Knowledge Exchange

OALP Client Update

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Constitutional Amendment

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The impact of the recent constitutional amendment on the nullification of gubernatorial elections

Introduction

The controversy which surrounded the interpretation of the provisions of section 180(2) of the Constitution of the Federal Republic of Nigeria 1999 ("the **Constitution**") seems to have been laid to rest by the recent enactment of the Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010 ("the **First Alteration Act**"). The amendment brought about by the First Alteration Act significantly heralded a new beginning for the interpretation of the provisions of the said section 180(2) by the insertion of a new section 180(2)(A) into the Constitution which reads thus:

> *"In the determination of the four year 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"*

Out of this amendment to section 180 flows various issues to wit: what is the mischief which this constitutional amendment seeks to cure; or better still what are the policy reasons underlying the amendment of section 180 of the Constitution along these lines? A host of divergent views and interpretation have since ensued; however before taking a latch into these, it is important to provide a brief background into the purport of section 180(2) of the Constitution.

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Section 180(2) of the Constitution

The combined effect of the provisions of sections 180(2) (a) and (b) of the Constitution is that, a duly elected governor may only remain in office for a period of 4 years commencing from the date he took the Oath of Allegiance and Oath of Office. By virtue of section 180(1), the Governor shall hold office until the occurrence of any one of the following events: (i) when his successor in office takes the Oath of that office or (ii) he dies whilst holding such office; or (iii) the date when his resignation from office takes effect; or (iv) he otherwise ceases to hold office in accordance with the provisions of the Constitution. In sum, what is clear is that section 180 of the Constitution provides for the computation of the tenure of office of a duly elected governor of a state in Nigeria.

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On the face of it, the provisions of section 180 seems quite straight forward and self-explanatory as it deals with the commencement and expiration of the tenure of the office of a governor; however, as will be seen, the position may not be clear cut in all cases in which there is the need to determine the time of commencement of the term of office of an elected governor as intended by the Constitution. This problem is particularly brought to the fore in view of the inherent power of the courts to nullify an election and the attendant consequences which such nullification may have on the computation of time.

Nullification of elections and governorship tenure

Under the various Electoral Acts, a tribunal or court of law as the case may be is empowered to nullify an election where it is found that the candidate who was elected for any political post was not validly elected on any ground. For ease of reference, the relevant provision in the Electoral Act 2010 ("**EA**") is hereunder reproduced. Accordingly, section 140(1) of the EA provides thus:

> *"…if the Tribunal or the Court as the case may be, determines that a candidate who was returned as elected was not validly elected on any ground, the Tribunal or the Court shall nullify the election."*

Usually when an election is nullified and a re-run election is conducted, the candidate that wins the re-run election will be declared winner of the re-run election. It may however be the case that the winner of the re-run election is the candidate whose election was initially nullified ("the **re-elected candidate**"), in which case the issue is bound to arise as to computation of the time when the governorship of the re-elected candidate began for the purposes of section 180(2) of the Constitution – i.e. will it be said that the 4 year period of the re-elected candidate began from the time when his first tenure began, i.e. the time he took his first oath of allegiance and oath of office; or from the time when he was re-elected and took his second oath of allegiance and oath of office?

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Though the solution to this sort of scenario has been provided by the enactment of section 180(2)(A), there are nevertheless life cases in which the issue is yet to be resolved especially as they were before the court before the enactment of Section 180(2)(A) which does not have a retrospective effect. A classic example of such cases is the "tenure elongation" cases of five State Governors in which the courts were faced with the task of interpreting the provisions of section 180(2) of the Constitution as a result of the nullification of the election of the governors. For the purposes of this newsletter, the case of the past governor of Adamawa State, Admiral Murtala Nyako who is one of the five State Governors will be taken as a case study.

Though the solution to this sort of scenario has been provided by the enactment of section 180(2) (A), there are nevertheless life cases in which the issue is yet to be resolved especially to the extent that section 180(2) (A) does not have a retrospective effect.

Brief Facts into the governorship battle of Nyako

Admiral Nyako emerged as the winner of the governorship elections held on 14 April 2007 and he was sworn in as the governor of Adamawa State on 29 May 2007, when he took his oath of allegiance and oath of office. On 26 February 2008, the Court of Appeal confirmed the nullification of his election into office by the Governorship and legislative Houses Election Tribunal for Adamawa State. Fresh elections were then held in Adamawa State on 26 April 2008 and Admiral Nyako again emerged winner and took another oath of allegiance and oath of office on 30 April 2008. In January 2011, fresh elections were to hold in Adamawa State but Admiral Nyako went to court to contest the holding of an election in Adamawa State in that year on the ground that his constitutionally guaranteed 4 year tenure contemplated under section 180(2) of the Constitution will be curtailed by the Defendants i.e. Independent National Electoral Commission, the Attorney General of the Federation and the People's Democratic Party, if the January 2011 elections were allowed to hold in Adamawa State. At the Federal High Court, it was argued on behalf of Admiral Nyako that the combined effect of the Supreme Court decision in **Peter Obi v. INEC** [2007] 11 NWLR (1046) 565 and the provisions of section 180(2) (a) and (b) of the Constitution is that the 4 year term of Nyako as governor of Adamawa State commenced from 30 April 2008 when he took the oath of allegiance and oath of office for the second time.

Nyako also contended that by the nullification of the elections held in Adamawa State on 14 April 2007, the oath of allegiance and oath of office taken by Admiral Nyako on 29 May 2007, was also rendered null and void and of no legal effect having been taken pursuant to an act declared a nullity. Accordingly, it was argued that the only oath of office to be taken into consideration by the court in the computation of Nyako's tenure in office as governor is the one taken on 30 April 2008. Nyako's argument was upheld by both the trial court and the Court of Appeal.

At this juncture, it is expedient to consider in brief what amounts to a nullity in law and whether this should be applied *strictu sensu* in the case of nullification of governorship elections in view of section 180(2) of the Constitution which provides for four year governorship tenure for one term and no more.

What is Nullity?

In describing what amounts to a nullity, reference is usually made to the over quoted dictum of Lord Denning in the case of **UAC v. McFoy [1961] 3 All ER, 1169 at 1172,** where he stated thus:

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

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The statement like all widely couched principles is not absolutely true and it is not without its exceptions. Indeed, there is hardly a situation in which an act is automatically void, as it only becomes void when the courts say so. A classic example is what we find in the case of elections which can only become a nullity upon the pronouncement of a court of law validly made pursuant to the relevant Electoral Act. Until the courts declare an election a nullity, there is a presumption of law that it is valid. There is no election that is "automatically void, without more ado". Professor Jennings pointed out in his article "Nullity and Effectiveness in International Law", that the case with most municipal laws is that an act that is not a nullity *ab initio* may be subject to annulment by a court or other proper authority. When the order of nullity is pronounced, it will be with retrospective effect, but there would usually have been certain legal effects flowing from the act whilst it was so to speak legally alive, which results, if they were incurred in good faith may have to be preserved in being despite the declaration of nullity.

Applying these principles of nullity to governorship elections, the question is what then can be said to be effect of nullity of the governorship election in such cases? Indeed, the position has been canvassed in cases such as ***Obi v. INEC*** and ***Labour Party v. INEC*** [2009] 6 NWLR (Pt. 1137) 315 at 337 that in effect, the nullification of the election implies that such persons were never elected nor sworn in as governor.

The election is void ab initio and a fresh election is conducted as if the earlier one did not take place at all. Further, it was held in ***Obi v. INEC*** that that the effect of nullification of governorship elections is to nullify the oath of office taken by the governor elect, such that in computing the term of office of the re-elected governor, the first oath taken by him in his first election cannot be a reference point for calculating the four-year term of the governor but the 2nd oath of office taken subsequently. The question is what exactly was nullified? Was it the elections, the oath of allegiance and oath of office or the acts purportedly carried out by the governor prior to the nullification?

What is Nullified?

Not surprisingly, the Federal High Court and the Court of Appeal in Nyako's case followed the reasoning in ***Obi v. INEC*** and held that in computing the term of office of Nyako, the oath of office taken on 29 May 2007 cannot be a reference point for calculating his four-year term but the oath of office taken on 30 April 2008, the reason being that the effect of the declaration of nullity was to nullify the oath of allegiance and oath of office taken in the first instance. It is submitted with due respect to the learned justices both of the Federal High Court and the Court of Appeal that adopting such a strict interpretation to governorship elections cannot in any way serve the legislative intent behind section 180 of the Constitution. Indeed, the Courts failed to appreciate the fact that unlawful or illegal acts do have juridical consequences which the law recognizes. For example, in the case of governorship elections, where a governor is appointed, he proceeds to exercise the full powers and duties expected of his office under the Constitution. These includes taking the oath of office and allegiance, signing bills into law; awarding contracts on behalf of the State; making appointments to various boards and offices; presenting the State Budget and implementing it after approval by the State Houses of Assembly; appointment of judges etc.

The question is: do all the foregoing cease to have effect or would they all be unraveled because the election was declared null? The answer with due respect, is an emphatic no, because to do so would not only be practically impossible but would result in far reaching and debilitating consequences.

In this wise, it important to underscore the point that because the broad principles of government is a constitutional matter, what section 180 does is to circumscribe the tenure of office of the governor, and thus, it is beyond cavil that in determining the effect of the nullification of an election on the tenure of a governor, the starting point for the court must be the broad principles enshrined in the Constitution. This view has been adopted by the court in a number of judicial authorities a significant one being the case of ***Bronik Motors Ltd. & Anor v. Wema Bank Ltd.*** [1985] 6 NCLR, 1 at 20, where Nnamani JSC in considering the meaning of certain provisions of the Federal Revenue Court Act 1973, vis-à-vis several provisions of the 1979 Constitution, held that the Court must be guided by the broad

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principles of the constitutional provisions.

Thus, the crucial question at this point is that, can it safely be said that the legislative intent of the framers of the Constitution under section 180(1) & (2) of the Constitution is to create room for either (i) the self-succession in perpetuity of one man in a democratic government or (ii) that a man should remain in office for more than eight years, or the tenor agreed by the people? Certainly, this cannot be the intendment of the legal draftsman.

Hence, in Nyako's case, it was argued on behalf of the Defendants that: (x) though the nullification of the 2007 elections in effect voided the elections, it cannot be said that the oath of allegiance and oath of office taken on 29 May 2007 was also nullified; (y) all the acts performed by the erstwhile governor whilst in office were valid and cannot by any iota of imagination be declared a nullity. Though the arguments were jettisoned by the Federal High Court and the Court of Appeal, one cannot but lean in favour of the arguments of the Defendants in this case to the extent that on the other side of the divide is the risk of creating room for a possible situation of undue tenure elongation contrary to the intention of the legislature under section 180(2) of the Constitution. From a read of section 180(2) CFRN, one cannot but arrive at the conclusion that the intention of the framers of the constitution was to introduce certainty in the determination of the tenure of the governor.

Clearly, it is in recognition of the problem generated by the interpretation of section 180 in election nullification cases, and the attendant uncertainty on the law which is not in any way in the interest of the general public that the legislature decided to clear the airwaves by the enactment of section 180(2)(A).

Conclusion

It can be said without any fear of contradiction that where there is uncertainty in the law on any issue, there is bound to be conflict of interest of various stakeholders: a situation which is not in the best interest of the public, and hence the need for legislative intervention where necessary to bring certainty into the law. The enactment of the new section 180(2)(A) is indeed a laudable attempt by the legislature to bring certainty into this area of the law, and going forward, it can be said assertively that issues surrounding the interpretation of 180(1) and (2) of the Constitution has been resolved by the enactment of section 180(2)(A). The enactment of section 180(2)(A) was a much needed intervention at a time where too many uncertainties beclouded this area of the law.

However, as noted earlier, the provisions of section 180(2)(A) do not have a retrospective effect in that it can only serve as a basis for interpretation of the Constitution in relation to cases which arise after the amendment was done and not the ones arising before. Thus, one issue that lingers on is what will become the faith of the on-going cases in which this issue is yet to be resolved, especially to the extent that the statutory amendment does not apply to those cases.

Thus, the crucial question at this point is that, can it safely be said that the legislative intent of the framers of the Constitution under section 180(1) & (2) of the Constitution is to create room for either (i) the self-succession in perpetuity of one man in a democratic government or (ii) that a man should remain in office for more than eight years, or the tenor agreed by the people? Certainly, this cannot be the intendment of the legal draftsman.

It remains to be seen whether the courts would take a bold step of courage expected of an institution regarded as the 'last hope of the common man' by refusing any attempt by any man to unjustly usurp an office in perpetuity. This can only be achieved by the adoption of a purposive interpretation of the Constitution, with a view to giving effect to the intention of the legislature. It cannot be the intention of the legislature that one man be allowed to elongate his tenure in office at his own whims and caprices. Very instructive at this point are the words of Udoma JSC in ***Nafiu Rabiu*** v. ***State*** *[1981] 2NCLR 293 at 326* where he said thus:

> *"…that the function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our varying communities must involve, ours being a plural, dynamic society, and therefore more technical rules of interpretation are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the constitution."*

It is critical to underscore that in dealing with this high constitutional matter that goes to the root of our definition as a society, our courts cannot afford to be enslaved by the shackles of excessive legalism, rather they must drink from the fountain of justice, be broad in their imagination, worship at the altar of substance, and reject every notion of being cribbed in by the past when it is the future that is ahead of us.

If the judiciary fails in its duty to interprete the Constitution in a manner that will reflect the intendment of the legislature, who will?

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