***"THE SUPREME COURT'S INTERPRETATION OF SECTION 180 OF THE 1999 CONSTITUTION IN THE FIVE GOVERNORS' CASE; IMPLICATIONS FOR NIGERIA'S CONSTITUTIONAL DEMOCRACY."***

***PAPER PRESENTED BY OLUWOLE OSAZE UZZI, ESQ. AT THE NIGERIAN BAR ASSOCIATION (NBA) BENIN LAW WEEK. MAY 2012.***

## PROTOCOL

## Introduction:

Permit me to start by thanking the organisers of the NBA Law Week for their kind invitation to me, not only to participate at this year's Law Week but also to share my views on this topical issue dealing with one of the most important decisions of the Supreme Court and its likely implications in our quest for a sustainable, virile, democratic nation bound by its constitution and the Rule of Law. The cases essentially deal with the applicability and interpretation of section 180 of the Constitution of the Federal Republic of Nigeria (1999) (prior to its amendment). To aid our discourse therefore, it is imperative to state the facts and reproduce the relevant portion of the provision . First, the facts:-

## THE FACTS

Before going further, it is perhaps pertinent to remind ourselves that the appeals to the Supreme Court arose out of, not one, but five cases filed by the Governors of five states challenging the notice issued by the Independent National Election Commission (INEC) to conduct Governorship elections in their respective states, viz- Kogi, Adamawa, Bayelsa, Sokoto, and Cross River State in January, 2011. In addition to these 5 cases, Brig-General Mohammed Buba Marwa and his party, the Congress for

Progressive Change (CPC) (who were interested in participating in the Governorship election in Adamawa), with the leave of the Supreme Court also appealled as a party interested in the matter. So in total, there were 6 appeals all of which were consolidated **(SC141/2011, SC266/2011, SC282/2011, SC56/2011, SC267/2011, and SC357/2011.)**

It will be recalled that General elections were conducted in 2007 nationwide, which included Governorship Elections in all the 36 States. Five of these governorship elections were successfully challenged at the Tribunals and the Court of Appeal and the affected governors who had earlier been sworn in on May 29, 2007 had their election nullified for various reason. They were ordered to vacate office and new elections conducted following the annulment.

All five erstwhile governors were successful in the re-run elections held at various times in 2008 and were accordingly sworn in again taking their respective Oaths of Allegiance and of Office on the following days:-

| | | | | |
|---|---|---|---|---|
| (1) | Ibrahim Idris | (Kogi) | - | 5/4/2008 |
| (2) | Admiral M. Nyako | (Adamawa) | - | 30/4/2008 |
| (3) | Aliyu Wamako | (Sokoto) | - | 28/5/2008 |
| (4) | Timipre Sylva | (Bayelsa) | - | 29/5/2008 |
| (5) | Liyel Imoke | (Cross River) | - | 28/8/2008. |

INEC, in the belief that their respective tenures expire in May 2011, having taken their first Oaths and assumed the office of Governor of their respective states on May 29, 2007, issued notice of Governorship Elections for some states, (including these five) scheduled for January 2011. In accordance with the 1999 Constitution and the Electoral Act, 2010. The five Governors disagreed with INEC's position.

It should be noted that prior to the publication of the notice of election, the 1999 Constitution had been amended, including Section 180, with the inclusion of a new subsection (2A) which provides as follows:-

***"In the determination of the four years term where a re-run election has taken place and the person earlier sworn in wins the re-run election, the time spent in office before the date the election was annulled shall be taken into account."***

(See Section 17of the Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010.)

**SECTION 180.**

The old section 180, which called for interpretation in these appeals provides as follows:-

**(1)** ***Subject to the provisions of this Constitution a person shall* h*old the office of Governor of a State until:-***

***(2)*** ***(a)*** ***when his successor in office takes the Oath of Office; or***

**(b)** - - - - - -

**(c)** **- - - - - -**

**(d)** ***He otherwise ceases to hold office in accordance with the provisions of the constitution.***

**(2)** ***Subject to the provision of subsection (1) of this section, the governor shall vacate his office at the expiration of four (4) years commencing from the date when:-***

***(a)*** ***in the case of a person first elected as governor under this constitution, he took the Oath of Allegiance and Oath of Office; and***

***(b)*** ***the person last elected to that office took the oath of Allegiance and Oath of Office or would, but for his death, have taken the Oaths.***

**AT THE HIGH COURT:**

Following the issuance of the notice of election and preparations for same, the Governors instituted their actions at the Federal High Court for a declaration that the notice was pre-mature as their tenures do not expire until

2012 and for orders of injunction stopping INEC from conducting any election in their respective States. Their reliefs were predicated on the argument that INEC was acting in breach of the Constitution and the Electoral Act in giving notice of the elections in so far as it concerns their respective states and commencing preparation for the conduct of the governorship elections in the said states in 2011 when tenures do not expire until well into 2012.

**The Governors' Argument.**

In support of their case, the argument of the Governors can generally be summarised as follows:-

(i) That upon the nullification of their election in 2008, their respective Oaths taken were thus rendered null and void and of no legal effect, having been done or taken pursuant to an act declared a nullity. Afterall, you cannot build something on nothing, following Lord Dennings dicta in **UAC V. MCFOY (1961)3 ALL ER 1169 @ 1172.**

(ii) Consequently, their four years tenure of office did not commence or start to run until they took their second Oaths following their victories in the re-run elections by virtue of the combined effect of Section 180(2) (a) and (b) of the 1999 Constitution and the decision of the Supreme Court in **PETER OBI V. INEC (2007) 11 NWLR (Pt. 1046) 565.**

(iii) It was their further contention that the amended Constitution (Section 180 (2) (A) (which stipulated that the time previously spent in office should be taken into account in determining the 4 years tenure) does not apply to them as it does not have retrospective application, the amendment having been made in 2010, years after they took office.

The amendment, they contended further, does not and cannot apply retrospectively to affect their rights which they had acquired under the old Section 180 before the amendment. Laws are generally

prospective as they apply to situations and transactions arising after they have come into effect.

There is, in our Law a presumption against retrospective legislation, which can only be rebutted by clear and express words to that effect in the legislation. This is not so in the Constitutional amendment of 2010.

**INEC's Position**

The Commission was of the view that what it had done was in order, as it, being a creature of the Constitution, was bound to give effect to it and carry out its mandate under the law. It was its belief that the tenure of the governors will expire in 2011, they having taken their respective Oaths in 2007. It would have been otherwise if someone else won the re-run election in accordance with the decision in **PETER OBI V. INEC(Supra).**

The Constitution envisages a four year tenure (8 years cumulatively) for governors and such cannot be extended under any guise. In any case, the Constitution has now been amended and is operative to take into account the time earlier spent in office before the nullification of the earlier election of 2007.

Furthermore, what was annulled, was the previous elections and the annulment of the election cannot be equated with the annulment of the Oaths taken. The Oaths themselves remain valid, as does all actions taken when they occupied the office – ***de facto****,* even if not ***de-jure****.* The second Oaths taken by the governors after the re-run elections were, at best, superfluous.

**The High Court Decision**

On the 23rd of February, 2011**,** the Federal High Court delivered its judgment in favour of the governors and in the main, granted the reliefs sought. It held that the tenures do not terminate until 2012, the

governor not having taken any valid Oaths until 2008 (after the re-run elections). Their previous Oaths, the Court held, were nullified along with the election.

The computation of their 4 years tenures commenced from the second Oaths taking. In the words of the learned trial Judge, A. Bello J. ***"the nullification of the election of the plaintiffs by the Court of Appeal. has the legal effect of nullifying the Oath of Allegiance and Oath of Office which they took on 29th May, 2007"***

The learned trial Judge went on to hold that the period in which the plaintiffs held office **de facto** should not be taken into account in calculating his 4 years term. He held further that the amended **Section 180(2A)*" cannot and does not apply retrospectively to affect the re-run election of all the plaintiffs as it became effective on 16th July, 2010".***

**THE COURT OF APPEAL DECISION**

Dissatisfied with this judgment, INEC appealed to the Court of Appeal, which on 15th April, 2011 dismissed the appeal and affirmed the judgment of the trial Court.

**THE COURT OF APPEAL DECISION**

The main ratio of the Court of Appeal's decision is that any reference to an election presuppose a proper election under the law – one which is valid in that it complied with the provisions of the Constitution and the Electoral Act. This is the foundation upon which section 180 can apply. Any Oath taken pursuant to a flawed or annulled election can not be the Oaths envisaged in the Constitution as ***" a valid election conducted in accordance with the constitution and the Electoral Act is a condition precedent to the validity of the Oaths".***

The Court went on to hold that the effect of the nullification of the elections.

> "***is to completely wipe out, obliterate, remove, undo, erase or render it ineffective, useless, as if it had never been in the first place. In judicial and legal terms and context, the nullification of any action or order ….. is to render such action or order void from the very beginning, ab initio, as if it had never taken place".***

INEC was again dissatisfied with this judgment and further appealed to the Supreme Court.

**Was INEC Right to Appeal?**

Some have questioned the rationale, and right of INEC appealing these decisions, it being an umpire with nothing to lose whether the elections are conducted in 2011 or 2012.

We do not intend to go into the argument or dwell on the desirability or otherwise of INEC appealing these decisions. I only wish to point out that in my humble view, the Commission was right in chosing to appeal.

First, it had the undisputed Constitutional right to appeal. Further, it had the duty to seek an interpretation of the Constitution especially as it affects its responsibilities, functions and obligations under the law. This will no doubt aid and guide it and other stakeholders in their future conduct. Surely, this is in accord with common sense and the rule of law. We are all the better for it now, whether we agree with the final decision or not, for it has brought some certainty to the interpretation of the law.

**AT THE SUPREME COURT:**

The Supreme Court delivered its judgment on the 27th January, 2012, with the Chief Justice presiding, while Onnoghen JSC delivered the leading judgment which was unanimously endorsed by a full panel. It is pertinent to point out here before proceeding to discuss the decision, that the Court, due to the importance it attached to the issue in question invited Chief Richard Akinijide SAN, (former Attorney General Federation), Olukonyinsola Ajayi, SAN and Professor Itse Sagay, SAN, as amicus curiae. This is in addition to a dozen SAN's (including another former Attorney General of the Federation and the Solicitor General of Nigeria) retained by the parties and two other SANs. and a Professor of Law who were in the teams of the amicus curiae.

**Issues For Determination**

The main issue identified by the Supreme Court for determination was whether the lower Court was right in holding that the tenures of the governors commenced from the date they took their second Oaths in 2008 as against the first ones in 2007, having regards to section 180(1) and (2) and 182 (1)b of the 1999 Constitution.

The sub issue distilled by the Court from the various briefs, is whether section 180(2A) of the Constitution of 1999 (as amended) is applicable to the facts of the case

**Preliminary objection.**

The Peoples Democratic Party (PDP), a respondent in some of the appeals, raised preliminary objection, the gravamen of which is that the appeal had become academic and was unconstitutional. The Court wasted no time in dismissing the objection as the main issue for determination is ***"of great constitutional importance and does not deserve to be trivialized ….(it) ought to be considered and***

***resolved on the merit, not to be truncated by technical arguments not supported by the facts and circumstances of the case"*** (per Onnoghen, JSC.)

**The Supreme Court Decision**

The Supreme Court then considered the appeal on its merit and unanimously allowed same. It set aside the judgment of the lower Courts and stated that the tenure of the governors commenced on 29th May, 2007 and terminated on 28th May, 2011**,** being 4 years allowed by the 1999 Constitution

**Ratio and Reasoning.**

In reaching its conclusion, the Court held that the tenure of a governor shall be four years from when he first took the Oaths. He may spend less, due to death, resignation or impeachment, but he cannot spend more. The learned Justices were guided by established rules of interpretation relying particularly on Obaseki JSC's 12 point rule propounded in **ATTORNEY GENERAL OF BENDEL STATE V. ATTORNEY GENERAL OF THE FEDERATION (1981) 10 SC I** AND OGUNDARE JSC'S ADDITIONAL 4 POINT RULE IN ***ISHOLA V. AJIBOYE (1994) 8SCNJ* (PT. 1) 1 @ 35** amongst others. It re-stated that the Constitution must be constructed liberally so as not to defeat the obvious ends it was designed to serve **(NAFIU RABIU V. Kano State (1980) 8 – 11 SC 130 @ 149** per Sir Udo Udoma JSC) See also **SENATE OF THE NATIONAL ASSEMBLY V. MOMOH (1983**) 4 NWLR 269.

The intendment of a 4 years tenure was held to be **"the will of the legislature"** especially when construing the Constitution as a whole. To hold otherwise will defeat the intendment of the framers and

acceding to the argument of the Governors will have the effect of elongating their tenures.

**Unbroken Tenure of Governors**

The 4 years tenure is an unbroken tenure following its earlier decision. Hence, although in **INOAKOJU V. ADELEKE (2007) 4 NWLR (Pt. 1025) 423,** the Court held that the purported impeachment of Governor Ladoja of Oyo State was unconstitutional, null and void. It however refused to extend his tenure by granting him the 11 months he had stayed out of the office consequent upon the purported impeachment: **See LADOJA V. INEC (2007) 12 NWLR (Pt. 104 7) 119 @ 167-168.**

**Voidity of Oaths pursuant to voided election:**

As to the argument that the Oaths made pursuant to an annulled election are void, the Supreme Court did not feel bound by the Court of Appeal in this interpretation. Not only did it hold that Lord Dennigs often quoted dicta in **UAC V. MACFOY (Supra)** was obiter, it stated clearly that the elections were not null and void, but voidable. In Onnoghen JSC's: words:-

> ***"when you consider the nature and consequences of an election which produced a winner who was sworn in on the presumption that the election that produced him was regular and legally valid, then when that election is set aside or nullified, the nullification is only limited to the election and does not affect acts done while the person occupied that office. In effect, what it means is that the election that was later nullified was only voidable, not void, because if it is to be taken literally as void ab initio… it means the country would be plunged into chaos as all acts done by the governors must of necessity be null and void. So when we have a situation where the acts of***

***the governors whose election is nullified are saved, then the only legal explanation or meaning to be attached to the use of the word, "null and void" in describing the said election by the Court is "voidable" ab inito"***

The governors, the Court held, were for all intents actually governors **de facto**; though they may not have been so **de-jure** for that first period they functioned in office. Further and notwithstanding the annulment of their elections, Court/Tribunal's decision did not affect the Oaths taken nor such acts as the Bill's signed into law or contracts awarded. To hold otherwise would, in My Lord's words be "**Contrary to common sense and the clear intention of the framers of the constitution".**

That not all acts of the governors who took Oaths pursuant to an invalid election are void is consistent with the reasoning of the Court in **BALONWU V. Governor, Anambra State (2009) 18 NWLR (Pt. 1172) 13 @ 49.** Although Dr. Chris Ngige, de -jure may not have been governor in Anambra State, as the Court held that he was never validly elected in consonance with the extant laws, such acts as the contracts awarded, bills signed into law and the inauguration of the state House of Assembly were held to have been proper and done in accordance with Constitutional provisions.

One last word on the ***de-jure*** and ***de-facto*** issue which may be raised as a quere :- ***"*** *What is the position of the time spent out of office by the governors between when their elections were annulled by the Courts or Tribunals, and the time when they were sworn in for the second time*"

Some of these governors were out of office for up to 2 months. In that time, they were neither governors *de-facto* or *de-jure*. Perhaps we can hold on the unbroken tenure' principle enunciated in **LADOJA's CASE** but in that case, Ladoja was the *de-jure* governor as his purported impeachment was held to be illegal, null and void and he was said by the Court to be the governor for this period, at least in the eyes of the law.

**Can The Time Fixed By The Constitution Be Extended?**

This was aptly answered again by Onnoghen JSC when he stated that:-

> ***"It is settled law that the time fixed by the Constitution cannot be extended. It is immutable, fixed like the rock of Gibraltar it cannot be extended, elongated, expanded, or stretched beyond what it says. To calculate the tenure of office of the governors' from their second Oaths of Allegiance and Office while ignoring the period from 29th May, 2007 when they took the first Oaths is to extend the four years tenure constitutionally granted the governors to occupy and act in that office which would be unconstitutional. It is therefore clear and I hereby hold that the second Oaths of Allegiance and of office taken in 2008, though necessary to enable them continue to function in that Office, were clearly superfluous in the determination of the four years tenure under section 180(2) of the 1999 Constitution".***

**SOME OTHER ISSUES ARISING:**

It is clear from the foregoing that the Court took such issues as public policy and "common sense" into consideration in determining the case. The common sense approach to statutory interpretation is in line with the Court's pronouncement in such cases as **Nigerian Arab Bank v. Comex (1999) 6 NWLR (Pt. 608)648 and Sobamowo v. Elemuren (2008) 11 NWLR (Pt. 1097) 12 @ 28-29 and CPC V. INEC (1012) 1 NWLR (Pt. 1280) 106 @ 127.**

The Learned Justices saw it as going against the letter and spirit of the constitution, and therefore unconstitutional for any person to spend more than the accumulative 8 years in office as governor. They brushed aside the consideration of the amended (new) section 180(2A), holding that it was inapplicable to the determination of the issue under consideration as the

intention of the framers was clear even before the amendment was introduced.

The governors' counsel cited and relied on the earlier dictum in **PETER OBI V. INEC (2007) 11 NWLR (Pt. 1046) 565** to the effect that**.**

> ***"The Oath taken by Dr. Chris Ngige as Governor of Anambra State was nullified. The effect of this nullification is that Dr. Chris Ngige was never elected and sworn in as Governor of Anambra State."***

It should however be noted that the facts and circumstances of Peter Obi's case differ with the case at hand, as there was no re-run election in Anambra, and the election was not nullified. What was nullified was the return of Dr. Ngige as the winner of the election. In its stead, Peter Obi was returned as having won the election by the Tribunal and affirmed by the Court of Appeal. The question of the validity or invalidity of Ngige's Oath was therefore not an issue that arose for consideration and is not the ratio of the case.

It will also be recalled that the Supreme Court agreed with the Court of Appeal and refused to set aside the Oaths of Allegiance and Office sought by the applicants in **BUHARI V. OBASANJO (2003) 17 NWLR (Pt 850) 587 @ 664 – 665** at the interlocutory stage, acknowledging that no vacuum can be created in government and for public policy considerations amongst others.

In any case, the law seems to have been settled without any equivocation with the amendment to the Constitution, the effect of which the Court of Appeal has had the opportunity to consider in **UDUAGHAN V. OGBORU (2012) NWLR (Pt. 1282) 521.** The time earlier spent in Office is to be taken into consideration in the computation of the four year tenure of a governor who wins a re-run election.

## POST JUDGMENT CONTROVERSIES

No sooner had the ink dried in the judgment did new controversies arise First, since the governors' tenures expired in 2011, they were to vacate Office forthwith, but who was to take over in Kogi State where the election to fill the vacancy had already been conducted?

The Attorney General of the Federation gave directives that the Speakers of the five affected States be sworn in. In my humble view, while this may be in accord with the Constitution in the other four States (see section 191 (2) thereof), it does not hold true for Kogi. I think the INEC position as stated by its Chairman – Professor Attahiru Jega was right; the winner of the election already conducted, was correctly sworn in. He was the governor -in-waiting, as it were. Harbouring under the belief (mistaken as it turned to be out, but in accord with the Court of Appeal decision that the tenure of his predecessor had not expired). The winner of the election was waiting for the expiration of the incumbents tenure before being sworn in. Section 185 (2) of the Constitution also stipulates that the Oath should be administered by the Chief Judge. Grand Kadi of the Sharia Court of Appeal or the President of the Customary Court of Appeal of the State.

Another controversy arose out of INEC's decision to bring some of the governorship elections forward. Some felt that the earlier scheduled dates should have remained. Again, I think the Commission was in order. Vacancies had occurred and it was bound to act more timeously in view of the fact that the Constitution did not envisage such a situation as governors staying on in office for a year after the expiration of their tenure, as it enjoins the Commission to conduct such elections not later than 30 days before the expiration of their tenures. (See section 4 of the Constitution (Second Alteration) Act, 2010 which amended section 17 of the First Alteration Act, 2010 and Section 178 of the 1999 Constitution).

The third controversey concerned the fate of the earlier party primaries for selection of candidates undertaken pursuant to the earlier notice given by the Commission to the political parties especially in Kogi and Bayelsa. Some parties had already forwarded the names of their candidates to the Commission pursuant to the provision of Section 31 of the Electoral Act. 2010. (as amended) Following the decisions of the lower Courts, INEC had directed the parties to conduct fresh primaries. The Peoples Democratic Party (PDP) complied with this and new candidates then emerged and had their names forwarded to the Commission in line with section 31 of the Electoral Act, 2010 (as amended).

It is argued that INEC had no right to call for fresh congresses or to accept any names other than those earlier submitted. Those who believe so refer to section 33 of the Electoral Act which provides that

> ***"No political party shall be allowed to change or substitute its candidate whose name has been submitted pursuant to section 31 of this Act except in the case of death or withdrawal lay the candidate"***

If the earlier notice of election is valid, then everything done pursuant thereto, including the earlier primaries and the submission of names are valid, it is argued. These are live issues in the on going cases before the Courts, so are ***sub-judice***. We therefore must terminate our discussion of this at this point and await the Courts' decisions.

## CONCLUSION

No doubt, and as acknowledge by the Supreme Court itself, the five Governors' case as they have become known, resolved ***"a very thorny constitutional issue which had heated up the polity for a while".*** In reaching its decision, the Court held that it could not be the intendment of the

drafters of the Constitution that the tenure of Governors should be indefinite, or last beyond the 4 years (single tenure) or 8 years (cumulative) that the Constitution stipulated and envisaged. This will bring uncertainty to an otherwise clear and unequivocal provision.

In resolving the issues however, new issues seem to have been thrown up. In effect, the Court has said that the setting aside or nullification of an election does not necessarily affect acts done while the person sworn in was in office. The election, it held, is only voidable and not void ab initio, regardless of the words used by the Court or Tribunal. Not all acts of such an impostor Governor will be regarded as null and void, even though they are predicated on a null election.

Can we then now conclude that it is not only in the metaphysical world or in magic that one can sometimes build something on nothing. This now seems to happen sometimes in law, notwithstanding the dicta in **UAC V. MACFOY (supra)** and the long line of cases where this has been accepted and applied in our higher Courts.

Finally, we should ask ourselves, ***"Is this an appropriate case where the Supreme Court should have made specific consequential orders as it did in AMAECHI V. INEC* (2008)5NWLR (Pt. 1080)223 *in* order to *further clarify issues as to successors especially in Kogi State and the fate of the party primaries in Kogi and Bayelsa States, even though from the records, no specific request was made for it***"

I leave you with this food for thought – Bon Appetite.

Thank you all and God bless.

**OLUWOLE OSAZE UZZI Esq.**
**April, 2012.**