP 2010, p 48) and argued in one of its releases that 'unlike the AC, which has a habit of condemning the judiciary each time a judgement does not favour it, we are law abiding people, and our party believes in the rule of law' (Akaeze 2009, p 20), when the ruling went against it, alleged fraud in the judiciary and labelled the process a 'judicial mathematical manipulation'.

SUMMARY AND CONCLUSION

Within the framework of state-oriented theory this study has attempted to illustrate the dynamics of state institutions and political patterns and processes. In this case the study shows that the structure of the Nigerian judiciary has the potential to permit the perpetration of electoral fraud. Several examples were cited to show cases of compromises in the judiciary which promoted electoral fraud in the state.

The study further employed the special case of the election disputes arising from Ekiti State's 2007/2009 gubernatorial elections to demonstrate the possible judicial dimension to electoral fraud in Nigeria. In this regard, the study shows that the Nigerian political elites see the judiciary as another political arena. For this reason there was a struggle among them to manipulate the judicial process to perpetrate electoral fraud. The immediate implication of this is that there has been a high level of public mistrust of the judiciary in Nigeria, especially with regard to elections. Going beyond the existing theories of electoral fraud, the study demonstrates that the judiciary and non-political elites are relevant to the discourse on electoral fraud in democracies.

To address the issue would require two reforms: the strengthening of the independence of the judiciary and the redefinition and redesigning of its adjudicatory role in election disputes in the country.

— REFERENCES —

- Adaramodu, Y & H Jamiu. 2011. *Long Walk to a New Dawn: An Account of the Struggle and Liberation of Ekiti People*. Ado-Ekiti: Adaramodu and Jamiu.
- Addeh, E. 2010. 'Ekiti: Oni Out, Fayemi In'. *Saturday Punch*, 16 October.
- Adebanwi, W. 2008. *Trials and Triumphs: The Story of TheNews*. Lagos: West African Book Publishers.
- Adeolu, I. 2007. 'Still on Ekiti Tribunal and AC's Propaganda'. *Nigerian Tribune*, 22 November.
- Adejumobi, S. 1999. *Demilitarization and the Search for Democratic Stability in Nigeria*. Mimeo.
- Adejumobi, S. 2000. 'Elections in Africa: A Shading Shadow of Democracy'. *International Political Science Review* 21(1).
- Adeniji, G. 2012. 'Salami, Victim of PDP's Conspiracy – Tinubu'. *The Punch*, 28 May. Available at: www.punchng.com/news/salami-victim-of-pdps-conspiracy-tinubu/
- Adewole, L. 2012. 'Stop Treating Judiciary as Appendage – CJN Tells Govs'. *Nigeria Tribune*, 13 September. Available at: tribune.com.ng/index.php/lead-stories/47550-stop-treating-judiciary-as-appendage-cjn-tells-govs-corrupt-sans-must-lose-title-nba
- Agbaje, S & A Adejumobi. 2006. 'Do Votes Count? The Travails of Electoral Politics in Nigeria'. *Africa Development* 31(3).
- Anderson, M.L. 2000. *Practicing Democracy: Elections and Political Culture in Imperial Germany*. Princeton, N J: Princeton University Press.
- Akazeze, A. 2009. 'Back in the Trenches'. *NewsWatch*, 2 March.
- Akeredolu, L. 2011. 'NBA Disciplinary Panel Indicts Oyinlola's Counsel'. *The Nation*, 1 September.
- Akinmade, K & D Falade. 2007. 'PDP, AC Trade Accusations over Transfer of Tribunal Members'. *Saturday Tribune*, 10 November.
- Alubo, A O. 2006. 'The National Judicial Council: A Desideratum for Judicial Independence and Public Confidence in the Judiciary'. *Frontiers of Nigeria Law Journal*.
- Aregbesola, R. 2010. 'Aregbesola Congratulates Fayemi on Appeal Court Victory'. *Osun Defender*, 15 October. Available at: www.osundefender.org/?p=10328
- Argersinger, P H. 1986. 'New Perspectives on Electoral Fraud in the Gilded Age'. *Political Science Quarterly* 100(4).
- Asoya, S & S Olaosebikan. 2007. 'Oni Will not be Governor – Fayemi'. *TheNews*, 30 April.
- Babalola, A. 2007. *Election Law and Practice*. Ibadan: Emmanuel Chambers.
- Birch, S. 2007. 'Electoral Systems and Electoral Misconduct'. *Comparative Political Studies* 40(12).

- Birch, S. 2008. 'Electoral Institutions and Popular Confidence in Electoral Processes: A Cross-National Analysis'. *Electoral Studies* 27(2).
- Benson, D & A Abdullah. 2012. 'Why Corruption Must Be Stamped Out From the Judiciary'. *Vanguard*, September.
- Bratton, M. 2008. 'Vote Buying and Violence in Nigerian Campaigns'. *Electoral Studies* 27.
- Callahan, W A & D McCargo. 1996. 'Vote-buying in Thailand's Northeast: The July 1995 General Election'. *Asian Survey*.
- Civil Liberties Organisation (CLO). 2004. *Clear and Present Danger: The State of Human Rights and Governance, 2004*. Lagos: CLO.
- Channels Television, 21 August 2012. 'ACN Urges National Assembly to Wade into Justice Salami's Case'. Available at: www.channelstv.com/home/2012/08/21/acn-urges-national-assembly-to-wade-into-justice-salamis-case/
- Chemerinsky, E. 2001. 'Bush v. Gore Was Not Justiciable'. *Notre Dame Law Review* 764.
- Chiedozie, I & S Nwogu. 2012. 'NJC reinstates Salami as President Court of Appeal'. *The Punch*, 11 May. Available at: www.punchng.com/news/njc-reinstates-salami-as-president-court-of-appeal/
- Chiedozie, H. 2013. 'Ekiti: Supreme Court strikes out Oni's appeal'. *The Punch*, 1 June. Available at: www.punchng.com/news/ekiti-supreme-court-strikes-out-onis-appeal/
- Collier P & P C Vicente. 2012. 'Violence, Bribery, and Fraud: The Political Economy of Elections in Sub-Saharan Africa'. *Public Choice* 153(1-2).
- Dada, T. 2012. 'Judicial Independence: A Fillip for the Rule of Law'. *Nigerian Observer Online*. Available at: www.nigerianobservernews.com/3102008/features/index.html
- Dudley, B. 1982. *An Introduction to Nigerian Government and Politics*. London: Macmillan.
- Evans, P, D Rueschemeyer & T Skocpol (eds). 1985. *Bringing the State Back In*. Cambridge: Cambridge University Press.
- European Union Election Observation Mission (EUEOM). 2003. *Nigeria: National Assembly Elections, Presidential and Gubernatorial Elections, State Houses of Assembly Elections* (Final Report). Available at: eeas.europa.eu/eueom/pdf/missions/nigeria2003.pdf
- EUEOM. 2011. *Nigeria: Final Report on the General Elections*. Available at: www.eueom.eu/files/dmfile/final-report-nigeria2011_en.pdf (25 May 2012).
- Falade, D. 2007. 'AC, Ekiti Govt. Trade Words over Transfer of Tribunal Judge'. *Nigerian Tribune*, 9 November.
- Fawehinmi, G. 2007. 'The Role of the Election Tribunals'. *The Guardian*, 2 May. Available at: www.nigerianmuse.com/20070502063404zg/sections/other-

- peoples-essays/gani-fawehinmi-the-role-of-election-tribunals/
- Fayemi, J K. 2009. 'An Insider's View of Electoral Politics and the Struggle for Electoral Reform in Nigeria'. African Studies Association's Annual Conference, New Orleans, USA, 20 November.
- Federal Government of Nigeria (FGN). 2008. *Report of the Electoral Reform Committee* (vol 1, main report).
- Gbadamosi, S. 2010. 'A Tale of Two Rulings, One Judgment in Ekiti'. *Nigerian Tribune*, 13 May.
- Hartlyn, J. 1994. 'Crisis-ridden Elections (again) in the Dominican Republic: Neopatrimonialism, Presidentialism, and Weak Electoral Oversight'. *Journal of International Studies and World Affairs* 36(4).
- Hicken, A D. 2007. 'How Do Rules and Institutions Encourage Vote Buying?'. In F Schaffer (ed). *Elections for Sale: The Causes and Consequences of Vote Buying*. Boulder, CO: Lynn Rienner.
- Human Rights Watch. 2007. *Criminal Politics: Violence, 'Godfathers' and Corruption in Nigeria*. New York: Human Rights Watch.
- Ibrahim, J. 2006. 'Transforming Elections in West Africa into Opportunities for Political Choice'. Nordic Africa Institute Conference on 'Post-Conflict Elections in West Africa: Challenges for Democracy and Reconstruction', Accra, Ghana, 15-17 May.
- Ibrahim, J. 2007. *Nigeria's 2007 Elections: The Fitful Path to Democratic Citizenship*. Washington, DC: United States Institute of Peace (USIP).
- Ibrahim, J & S Egwu. 2005. *Nigeria's Electoral Geography and the Path to Free and Fair Elections: How Can Citizens Defend their Votes?* Abuja: Electoral Reform Network.
- Ihonvbere, J O. 2000. 'How to Make an Undemocratic Constitution: The Nigerian Example'. *Third World Quarterly* 21(2).
- International Crisis Group (ICG). 2011. 'Lessons from Nigeria's 2011 Elections'. Available at: [www.crisisgroup.org/~media/Files/africa/west-africa/nigeria/B81%20-%20Lessons%20from%20Nigeras%202011%20Elections.pdf](http://www.crisisgroup.org/~/media/Files/africa/west-africa/nigeria/B81%20-%20Lessons%20from%20Nigeras%202011%20Elections.pdf)
- Irekpen, D. 2011. 'Ekiti: Will Appeal Court Reverse Itself?'. *ThisDay* 16 (5825), 15 April.
- Kolade-Otitoju, B. 2008. 'A Mega Scandal'. *The News*, 14 July.
- Kornblith, M. 2005. 'Elections Versus Democracy'. *Journal of Democracy* 16(1).
- Lafargue, J. 2008. *The General Elections in Kenya, 2007*. Nairobi: IFRA
- Lehoucq, F. 2003. 'Electoral Fraud: Causes, Types, and Consequences'. *Annual Review of Political Science* 6.
- Lehoucq, F & I Molina. 2002. *Stuffing the Ballot Box: Fraud, Electoral Reform, and Democratization in Costa Rica*. Cambridge: Cambridge University Press.

- Makumbe, J M. 2002. 'Zimbabwe's Hijacked Election'. *Journal of Democracy* 13(4).
- Marcus, R & P Razafindrakoto. 2003. 'Participation and the Poverty of Electoral Democracy in Madagascar'. *Africa Spectrum* 38(1).
- McDonald, R. 1972. 'Electoral Fraud and Regime Controls in Latin America'. *The Western Political Quarterly* 25(1).
- Migdal, J S. 2001. *State in Society: Studying how States and Societies Transform and Constitute One Another*. Cambridge: Cambridge University Press.
- Migdal, J S, A Kohli & V Shue (eds). 1994. *State Power and Social Forces: Domination and Transformation in the Third World*. Cambridge: Cambridge University Press.
- Minnite, L.C. 2007. *The Politics of Voter Fraud*. Washington and Arkansas: Project Vote.
- Molina, I & F Lehoucq. 1999. 'Political Competition and Electoral Fraud: A Latin American Case Study'. *The Journal of Interdisciplinary History* 30(2).
- Nation, The*. August 2008. 'Ekiti Tribunal: In Ekiti, the Waiting Continues'.
- Nation, The*. 2011. 'Why we are Vociferous against Justice Salami's Illegal Removal – ACN', 25 August. Available at: www.thenationonline.net/2011/index.php/news-update/17251-why-we-are-vociferous-against-justice-salami-illegal-removal-by-acn.html
- National Democratic Institute (NDI). 2008. *Final NDI Report on Nigeria's 2007 Elections*. Washington and Abuja: NDI.
- Nda-Isaiah, S. 2006. 'See What The Judiciary Has Done To Nigeria'. Available at: www.gamji.com/sam/sam25.htm
- Nigerian Law Times*. 2011. '2011 Elections: The Role of the Judiciary – Owonikoko', January.
- Nigerian Compass*. 2011. 'Oni: How Salami, ACN Chiefs Exchanged Calls, Texts', June. Available at: [//www.ekiti.com/ekitinews/display_search.php?news_id=104724](http://www.ekiti.com/ekitinews/display_search.php?news_id=104724)
- Nigerian Muse*. 2008. 'Supreme Court Judgement – Summaries of Justices: Arguments for and Against Yar' Adua, Buhari, Atiku', 13 December. Available at: www.nigerianmuse.com/20081213070147zg/nigeria-watch/elections-2007/supreme-court-judgement-summaries-of-justices-arguments-for-and-against-yaradua-buhari-atiku/
- Nnochiri, I. 2011. 'Corruption in Judiciary: CJN, NBA to the Rescue?'. *Vanguard*, 29 September.
- Nwabueze, B O. 1985. *Nigeria's Presidential Constitution, 1979-1985: The Second Experiment in Constitutional Democracy*. New York: Longman Inc.
- Nwabueze, B. 2008. *Nature and Forms of Election Rigging*. Available at: nigerdeltaworldcongress.org/articles/nature_and_forms_of.pdf
- Nwakwo, C. 1997. 'The Judicial System and Human Rights'. In L Diamond, A Kirk-Greene & O Oyediran. (eds). *Transition Without End: Nigerian Politics and Civil Society Under Babangida*. London: Lynne Rienner Publishers.

- Odimegwu, J.P. 2012. 'Judiciary should be financially independent – Gumi'. *National Daily Newspaper*, 22 October. Available at: nationaldailyngr.com/special-interviews/judiciary-should-be-financially-independent-%E2%80%94gumi
- Ogundele, K. 2013. 'NJC suspends Justices Naron, Archibong'. *The Nation*, 22 February. Available at: thenationonlineng.net/new/news/njc-suspends-justices-naron-archibong-2/
- Ojo, K. 2012. 'Essence of Oni's Supreme Court Appeal'. *The Will*, 23 November. Available at: thewillnigeria.com/opinion/17242.html
- Oko, O. 1997. 'Lawyers in Chains: Restrictions on Human Rights Advocacy under Nigeria's Military Regimes'. *Harvard Human Rights Journal* 10.
- Olayinka, L. 2012. 'PDP to ACN: Tell Nigerians if Justice Salami Belongs to Your Party'. Available at: www.thenigerianvoice.com/nvnews/90879/1/pdp-to-acn-tell-nigerians-if-justice-salami-belong.html
- Olayinka, O, B Olaniyi, F Makinde, S Aborishade. 2008. 'Tribunal Upholds Oni's Election'. *The Punch*, 29 August.
- Olowofoyeku, A. A. 1989. 'The Beleaguered Fortress: Reflections of the Independence of Nigeria's Judiciary'. *Journal of African Law* 33(1).
- Omotola, J S. 2009. ' "Garrison" Democracy in Nigeria: The 2007 General Elections and the Prospects for Democratic Consolidation'. *Commonwealth & Comparative Politics* 472.
- Omotola, J S. 2010. 'Elections and Democratic Transitions in Nigeria under the Fourth Republic'. *African Affairs* 109(437).
- Onabanjo, D. 'Judiciary: Who Clears the Corruption Mess?'. *Tell*, 5 June. Available at: www.tellng.com/index.php?option=com_k2&view=item&id=1482:judiciary-who-clears-the-corruption-mess?&Itemid=125
- Oni, A. 2010. 'Oni Triumphs Again'. *The Westerner*, 17 May.
- Orintunsin, J. 2012. 'Judicial Staff Union Sues Governors, NJC, Others for Financial Autonomy'. *The Nation*, 23 October. Available at: thenationonlineng.net/new/news/judicial-workers-sue-governors-njc-others/
- Otorofani, F. 2010. 'Nigerian Judiciary Reinvented as the Ultimate Rigging Machine'. Available at: franklinotorofani.wordpress.com/2010/12/07/nigerian-judiciary-reinvented-as-the-ultimate-rigging-machine/
- Oyetibo, T. 2012. 'The Role of the Judiciary in Combating Corruption in Nigeria'. *Premium Times*, 12 September. Available at: premiumtimesng.com/opinion/101606-the-role-of-the-judiciary-in-combating-corruption-in-nigeria-by-tayo-oyetibo-san.html
- People's Democratic Party (Ekiti State Branch). 2010. 'Ekiti Election Petitions Tribunal: AC's Calumny and Blackmail'. *Nigerian Tribune*, 16 May.
- Phillips, J A. 1979. 'The Structure of Electoral Politics in Unreformed England'. *Journal of British Studies* 19(1).

- Posada-Carbó, E. 2000. 'Electoral Juggling: A comparative History of the Corruption of Suffrage in Latin America, 1830-1930'. *Journal of Latin American Studies* 32(3).
- Project 2011 Swiftcount. 2011. *Final Statement on the April 2011 General Elections: National Assembly, Presidential and Gubernatorial Elections*. Available at: www.ndi.org/files/PSC-Final-Election-Observation-Statement-May-18.pdf >
- Punch, The*. 2012. 'Ekiti: Supreme Court strikes out Oni's appeal', 1 June.
- Punch, The*. 2012. 'Toying with Corruption in the Temple of Justice', 23 September. Available at: www.punchng.com/politics/toying-with-corruption-in-the-temple-of-justice/
- Rawlence, B & C Albin-Lackey. 2007. 'Nigeria's 2007 Elections: Democracy in Retreat'. *African Affairs* 106(424).
- Reynolds, J F. 1993. 'A Symbiotic Relationship: Vote Fraud and Electoral Reform in the Gilded Age'. *Social Science History* 17(2).
- Sahara Reporters*. 2006. 'Fayose and Deputy, Olujimi Impeached, His Whereabouts Still Unknown', October. Available at: saharareporters.com/news-page/breaking-news-fayose-and-deputy-olujimi-impeached-his-whereabouts-still-unknown
- Skocpol, T. 1985. 'Bringing the State Back In: Strategies of Analysis in Current Research'. In P Evans, D Rueschemeyer & T Skocpol (eds). *Bringing the State Back In*. Cambridge: Cambridge University Press.
- Skocpol, T. 2008. 'Bringing the State Back In: Retrospect and Prospect'. *Scandinavian Political Studies* 31(2).
- Soyinka, W. 2006. 'Towards the Dismantling of an Evil Empire'. *The Guardian*, 12 December.
- Suberu, R. 2007. 'Nigeria's Muddled Elections'. *Journal of Democracy* 18(4).
- Transition Monitoring Group (TMG). 1999. *Interim Report of the Presidential Elections held on Saturday, 27th of February 1999*. Available at: nigeriaeworld.com/focus/politics/tmg_report1.html
- Wang, C & C Kurzman. 2007. 'Dilemmas of Electoral Clientelism: Taiwan, 1993'. *International Political Science Review* 28(2).
- Ward, N. 1949. 'Electoral Corruption and Controverted Elections'. *The Canadian Journal of Economics and Political Science* 15(1).
- United States Institute for Peace (USIP). 2011. *Nigeria's 2011 Elections: Best Run, but Most Violent*. Available at: www.usip.org/files/resources/PB%20103.pdf > (27 February 2012).
- Ugbagwu, E, E Ikhilae, O Yishau & S Adeniyi. 2008. 'Tribunal Under Fire: Anger over Judges' Romance with Oyinlola's Lawyer'. *The Nation*, 9 July.
- US Department of State, 2012. *Report on Nigeria*. Available at: www.state.gov/documents/organization/186441.pdf
- Zafarullah, H & M Y Akter. 2001. 'Military Rule, Civilianisation and Electoral

Corruption: Pakistan and Bangladesh in Perspective'. *Asian Studies Review* 25(1).

Ziblatt, D. 2009. 'Shaping Democratic Practice and the Causes of Electoral Fraud: The Case of Nineteenth-Century Germany'. *American Political Science Review* 103(1).

Interviews

Former Public Relations Officer of the Ekiti State PDP and former Chairman of a local government in Ekiti State, Ado-Ekiti, 7 July 2012.

Telephone interview, Bayo Olu-Ojo, former PDP Chairman in Ekiti State, 9 July 2012.

Jide Awe, ACN Chairman in Ekiti State, Ado-Ekiti, 10 July 2012.