

## Ballot or bullet: Protecting the right to vote in Nigeria

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### Summary

*This article aims to construct a new paradigm for understanding the right to vote in Nigeria. Following strong indications that the 2011 Nigerian elections were managed better than in previous years, it is to be hoped that future elections can be built on its relative success. Therefore, as the country appears to have a handle on its electoral pathologies (albeit relatively speaking), the article examines one way of providing this assurance by placing the Nigerian voter at the centre and not the margins of the electoral process. It analyses the right to vote and what it means to the average Nigerian voter. Its starting position is that the right to vote is nowhere explicitly enshrined in the Nigerian Constitution or its electoral laws. Where, universally speaking, to vote is either a legal or constitutional right, the article argues that in none of those conceptions does such a right exist in Nigeria. Further, it shows how the Nigerian legal and electoral systems inordinately prioritise the rights of political parties and their candidates in elections over and above those of the ordinary voter, an issue which it is contended has to be satisfactorily addressed to meaningfully build upon the gains of the 2011 elections.*

### 1 Introduction

As has been routine since Nigeria moved from military to civil rule in 1999, the country's 2011 general elections received early evaluations from various quarters. But the verdict this time was that the process and its outcome departed substantially from what transpired in 2007

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and 2003.<sup>1</sup> In relative terms, the votes of Nigerians in 2011 counted perhaps more than ever since the transition from military to civil rule. Several authorities confirm and justify this conclusion. Both arms of the national parliament have a politically more diverse membership, unlike previously when the ruling People's Democratic Party (PDP) seemed to literally sweep the opposition off the political horizon by fair or, more often, crooked means.<sup>2</sup> Many states are now controlled by political parties other than the PDP. Quite significantly, the most important verdict on the election came from Nigerians themselves who, notwithstanding the unfortunate post-election violence in some states in the northern parts of the country, agreed that the elections to a great extent represented their will as voters.<sup>3</sup>

Nigerians have (and justifiably so) been asking questions about how it was possible to so significantly improve the credibility of the electoral process within a four-year span when the country in 2007 conducted perhaps its worst elections in history. What individuals or institutions should share the credit for this? Is what happened in the 2011 elections sustainable over time or is it a once-off event that would last only until retrograde politicians (so obviously tripped or surprised by it) regroup in the coming years and reverse the gains made? What should be done to ensure such a reversal, if attempted, is not achieved? If the lessons of history are anything to go by, is it not possible that the country will sleep on this relative success?

With the shortcomings of elections since the 1999 transition as helpful background, it is possible to contextualise the relative successes of the 2011 Nigerian elections and to place in perspective the factors that may have enabled that outcome. Without a doubt, two factors

<sup>1</sup> See O Adeniyi 'Divided opposition as boon to African incumbents' [http://www.wcfia.harvard.edu/fellows/papers/2010-11/Paper\\_Adeniyi\\_final.pdf](http://www.wcfia.harvard.edu/fellows/papers/2010-11/Paper_Adeniyi_final.pdf) (accessed 10 May 2012); 'Nigeria's elections, despite alleged vote buying, was most credible since 1999' *Touch Base* <http://www.touchbaseonline.ca/?p=1716> (accessed 10 May 2012), stating that '[c]ivil society watchdog groups, including the Abuja-based coalition known as the Elections Situation Room, say electoral reforms initiated under the leadership of elections commission chief Attahiru Jega have enabled greater transparency in the 2011 polls. International observer groups also said the polls were the most credible since 1999.'

<sup>2</sup> The fraud-ridden elections of 2003 and 2007 coincided with PDP's near total dominance of the two arms of the National Assembly. In 1999 the party returned 59 members of a 109-seat senate and 206 members of a 360-seat house of representatives. In 2003 they returned 76 senators and 223 house members, while in 2007 the party had 87 senators and 263 house members. By 2011 its share fell to 71 senators and 202 house members. Ten parties are represented in the 2011 National Assembly, unlike previously when only a handful of the parties returned members. See, generally, P Lewis's Nigeria Country Report (Cape Town: Centre for Social Science Research, 2011) [http://www.africanlegislaturesproject.org/files/ALP%20Nigeria%20Country%20Report\\_0.pdf](http://www.africanlegislaturesproject.org/sites/africanlegislaturesproject.org/files/ALP%20Nigeria%20Country%20Report_0.pdf) (accessed 11 May 2012).

<sup>3</sup> See eg H Ibrahim '2011 polls: NGOs give INEC pass mark' *Saturday Tribune* <http://www.tribune.com.ng/sat/index.php/news/4080-2011-polls-ngos-give-inec-pass-mark.html> (accessed 11 May 2012).

played a substantial role in this regard. The first is a welcome change in the direction of electoral management. Under a new leadership, Nigeria's Independent National Electoral Commission (INEC), which before now had been anything but independent, embraced a different conception of its role as an electoral umpire. The institution did not feel as beholden to the ruling party in the 2011 elections as had been the case previously. In the process, it did retrieve some of its lost credibility and legitimacy as a democratic public institution and introduced a new electoral management template upon which future progress may be established. Secondly, the incumbent President did not feel as entitled as the incumbent in 2003 and 2007 to press home the advantages of his position, especially in all non-presidential polls. He was rather willing to not manipulate INEC or the security forces (as had happened in past elections) to subvert popular will.<sup>4</sup>

Yet, this by no means is any indication that the 2011 elections were free of all negative incidents. Allegations that the election – especially the presidential ballot – was rigged, stood in contrast to the very positive evaluations stated above. In the northern parts of the country these complaints soon gave way to violent riots, leading to several deaths and the destruction of public and private property.<sup>5</sup> However, in addition to what the rioters may have perceived as the manipulation of the election, the subsequent violence was in part also blamed on 'inflammatory statements made by political leaders and public discourse in the media before, during and after the elections'.<sup>6</sup> The complaints of rigging and violent riots that ensued, though detracting from the major positives from the election, did only little to place it in the same situation as all other elections in the country since the 1999 transition.

However, although better election management and restraint in using incumbency powers may to consolidate Nigeria's electoral democracy in the short term, they still fall far below the requirements for ensuring the maintenance of that culture in the long term. They place undue emphasis on individual character and action in contrast to procedural effectiveness and institutional durability as objective qualities of a stronger electoral system. The question

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4 See 'Sahara reporters interview prominent Nigerian activist Innocent Chukwuma' <http://saharareporters.com/video/sahara-reporters-interviews-prominent-nigerian-activist-innocent-chukwuma> (accessed 11 May 2012). Chukwuma, a former Chairperson of the Transition Monitoring Group, TMG, Co-ordinating Committee, stated that the INEC was 'arguably neutral' and that the incumbent President did not show an inclination to be particularly 'overbearing'.

5 See 'Nigeria election: Riots over Goodluck Jonathan win' <http://www.bbc.co.uk/news/world-africa-13107867> (accessed 8 September 2012). See also Human Rights Watch 'Nigeria: Post-election violence killed 800' <http://www.hrw.org/news/2011/05/16/nigeria-post-election-violence-killed-800> (accessed 8 September 2012).

6 PE Ofili 'Provocative discourse and violence in Nigeria's 2011 elections' (2011) 17 *The Africa Portal Backgrounder* 1.

here is: What happens in future, assuming that the INEC reverts to a leadership less concerned about organising credible elections than with its relationship to the ruling party or if an incumbent president emerges who would rather exhaust all advantages conferred by that incumbency position than worry about whether elections are fair? It is because of the fragility and subjectivity of an overt reliance on individual character that a different paradigm built on the strength and objectivity of institutions and procedures is desirable to sustain free elections and democracy in Nigeria.

In this article, I will approach the goal of constructing this new paradigm by placing the Nigerian voter in her rightful place in the electoral architecture. It may well be that the 2011 elections were a once-off anomaly unless strong assurances exist that future elections can be built on its relative successes. I therefore intend to analyse the right to vote and what that right means to the average Nigerian voter. Where, universally speaking, to vote is either a legal or constitutional right, I argue in this article that no such right exists in Nigeria. Further, I will show how the Nigerian legal and electoral systems inordinately prioritise the rights of political parties and their candidates in elections over and above those of the ordinary voter, an issue which I contend has to be addressed satisfactorily to meaningfully build upon the gains of the 2011 elections.

My starting position is that the right to vote is nowhere explicitly enshrined in the Constitution or the electoral laws. In the first instance, Nigerians tend to conflate the right to vote with the right to be registered as a voter. Besides, voters do not have any legal rights under the electoral law to challenge the outcome of elections. Thus, to the average Nigerian, to vote means no more than merely casting a ballot and exiting the polling station. If anything happens to the vote (for example if it is diluted, debased, made not to count or otherwise rendered ineffective), the Nigerian voter, whether legally or constitutionally, is left with absolutely no remedy. Therefore, even if assuming that the right to vote exists in Nigeria, it defies the popular *ubi jus, ibi remedium* (where there is a right, there is a remedy) doctrine. I proceed by analysing the presence or lack of legal protection of the right to vote in Nigeria. I refer to comparative practices from other jurisdictions in Africa and elsewhere to show how they compare to Nigeria's current regime, identifying shortcomings and making recommendations for a new regime that places the rights of voters where they truly belong. Most of these comparisons are drawn from Africa as they share political and social situations with Nigeria. In addition, these countries have written constitutions with a broad array of human rights guarantees, as is the case in Nigeria. Where I highlight the practices of jurisdictions outside Africa, it is to provide added analytical insight.

For purposes of clarity, it should be stated that my main concern is whether there is a right to vote in Nigeria *qua* constitutional right

that an ordinary voter could enforce like all other constitutional rights. It is likely that the right could be derived from other rights, such as the right to equality and freedom from discrimination. The Nigerian courts have sometimes in the past allowed such derivative protection of rights, for example, when it was decided that the right to a travel passport arises from the right to freedom of movement.<sup>7</sup> While it may be possible to derive the right to vote from other rights, it has not already happened. In the circumstances, my analysis is restricted to what the right to vote means presently in Nigeria and not so much what it might become in future.

In the next section of the article I provide a conceptual outline of the right to vote, while section 3 contains an analysis of whether the right to vote is a right or a mere privilege. In section 4 I turn my attention to the tendency in Nigeria to confuse the right to vote with the right to be registered as a voter. The fifth section examines the nature of the legal protection accorded the right to vote in Nigeria, again from a comparative perspective. In section 6 I provide justification for the contention that the right to vote in Nigeria has to be protected if democracy is to be consolidated. The last section contains some concluding reflections.

## 2 Conceptualising the right to vote

Though legal and political scholars alike disagree on the true meaning and ramifications of democracy as a form of government,<sup>8</sup> they are united at least on one of its core foundations: elections as a means of making popular voices heard and of putting practical effect to the description of that political form as government of the people, by the people and for the people.<sup>9</sup> In a sense, therefore, elections are

<sup>7</sup> See *Olisa Agbakoba v Director, State Security Service* (1994) 6 NWLR (Pt 351) 475 (NCA). See also OC Okafor 'The fundamental right to a passport under Nigerian law: An integrated viewpoint' (1996) 40 *Journal of African Law* 53.

<sup>8</sup> P Schmitter & TL Karl 'What democracy is ... and is not' (1991) 2 *Journal of Democracy* 75: 'For some time, the word democracy has been circulating as a debased currency in the political market place. Politicians with a wide range of convictions and practices strove to appropriate the label and attach to it their actions. Scholars, conversely, hesitated to use it – without adding qualifying adjectives – because of the ambiguity that surrounds it.' See also S Lindberg *Democracy and elections in Africa* (2006); M Halperin 'Guaranteeing democracy' (1993) 91 *Foreign Policy* 106.

<sup>9</sup> Taken from an address by former United States President Abraham Lincoln delivered at Gettysburg, Pennsylvania on 19 November 1863, <http://history1800s.about.com/od/abrahamlincoln/a/gettysburgtext.htm> (accessed 11 May 2012): 'It is rather for us to be here dedicated to the great task remaining before us – that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion – that we here highly resolve that these dead shall not have died in vain – that this nation, under God, shall have a new birth of freedom – and that government of the people, by the people, for the people, shall

the oxygen that democracy breaths. Without elections or some other process by which it is possible for the people to effect the orderly renewal of the mandate or a peaceful replacement of political officials, democracy is empty. In fact, to speak of democracy without elections is a contradiction.

Once it is agreed that elections form the bedrock of democratic governance, we need also to agree on the value of the vote as an election marker. Universal suffrage is usually considered one of the most basic criteria for an election to be deemed democratic.<sup>10</sup> Among the seven conditions identified by Dahl as necessary for the existence of a polyarchy is the one that 'practically all adults have the right to vote'.<sup>11</sup> Yet, according to Gardner voting has no intrinsic value because even autocratic states hold elections in which the only candidate on the ballot is the incumbent autocrat. The results of this 'election' are then used to defend the political legitimacy of the autocratic regime.<sup>12</sup>

However, voters, and the political systems to which they belong, know how important it is that their votes are worth more than this. It is noted, for example, that an extensive body of voting rights law is devoted to the proposition that the denial of the vote – or the denial of an 'effective' vote – is presumptively bad. The question is: Why? 'What exactly is so important about the right to vote that its denial, or the perception of its denial, is so offensive?'<sup>13</sup> It is possible, therefore, that persons who claim its denial are actually claiming the following: They could be claiming that their exclusion from the franchise leaves them with an inadequate ability to influence the outcome of the governmental decision-making processes. They could also very well be saying that a denial of the vote constitutes an unacceptable form of exclusion from a validating social practice. In other words, they are claiming that exclusion from voting is, 'in effect, marks of inferiority, a consignment to a degrading form of second-class citizenship'.<sup>14</sup> In recognition of the above, the United States Supreme Court in the case of *Wesberry v Sanders*<sup>15</sup> held that '[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.'

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not perish from the earth.'

10 A Blais *et al* 'Deciding who has the right to vote: A comparative analysis of election laws' (2001) 20 *Electoral Studies* 41.

11 R Dahl *Democracy and its critics* (1989) 233.

12 JA Gardner 'Liberty, community and the constitutional structure of political influence: A reconsideration of the right to vote' (1997) 145 *University of Pennsylvania Law Review* 893 900. See also F Zakaria 'The rise of illiberal democracy' (1997) 76 *Foreign Affairs* 22.

13 As above.

14 As above.

15 (1964) 376 US 1 17.

Because of the importance of the right to vote in a democracy, societies which practise that form of government have devised various means of protecting it. Yet, while it is customary for all such countries to claim the existence of the right to vote, contextual variations exist across jurisdictions. Significantly, therefore, the right to vote does not have the same meaning or have the same degree of legal protection in all democracies; the mechanisms for securing and protecting it differ from country to country. Often the right to vote is shorn of its 'entitling' characteristics in which case it may be more appropriate to speak of it as being a privilege rather than a right. I will return to this point later. To illustrate the point about distinctive country preferences in the protection of the ballot, it is important as well to consider how the right to vote has evolved and the theories that have been applied to every level of its historical evolution.

Kirby identifies five stages in the historical evolution of the right to vote.<sup>16</sup> Among primitive peoples, in the city states of antiquity and during the Renaissance, the citizenship theory of the voting right prevailed. Under this theory, the right to vote was an attribute of citizenship. This theory holds true to this day, going by the practices of many countries which make the right to vote contingent upon citizenship. The second was the vested privilege theory in which the right to vote was distributed by reference to pure feudal principles. It was in this conception a vested privilege, an incident of a particular status and usually connected to land or other property ownership.<sup>17</sup> The third theory Kirby identifies is the natural rights theory in which the right to vote, like all other such rights, are abstract and founded on the basis of natural law, a consequence of a social compact and an incident of popular sovereignty.<sup>18</sup>

Under the government function theory of the right to vote, which is derived from modern principles of political science, Kirby states that in casting the ballot, a voter is performing a public function much like a legislator or judge. That therefore makes the voter an organ of government. The ethical theory, which is the last that Kirby identifies, suggests that the right to vote is essential to the development of the individual character, a condition necessary for the realisation of the full worth of the human personality.<sup>19</sup>

In historical terms, the development of voting rights in Nigeria followed a somewhat similar trajectory to Kirby's outline above from the period when efforts were concentrated on restricting or depressing the voting field and up to the time when those restrictions

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<sup>16</sup> J Kirby 'The constitutional right to vote' (1970) 45 *New York University Law Review* 996.

<sup>17</sup> As above.

<sup>18</sup> As above.

<sup>19</sup> As above.

were lifted and the pool of voters increased. According to Ayoade,<sup>20</sup> the development of voting rights in Nigeria could be divided into three historical periods: 1922-1950, 1950-1958 and 1958-1966. Significantly, each of these periods engaged, in terms of the right to vote, a distinct theoretical framework, as we will see presently. The first period, 1922-1950, according to Ayoade, was the period in which the right to vote was a vested privilege as with Kirby's 'vested privilege theory' above. At that time, Ayoade informs us, the voting franchise was restricted both spatially and numerically. It was available in only two cities: Lagos and Calabar, which were both prosperous and commercially cosmopolitan. These cities also had the most educated inhabitants in the country at the time.

During this period regulations attached to the franchise limited the number of people qualified to vote. This privilege was given only to male citizens aged 21 and above. In addition to citizenship and residency requirements, the prospective voter also had to possess an annual income of not less than 100 pounds during the calendar year immediately preceding the year of the election. Ayoade concludes that for this period, these restrictions and a further one which placed the onus of registration on the prospective voter rather than the state appreciably cut down the number of voters.

Unlike the first period of mixed regulations, the second era of 1950-1958 saw the promulgation of ones universally applicable throughout the country. This apparent universality notwithstanding, the federal electoral regulations still took cognisance of regional diversities.<sup>21</sup> This framework was consolidated in the third era, 1958-1966, when a marked improvement in federal competence in the regulation of federal elections was established. For example, the Elections (House of Representatives) Regulations of 1958 stipulated that its provisions shall apply throughout the entire country.<sup>22</sup> However, in some areas, regional peculiarities still prevailed. It is therefore significant for our purposes that, while the above regulations endorsed universal adult suffrage in both the eastern and western regions, it approved only male suffrage in the northern region. These two periods seemed to recognise the right to vote in the east and west on the basis of the ethical and natural rights theories that Kirby discussed while maintaining its feudal characteristics in the north. The entire country later adopted universal suffrage in the years following independence in 1960.

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20 J Ayoade 'Electoral laws and national unity in Nigeria' (1980) 23 *African Studies Review* 42.

21 As above.

22 As above.

### 3 Is the vote a right or privilege?

I stated earlier that there are variations across legal and political jurisdictions on the true nature of the franchise. While some view it 'as a mere civil right dependent on law', others see it as a 'fundamental political right'.<sup>23</sup> Unlike the position of the United States Supreme Court in the earlier referenced case of *Wesberry v Sanders*, in the case of *Re North Perth; Hessein v Lloyd*,<sup>24</sup> it was stated that 'the franchise is not an ordinary civil right, it is historically and truly a statutory privilege of a political nature being the chief means whereby the people, organised for political purposes, have their share in the function of government'.

Even if imagined as a right, Lardy still believes that the vote is different from all other rights because it is 'based upon a different theory of liberty from that which founds the traditional civil liberties'.<sup>25</sup> That writer goes on to argue that traditional civil liberties 'are essentially about guaranteeing liberty in the sense of non-interference by officialdom with individual choice and action'.<sup>26</sup> Further:<sup>27</sup>

This theory of negative liberty forms, however, only a tangential part of the idea of the right to vote, and is always subsidiary to its essential concern with establishing and maintaining the democratic authority of voters. This authority constitutes a permission to participate in elections. It does more, though, than merely license voters to cast ballots if they so choose, as proponents of the right to vote effectively suggest. The democratic standing which the right to vote confers is fully intelligible only as the award of an entitlement to participate actively, rather than as a merely passive possessor of the franchise.

In addition to the above, there are other characteristics that differentiate the right to vote from other libertarian rights and for which reason some have questioned the tendency to sometimes describe it 'as a civil liberty, or even as a human right'.<sup>28</sup> Thus, the central function of the right to vote is to guarantee the entitlement of all qualified individuals to cast a vote as opposed to all other rights which are generally distributed to individuals without reference to their abilities or qualifications to perform the activity protected by the right.<sup>29</sup> In addition, those other rights are universal and are enjoyed by all within the jurisdiction which has authority to enforce them. On

23 E Azinge 'The right to vote in Nigeria: A critical commentary on the open ballot system' (1994) 38 *Journal of African Law* 173.

24 Cited by Azinge (n 23 above).

25 H Lardy 'Is there a right not to vote?' (2004) 24 *Oxford Journal of Legal Studies* 311.

26 As above.

27 As above.

28 As above.

29 As above.

the contrary, the right to vote, even though often described in terms of universal suffrage, is not by any means universal as typically only citizens qualify to vote while other requirements (residence, capacity and good behaviour) often come into play.<sup>30</sup>

The above view perhaps provides a foundation for the opinion that to vote 'might be a mere political right, privilege or civil right to be given or withheld at the exercise of the law-making powers of the sovereign' and that 'in the absence of an express constitutional grant, [it] is not a vested, absolute or natural right of which a citizen cannot be deprived and it is not vested absolutely in any citizen'.<sup>31</sup> According to Kirshner, there are four different categories of constitutions in terms of how they treat the right to vote.<sup>32</sup> Firstly, there are those in which there is no affirmative constitutional right to vote and there is no legislation of similar weight. Among countries he placed in this category are Australia, the Bahamas, Bangladesh, Barbados, Belize, India, Indonesia, Nauru, Samoa, the United States and the United Kingdom.<sup>33</sup>

Secondly, there are constitutions that establish universal suffrage for the election of sovereign bodies – such as parliament. Kirshner places Nigeria in this category, which also includes countries such as Germany, Jamaica, Russia, New Zealand, Senegal, Sweden, South Korea, and others.<sup>34</sup> Since this chapter is on Nigeria, I will later show how this categorisation is erroneous, being that it conflates the right to be registered as a voter with the right to vote. Thirdly, there are constitutions that provide a general and independent right to vote and, fourthly and finally, there are constitutions that not only provide for a right to vote, but also specify a government obligation to facilitate citizen participation and those that limit the kinds of restrictions the state can place on who is eligible to vote.<sup>35</sup>

Regarding the language in which the right to vote could be constitutionally textualised, drawing from contemporary comparative constitutional provisions governing the subject, there are two major ways this could be accomplished. Any one of the above four categories of constitutions can express the text of the voting right in any of these two ways. On the one hand, there are constitutions broadly establishing the right of citizens to vote for constitutionally-defined

30 As above. See also Blais *et al* (n 10 above) 43-58.

31 Azinge (n 23 above) 174.

32 A Kirshner 'The international status of the right to vote' [http://www.demcoalition.org/pdf/International\\_Status\\_of\\_the\\_Right\\_to\\_Vote.pdf](http://www.demcoalition.org/pdf/International_Status_of_the_Right_to_Vote.pdf) (accessed 11 May 2012).

33 As above. For an analysis of the dilemma in India, see R Kadambi 'Right to vote as a fundamental right: Mistaking the woods for trees. *PUCL v Union of India*' (2009) 3 *Indian Journal of Constitutional Law* 181.

34 As above. Taking the South Korean Constitution as sample, it provides in art 41 that '[t]he National Assembly is composed of members elected by universal, equal, direct, and secret ballot by the citizens', while art 67 thereof provides that '[t]he President is elected by universal, equal, direct, and secret ballot by the people'.

35 Kirshner (n 32 above) 8.

electoral positions, and on the other hand there are constitutions which not only guarantee universal suffrage, but also stipulate that this fundamental right exists at every level of government. Constitutions in the second category could also curb the ability of the government to reduce the size of the electorate.<sup>36</sup> It is, however, by evaluating the next quality of the voting right that one could tell whether indeed it is an enforceable right or a mere privilege. Kirshner says that constitutional right to vote articles provide individuals with a powerful tool with which to challenge a state action or state inaction that impedes voters. He recognises, though, that the right to vote is not a prescription that cures all.<sup>37</sup>

The foregoing offers an excellent background for my analysis of the nature of the right to vote in Nigeria. It has been claimed that the right to vote in Nigeria is conferred by the Constitution and therefore constitutional.<sup>38</sup> In support of this assertion, sections 65, 77, 106, 117, 131 and 132(1), (4) and (5) of the Nigerian Constitution of 1999 have been mentioned.<sup>39</sup> As I stated earlier, I will contest these claims on two grounds. In the next section, I canvass those grounds in greater detail.

#### 4 Nigeria: Between the right to register as a voter and the right to vote

I will now expand my contention that those who describe the right to vote in Nigeria as one guaranteed under the Constitution are making a mistake by not distinguishing the right to register to vote in an election from the right to vote itself. To support this view, I will examine more closely the constitutional provisions they rely upon to advance that error. In this section as well, an analysis of how the Nigerian provision compares to other constitutions will be undertaken.

The first provision usually mentioned is section 65 of the Constitution, which is clearly off the mark because it deals only with qualification for election as a member of the Nigerian National Assembly. The next is section 77 which is also not helpful. This provision deals with the process of electing senators and members of the house of representatives as well as those who could qualify to be registered as voters for legislative houses elections. For clarity, let me reproduce the entire provision:<sup>40</sup>

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36 As above.

37 As above.

38 Azinge (n 23 above) 174.

39 A Omakoji 'The role of the courts in the enforcement of electoral rights through election complaints: A comparative study of Nigeria and the United Kingdom' LLM dissertation, Central European University, 2009 <http://goya.ceu.hu/search> (accessed 10 May 2012).

40 My emphasis.

- (1) Subject to the provisions of this Constitution, every senatorial district or federal constituency established in accordance with the provisions of this part of this Chapter shall return one member who shall be directly elected to the Senate or the House of Representatives in such a manner as may be prescribed by an Act of the National Assembly.
- (2) Every citizen of Nigeria, who has attained the age of eighteen years residing in Nigeria at the time of the registration of voters for purposes of election to a legislative house, *shall be entitled to be registered as a voter* for that election.

Section 106 of the Constitution, usually highlighted by some as one of those provisions from which a right to vote could be constitutionally supported in Nigeria, is in similar terms as section 65 above, and section 117 is worded exactly as section 77. The only difference, however, is that, while sections 65 and 77 relate to elections into the National Assembly, sections 106 and 117 only deal with elections to the State Houses of Assembly. The similarities in the text of these provisions would therefore provide a sufficient indication that, as with sections 65 and 77, sections 106 and 117 do not help an understanding of the constitutional nature of the right to vote in Nigeria.

In the same manner, sections 131 and 132 of the Constitution, touted as providing a constitutional foundation for the right to vote in Nigeria, do not remotely come close to doing so. While section 131 deals with qualification for election into the office of President, section 132 is only significant for the manner in which subsection (5) is created. It provides there that '[e]very person who is registered to vote at an election of a member of a legislative house shall be entitled to vote at an election to the office of President'. Sections 177 and 178(5) make similar provisions with respect to who can qualify to stand for election as a state governor and who would be qualified to vote at such an election. Although these provisions contain the words 'shall be entitled to vote', they cannot be taken out of the context in which those words occurred. When they are taken together with all the other provisions already examined, one cannot escape the conclusion that they were not intended to express a constitutional or enforceable right to vote. To support this contention, I shall now look at a few examples of how the right to vote has been textualised in some comparative constitutions.

How do the Nigerian provisions compare to those of other African countries? Part 2 of the Kenyan Constitution of 2010 contains what it describes as 'rights and fundamental freedoms', among which are political rights, including the right of every adult citizen without unreasonable restrictions (a) to be registered as a voter; and (b) to vote by secret ballot in any election or referendum.<sup>41</sup> Equally significant is the constitutional provision that none of the guaranteed rights and fundamental freedoms shall be limited 'except by law, and then only

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<sup>41</sup> Sec 38(3).

to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.<sup>42</sup> In the Kenyan context, therefore, the right to vote is easily enforceable when it is infringed.

The 1995 Ethiopian Constitution contains similar provisions. Its third chapter, like its Kenyan equivalent, enshrines fundamental rights and freedoms. While the first part of the chapter deals with 'human rights', the second part deals with 'democratic rights'. Included among democratic rights in article 38 is the right to vote and to be elected. Section 38(1) provides:

Every Ethiopian national, without discrimination based on colour, race, nation, nationality, sex, language, religion, political or other opinion or other status, has the following rights:

- (a) to take part in the conduct of public affairs, directly and through freely chosen representatives;
- (b) on the attainment of 18 years of age, to vote in accordance with law;
- (c) to vote and to be elected at periodic elections to any office at any level of government; elections shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of electors.

Again, as is the case in Kenya, Ethiopian voting rights are not unenforceable. This view is supported by the fact that article 13(1) of the Constitution charges all federal and state legislative, executive and judicial organs at all levels with the responsibility and duty to respect and enforce the provisions of the human rights chapter. It goes further to provide in article 13(2) that '[t]he fundamental rights and freedoms specified in this chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights and international instruments adopted by Ethiopia'.

When comparing these constitutional provisions to those of Nigeria, one cannot avoid the conclusion that the right to vote does not seem to exist as such under the Constitution of Nigeria. The Constitutions of Kenya, Ethiopia and, as I will show later, Ghana, do not tie the right to vote to one's registration as a voter. In all these Constitutions the right is accorded the same force and recognition as other fundamental human rights. The conclusion that could be drawn from this, therefore, is that where a voter believes that the right has been tampered with, a consequential right to seek a judicial remedy is triggered. In the next section, I will discuss how judicial redress for the infringement of the right to vote adds to its significance as a right rather than a mere privilege.

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<sup>42</sup> Sec 24(1).

## 5 What legal protection exists for the right to vote?

The major reason I advance for my contention that the right to vote does not exist as such in Nigeria is the lack of any legal remedies available for voters if the right is breached or impeded. Yet, if indeed it is a constitutional right as claimed in some quarters, it means a correlative duty is imposed on institutions for its actualisation, failing which an entitlement to a remedy is triggered. For example, had the right to vote been included as one of the fundamental rights recognised under the Constitution,<sup>43</sup> it would have been obvious that, like all the other rights in this category, its denial could be remedied by a legal application to that effect. However, this is not the case. However, even more significantly, ordinary voters are not included in the category of persons who may question or complain about election results in an election tribunal established to handle such complaints.

The prevailing system in Nigeria is that after each election cycle, special tribunals are established to look into grievances and complaints arising from elections.<sup>44</sup> For unknown reasons, this practice was started in the country during the elections that heralded the transfer of power from the military to civilians in 1992. But the establishment of special election tribunals to deal with electoral complaints (in exception to the regular courts) has taken root and become a prominent feature of Nigeria's electoral practice. These tribunals are established under the Constitution,<sup>45</sup> but the procedure they adopt for their activities are prescribed in the Electoral Act.<sup>46</sup>

Not every person aggrieved by a result declared after an election in Nigeria is competent to launch a complaint before such a tribunal. Nigerian voters do not have such competence and are therefore barred from presenting any complaints if aggrieved by the results declared after an election. According to section 137(1) of the Electoral Act 2010 (as amended), '[a]n election petition may be presented by one or more of the following persons: (a) a candidate in an election; (b) a political party which participated in the election'. One therefore wonders about the effect of the so-called right to vote in Nigeria if voters are unable to exercise the legal right to question a denigration of that right. Again, this is a travesty when no particular remedy flows from the exercise of the right to vote if the vote is diluted or discounted.

However, treating the rights of Nigerians to exercise the franchise with derision has its roots in Nigeria's political and legal culture. With the constitutional shackles in place, as discussed earlier, there is restraint in the legal process as a mechanism for enforcing the right

<sup>43</sup> Secs 33-46 of the 1999 Constitution, as amended.

<sup>44</sup> See eg B Ugochukwu *Democracy by court order: An analytical evaluation of the 2007 election petition tribunals in Nigeria* (2009).

<sup>45</sup> See sec 285 of the 1999 Constitution, as amended.

<sup>46</sup> See sec 145 of the Electoral Act 2010, as amended.

to vote in Nigeria. One of the first cases related to this was decided a year after Nigeria's independence in 1960. In *Ojiegbe v Ubani*<sup>47</sup> the applicants claimed that, by fixing and holding elections on a Saturday, the government denied their franchise as well as violated their right to be free from discrimination. The applicants all belonged to the Seventh Day Adventists Christian denomination whose ethics, according to them, did not allow them to vote on a Saturday, which is their appointed day of worship.<sup>48</sup>

Two things are significant in the way in which the Nigerian Federal Supreme Court resolved the case. In the first instance, the denial of the franchise was subsidiary and marginal to the overarching claims of the applicants. Secondly, that portion of their application was not presented as a human rights enforcement claim as were the allegations of discrimination and violation of their freedom of conscience and religion. Nevertheless, it was on the basis of the denial of the franchise component of the claim that the Court disposed of it. In doing this, however, the Court demonstrated clearly how trivial it considered the claim. In its judgment, the Court came to the conclusion that, assuming all the members of the Seventh Day Adventist Church who alleged a denial of their franchise had voted in that election, the individual who was declared a winner would still have emerged victorious.

However, in my view, the Court made a serious error. The question before it was whether the complainants had been denied their right to vote. It was not whether or not their votes would have affected the electoral outcome. Clearly, the validity and potency of this right is not dependent on whether or not exercising it would affect the result of an election. This decision therefore detracted significantly from the right in question. I doubt that this was what the legislation intended.

This hurdle was erected for Nigerian voters immediately following independence, but since has been raised even higher with the provisions of the Electoral Act that I referenced above. The consequences of the current dispensation for voters who have complaints about the outcome of elections in which they participated were highlighted in the case of *Chuba Egolum v Olusegun Obasanjo and Others*.<sup>49</sup> This case arose from the presidential elections held in Nigeria in 1999. Egolum, a registered voter, was aggrieved by the announcement that Obasanjo was the winner of the election and decided to challenge it in court. As with the 2010 Electoral Act, the legal framework for that election provided that only candidates and political parties could legally challenge the results. How was the plaintiff to present his case in these circumstances?

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<sup>47</sup> (1961) 1 All NLR 277 (NFSC).

<sup>48</sup> See T Abayomi 'Continuities and changes in the development of civil liberties litigation in Nigeria' (1990-1991) 22 *University of Toledo Law Review* 1035.

<sup>49</sup> (1999) 7 NWLR (Pt 611) 355 (NSC).

Egolum claimed to have a right to contest the election in question. Yet, from all available evidence he had no such right and his petition was therefore doomed from the beginning to denial. He was not sponsored by any political party. The Court of Appeal, sitting as the first instance tribunal in this petition, dismissed it. On appeal to the Supreme Court, it was held that Egolum had an obligation to specify the nature of the right that entitled him to contest the election. To hold otherwise, the Court continued, was to permit any person not qualified under the provisions of the law to claim a right to contest an election. This would open the door of litigation to those the Court referred to as 'meddlesome persons', including non-citizens of Nigeria, under-aged persons and individuals not belonging to or sponsored by political parties.

It is obvious that Egolum's situation merits sympathy. As a registered voter and a person who voted in the election, he had every right to question its outcome if the right to vote in Nigeria meant no more than an empty promise. However, his options were limited by a law that prevented him *a priori* from presenting such a question in court. Clearly, it was for this reason that, rather than couch his claim from the position of a voter entitled to prevent an election producing the wrong outcome, he bizarrely claimed that he had a right to contest the election and to be returned as the winner. Yet, exercising the franchise engages an ends/means calculation. It has been argued that voting is not an end in itself but merely a means to an end – the end of implementing democracy.<sup>50</sup> In Egolum's case, he had exercised the means (voting) but felt that that had not served the end (ensuring the vote counted towards enhancing democracy). His claim in court was therefore to vindicate the 'end' component of the equation.

The Supreme Court's decision pointed to the reason that may have informed the ban placed on voters challenging the results of elections in Nigeria: that it would open the floodgates of litigation. This, however, is not an attitude of the Nigerian legal system specific to electoral cases. The same justification is often presented for discouraging all other kinds of litigation through strict standing requirements that diminish rather than broaden access to the courts for the aggrieved.<sup>51</sup> However, as I will go on to demonstrate later in this article, stopping persons with legitimate grievances about the handling of elections from acting on those grievances through the legal channel encourages impunity. It promotes recourse to extra-judicial methods, including violence, to address those grievances.

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<sup>50</sup> G Kateb 'The moral distinctiveness of representative democracy' (1981) *Ethics* 357. See also Gardner (n 12 above) 897.

<sup>51</sup> T Ogowewo 'Wrecking the law: How article III of the Constitution of the United States led to the discovery of a law of standing to sue in Nigeria' (2000-2001) 26 *Brooklyn Journal of International Law* 527.

In order to show how inappropriate the lack of legal protection accorded the right to vote in Nigeria is, I draw comparisons with other jurisdictions. In doing so, it becomes evident that the fear of opening up the floodgates of litigation to 'meddlesome persons', as anticipated by the Supreme Court in Egolum's case above, is speculative and unfounded. As stated earlier, the United States falls in the category of countries without a constitutional right to vote.<sup>52</sup> This is a misleading categorisation because, even though the right may have been mentioned 'only in a backhanded way'<sup>53</sup> in the US Constitution, the right to vote in the US is accorded very robust constitutional protection.<sup>54</sup>

In *Harper v Virginia State Board of Elections*,<sup>55</sup> the claimant challenged a Virginian law requiring the payment of a poll tax as a precondition for voting. The question before the Supreme Court was whether this particular law violated the equal protection clause of the American Constitution. The Court answered the question in the affirmative and held that, although the right to vote in state elections was not specifically mentioned in the Constitution, it was implicit by reason of the First Amendment to the US Constitution. The Court also decided that, where fundamental rights and liberties (like the right to vote) are asserted under the equal protection clause of the US Constitution, classifications which might invade or restrain them must be scrutinised closely and carefully confined. Therefore, unlike in Nigeria, the right to vote in the US is tied to equal protection which is a fundamental constitutional entitlement in that context.

On the basis of this recognition of the fundamental character of the voting right under the US Constitution, it is possible to present a legal

<sup>52</sup> Kirshner (n 32 above) 32.

<sup>53</sup> P Karlan 'Ballots and bullets: The exceptional history of the right to vote' (2002-2003) 71 *University of Cincinnati Law Review* 1345.

<sup>54</sup> The United States Supreme Court has, however, held consistently that art I(2) of the Constitution provides a legal basis for the right to vote in federal elections. See *United States v Classic* (1941) 313 US 299 ('The right of the people to choose ... is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right.') See also *Harper v Virginia Board of Elections* (1966) 383 US 663. On the other hand, it has been suggested that the right to vote is only a 'fundamental interest' developed along with other similar interests by the US Supreme Court of the Earl Warren era. Apart from the right to vote, that Court also added others like the rights to criminal appeals and interstate travel. See G Gunther *Constitutional law* (1985) 588. However, whether seen as a right or interest, the same Court in *Reynolds v Sims* (1964) 377 US 533 561 held that '[u]ndoubtedly the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinised.' H Lardy 'The American Supreme Court and the right to vote: Early doctrine and developments' (1992) 23 *Cambrian Law Review* 69.

<sup>55</sup> (1966) 383 US 663.

claim on the basis of vote dilution (the rendering of votes to count for less by political gerrymandering) so long as the claimant can prove not only intentional discrimination against an identifiable political group, but also the actual discriminatory effect on that group.<sup>56</sup> The same is true of voting schemes that invidiously minimise or cancel out the voting potential of racial or ethnic groups.<sup>57</sup> While these cases deal with electoral policies that target particular racial or ethnic groups, it has been stated that 'one of the vastly underappreciated consequences of the *Bush v Gore*<sup>58</sup> case is its recognition that the Constitution protects the right to vote from being arbitrarily infringed, for any reason at all, whether or not race is involved'.<sup>59</sup> However, of course this argument has no effect on the Nigerian practice of refusing individual voters to legally challenge the outcome of elections.

As well, unlike in the US, most other countries, although recognising the importance of the right to vote in any effective democracy, seem to confuse the 'means' of actualising the right (voting) with its 'end' (implementing democracy). As a result, most cases arising for consideration in those jurisdictions on the voting right turn only on the denial or potential denial of the vote and not on the tampering with the vote once it is cast. This is, however, not the case in Canada. Section 3 of the Canadian Charter of Rights and Freedoms provides that every citizen has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

In *Figueroa v Canada*,<sup>60</sup> the Canadian Supreme Court evaluated the ramifications of this provision and the nature of the protection it accords the right to vote. The Court understood that the provision was relatively narrow, granting citizens no more than the bare right to vote and to run for office in the election of representatives of the federal and provincial legislative assemblies. The Court's analysis, however, did not terminate with that finding. It held instead that, in their analysis of Charter rights, Canadian courts must look beyond the words of the section which the Court concluded intended more than 'the bare right to place a ballot in a box'.<sup>61</sup> According to the Court:

56 *Davis v Bandemer* (1986) 478 US 109.

57 *City of Mobile v Bolden* (1980) 446 US 55. The dilution which is alleged in such cases has been defined as a claim 'that the election structure when superimposed upon racially-oriented politics produces a situation that deprives them of the benefit of their numbers in the political process. They are thus deprived of the *value* voting.' See K Butler 'Constitutional and statutory challenges to the election structures. Dilution and the value of the right to vote' (1981-1982) 42 *Louisiana Law Review* 851.

58 (2000) 531 US 98.

59 R Pildes 'The future of voting rights policy: From anti-discrimination to the right to vote' (2005-2006) 49 *Howard Law Journal* 741 759.

60 (2003) 227 DLR (4th) 1.

61 *Figueroa* (n 60 above) para 19.

The purpose of section 3 of the Charter is not equality of voting power *per se*, but the right to 'effective representation'. Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative.

If, according to the Court's interpretation, there is more to the right to vote than merely placing a ballot in a box, it follows, as has been argued elsewhere, that the right has 'an intrinsic value independent of the outcome of elections'.<sup>62</sup> The quality of the right therefore depends less on the extent to which a single ballot could actually influence the outcome of an election, but more on that single voter's belief that her vote could make a meaningful difference. This belief is truncated if, after casting the ballot, the voter for some legal reason cannot ask basic questions about what became of it. In the American and Canadian systems, the right of voters to keep track of the ballot has thus been incorporated into the right to vote.

However, while the position of the right to vote in both the United States and Canada represents its most vigorous expression, they may not be effectively extrapolated to the Nigerian political system without taking contextual factors into consideration. If that is the case, Nigeria may benefit from the experiences of countries closer to home. One such country is Ghana, now recognised generally as a thriving democracy. Section 42 of the 1992 Ghanaian Constitution is very clear on its protection of the right to vote. It provides that '[e]very citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda'.

In *Tehn Addy v Electoral Commissioner*,<sup>63</sup> the Ghanaian Supreme Court had an opportunity to pronounce on the boundaries of the right. That case challenged a voter registration policy requiring voters to register only within a specified time period. Relying on section 42 above, the Court held unanimously that the Electoral Commission could not refuse to register the plaintiff outside that specified time period and ordered the Commission to register him. In its judgment, the Court held that through the exercise of the right to vote, the citizen is able not only to influence the outcome of the elections and therefore the choice of a government, but it also places the citizen in a position to help influence the course of social, economic and political affairs thereafter.<sup>64</sup> The Court also surmised that 'whatever the philosophical thought on the right to vote, article 42 of the Constitution ... makes the right to vote a constitutional right conferred on every Ghanaian

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<sup>62</sup> Kirshner (n 32 above) 17.

<sup>63</sup> (1997) 1 GLR 47.

<sup>64</sup> *Tehn Addy* (n 63 above) 50.

citizen of eighteen years and above'.<sup>65</sup> The Ghanaian Constitution, like in all those systems where the right to vote flows from a constitutional source, is clear enough to permit any voter who fears that her ballot is being discounted to seek legal redress.

Drawing from my analyses, it is possible to split the legal protection of the right to vote into two parts. The first deals with the right to be entitled to vote which includes the right to be registered as a voter. This could accommodate voter disaffection with constituency delimitation, voting procedure, campaign finance and the behaviour of political parties during their primaries and which may have an adverse effect on voters. Collectively these are what I argue constitute the 'prospective' element of the right to vote. Nigeria accords protection to this element of the right to vote. I have noted this already and also stated that part of the struggle to properly conceptualise the right to vote in the country's electoral system is owing to the conflation of the right to register with the right to vote. But, however much these constitutive elements of the prospective component of the right to vote (whether taken alone or in conjunction with others) are significant, they cannot replace the right itself when fully conceptualised. Therefore, the difference lies with the second part of the right which is to vote and have the ballot counted. This part, to the extent that it concerns what happens to the ballot after it had been cast, is to my mind the 'retrospective' component of the right to vote. One major means of securing this element of the right is for the voter to be able to keep track of her vote and be legally permitted to challenge any action or policy that dilutes, tarnishes, debases or stultifies it. It is here, as I have stated already, that the Nigerian system is wanting.

As well, for the right to vote to enjoy meaningful legal protection, the mechanism to achieve this must couple both its prospective and retrospective cores. This could be accomplished in several ways, but most effectively through a constitutional recognition of the right to vote as a fundamental political/human right enforceable through the ordinary legal mechanisms of enforcing all other civil and political rights.

## 6 Why protect the right to vote?

Nigeria faced major challenges in the past when it attempted to organise elections that were free and fair, and that met international best practices. Most of these previous elections were poorly organised.

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<sup>65</sup> *Tehn Addy* (n 63 above) 52-53.

Violence, vote rigging and other malpractices marred them.<sup>66</sup> There is a way in which the poor legal protection of the right to vote in Nigeria relates to and incentivises questionable electoral practices. I discuss this below.

After the 2003 general elections in Nigeria, a coalition of Nigerian civil society organisations that monitored the elections issued a report with the instructive title 'Do the votes count?' It was the group's own way of expressing the dilemma of that year's elections in which voters were deceived by those intent only on practising and perpetuating electoral fraud. But if the 2003 elections were bad, those of 2007 were worse. Enthusiastic voters were in 2007 in most parts of the country denied the opportunity of casting their ballots and making them count.

The transgressions witnessed in those elections included stuffing electoral boxes with pre-marked ballot papers; violently hijacking voting materials; non-delivery of sensitive electoral documents like sheets for entering the scores of candidates (the sheets were then marked in secret locations outside authorised voting stations with fictitious scores); and shootings by thugs and compromised security personnel to scare voters away so they could carry out electoral fraud. Those who perpetrated these events did so in the secure knowledge that the voters had no effective mechanism of making them accountable for their actions. This is because voters lack a remedy if prevented from exercising their right to vote or of securing the integrity of the ballot where it is actually cast. In this section, I relate this to the larger goal of strengthening the electoral process and democracy in Nigeria. In doing so, I highlight the likely implications of perpetuating the current weak regime of ballot protection in the country.

The first obvious implication of not strengthening the legal protection of the ballot in Nigeria is that electoral violence will continue. Violence before, during and after elections in Nigeria is

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<sup>66</sup> B Rawlence & C Albin-Lackey 'Briefing: Nigeria's 2007 general elections: Democracy in retreat' (2007) 106 *African Affairs* 497; SJ Omotola "'Garrison' democracy in Nigeria: The 2007 general elections and the prospects of democratic consolidation' (2009) 47 *Commonwealth and Comparative Politics* 195; OO Emmanuel 'Nigeria's 2007 general elections and the succession crisis: Implications for the nascent democracy' (2007) 6 *Journal of African Elections* 14; A Agbaje & S Adejumobi 'Do votes count? The travails of electoral politics in Nigeria' (2006) 31 *Africa Development* 25; WA Fawole 'Voting without choosing: Interrogating the crisis of "electoral democracy" in Nigeria' in TL Kasongo (ed) *Liberal democracy and its critics in Africa: Political dysfunction and the struggle for social progress* (2005) 149; A Banwo 'Nigeria's 2007 elections: A great danger for future elections in Africa' in VO Okafor (ed) *Nigeria's stumbling democracy and its implications for Africa's democratic movement* (2007) 134; N Orji 'Responses to election outcomes: The aftermath of the 2007 elections in Nigeria and Kenya' (2010) 9 *African and Asian Studies* 443; S Osha 'The order/other of political culture: Reflections in Nigeria's fourth democratic experiment' (2011) 25 *Socialism and Democracy* 144.

a recurring problem.<sup>67</sup> The resort to violence is often born out of frustration with the normal channels of redressing electoral grievances, especially with the dominant role of incumbency considerations in the electoral process. Rarely are persons responsible for violence and crime in the course of elections arrested and brought to justice. This encourages the resort to self-help by those who feel cheated. It may further be argued that the presence of criminal laws mandating the prosecution of electoral offenders in Nigeria provides significant protection for the right to vote. However, this may not necessarily be the case, for two reasons. The first is that the enforcement of the law is weak, as I stated above. As significantly, where those charged with enforcement fail in that duty, the legal means to hold them responsible do not exist. Therefore, while criminalising behaviour that harms the vote may offer some form of protection, it cannot stand as a substitute for legally empowering voters to protect their votes.

In Nigeria this has since given rise to what in civil society circles is known as 'mandate protection'.<sup>68</sup> Groups that work in this area describe the mandate as involving the relationship between the people's votes and the outcomes of elections,<sup>69</sup> while to protect it involves the combination of mobilising and organising citizens to insist that election stakeholders operate within the law, as well as monitoring, exposing and challenging election fraud and abuse at every step of the electoral process.<sup>70</sup> When it is recognised that mandate protection became necessary because voters lack better alternatives to make their votes count, it also becomes clear how risky such protective activities are to those involved, especially if they are required to 'insist', not within legal boundaries, but by taking the law into their own hands.<sup>71</sup>

Not providing adequate legal protection for the right to vote obviously also leads to weak political parties. The worst that can happen in a democracy is for the impression to be given that people's votes do not count in the outcome of elections. The first implication is that it will affect voter enthusiasm and, second, political parties

<sup>67</sup> E Onwudiwe & C Berwind-Dart 'Breaking the cycle of electoral violence in Nigeria' (2010) 263 *Special Report 1* [http://www.usip.org/files/resources/SR263-Breaking\\_the\\_Cycle\\_of\\_Electoral\\_Violence\\_in\\_Nigeria.pdf](http://www.usip.org/files/resources/SR263-Breaking_the_Cycle_of_Electoral_Violence_in_Nigeria.pdf) (accessed 12 May 2012); E Obadare 'Democratic transition and political violence in Nigeria' (1999) 24 *Africa Development* 199 ('Politics and violence are like Siamese twins in Nigeria. Political activity has always featured a notable degree of violence...').

<sup>68</sup> See BU Nwosu 'Civil society and electoral mandate protection in South Eastern Nigeria' (2006) 9 *The International Journal of Not-for-Profit Law* 20.

<sup>69</sup> Global Rights *Election mandate protection toolkit 2006* [http://www.globalrights.org/site/\\_DocServer/Election\\_Mandate\\_Protection\\_Toolkit\\_2006.pdf?docID=11083](http://www.globalrights.org/site/_DocServer/Election_Mandate_Protection_Toolkit_2006.pdf?docID=11083) (accessed 12 May 2012).

<sup>70</sup> Global Rights (n 69 above) 8.

<sup>71</sup> A Okoli & S Okobi 'Mandate protection: JDPC Mobilises 10 000' *This Day* <http://www.thisdaylive.com/articles/mandate-protection-jdpc-mobilises-10-000/75639/> (accessed 12 May 2012).

will have little incentive to invest in expanding their membership base. Both consequences are currently at play in Nigeria. The 2011 elections may have shifted the paradigm a little but before then, voters never really felt that they could make any real difference by voting in elections given their past experiences. At the level of political parties, this only compounded already-existing challenges. The rise of the political 'godfather'<sup>72</sup> who had the financial leverage to determine who won an election or lost it, led to consigning to an insignificant position the voter who had no such resources. Thus, political parties would rather invest in attracting political godfathers to their fold than ordinary voters. This was evident with the Nigerian ruling party – the PDP – which, as a prelude to the 2007 general elections, actually deregistered some of its members who had fallen out with the party hierarchy.<sup>73</sup>

As has been argued, there is an intimate connection between the activities of godfathers in Nigerian politics and the subversion of the electoral process or electoral fraud as well as poor governance of political society.<sup>74</sup> This is so as such fraud perpetrated by godfathers or their go-betweens deny voters control of a 'valuable political resource; the giving or withholding of their votes'.<sup>75</sup> Moreover, because of the unusual leverage godfathers have across the political spectrum, there is a tendency for them to act with impunity and thus subvert the rule of law. As part of this strategy, they are often given to using violent means to reach their goals. Even among the political opposition the objective is always to counter force with violence. A prominent opposition politician was reported to have told Human Rights Watch that '[i]f anyone tries to attack me, my boys will unleash terror'.<sup>76</sup>

Besides, the prominence accorded godfathers in party formations means that voters often count for little in electoral calculations. As a consequence, politicians would rather invest in cultivating godfathers

<sup>72</sup> OA Adeoye 'Godfatherism and the future of Nigerian democracy' (2009) 3 *African Journal of Political Science and International Relations* 268 (defining the godfather as 'a kingmaker, boss, mentor, and principal'); S Hanson 'Nigeria's godfather syndrome' *Analysis Brief*, Council on Foreign Relations, 2007 <http://www.cfr.org/nigeria/nigerias-godfather-syndrome/p13077> (accessed 11 May 2012) ('political elites who sponsor candidates [for elections] with the understanding that they will reap the financial benefits once the candidate takes office'); Human Rights Watch 'Criminal politics: Violence, "godfathers" and corruption in Nigeria' (2007) [http://www.hrw.org/sites/default/files/reports/nigeria1007webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/nigeria1007webwcover_0.pdf) (accessed 12 May 2012).

<sup>73</sup> See Ugochukwu (n 44 above) 28.

<sup>74</sup> OO Olarinmoye 'Godfathers, political parties and electoral corruption in Nigeria' (2008) 2 *African Journal of Political Science and International Relations* 66.

<sup>75</sup> As above. See also JC Scott *Comparative political corruption* (1973). But for a more detailed understanding of the relationship between godfatherism and political violence, see IO Albert 'Explaining 'godfatherism' in Nigerian politics' (2005) 9 *African Sociological Review* 79.

<sup>76</sup> See Hanson (n 72 above).

and capturing political party structures (that is, the party bureaucracy that plays prominent roles in choosing candidates to be on the ballot) than earning the confidence of voters. Without a strong and alert membership able to insist on due process and to hold the officials to strict levels of accountability, political parties are weakened and suffer an erosion of internal democratic practices. Their dictatorial orientations not only discourage and demoralise their members; they also threaten the foundations of democracy. Yet, voters could ignore both the powers of godfathers and the arbitrariness of the party bureaucracy if they were offered better protection of their votes. In that case, whatever the machinations of the godfathers and party officials, individual voters could take steps to safeguard their votes from theft, debasement or dilution. Rather, the current legal framework prioritises the rights of candidates (fronted by godfathers) and political parties to question the outcome of elections while denying voters the same right.

The above scenario can only lead to voter apathy. When voters – the most important actors in any democracy – lose interest in, and enthusiasm for, the electoral system, there is little doubt that it is in serious danger. If voters think they are less important than godfathers in the estimation of political parties and electoral candidates, they will obviously begin to question and doubt their own efforts and commitment. This scenario is compounded by voters' experiences as party members because, in choosing candidates to place on the ballot, Nigerian parties generally ignore the preferences of their members. Party primaries in Nigeria are therefore mere rituals because party leaders can subvert the will of their members by reversing, often without explanation, the outcome of nomination congresses.<sup>77</sup> Consequently, at both ends of the electoral spectrum voters need to have their position better secured as a foundation for a sustainable electoral system.

## 7 Conclusion

In this article I analysed the right to vote in Nigeria and the need for it to be protected more vigorously in order to consolidate Nigeria's fledgling democracy. For Nigeria's electoral democracy to grow and be stabilised, the ordinary voter must be given a prominent place in the electoral system. The strength of the system rests on the popular participation of society. I reckon, therefore, that the level of prominence

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<sup>77</sup> See Ugochukwu (n 44 above) 39. See also *Onuoha v Okafor* (1983) NSCC 494, where the Nigerian Supreme Court held that questions about the choice of candidates by political parties are non-justiciable political questions. This judgment gave complete control of candidate nominations to party leaders who wielded that power arbitrarily.

given to ordinary voters is inversely proportional to the degree of legal protection that the vote is accorded by the legal system.

My critique of the current system in Nigeria is based on three points. The first is the tendency to confuse the right to vote with the right to be registered as a voter. My conclusion is that they are not the same thing. Secondly, without the protection of the right to vote, there is a likelihood for a disconnect between the votes cast by voters and the outcomes produced. Thirdly, even where voters are allowed access to the polls, political interference renders that access meaningless unless there is an understanding that the law will be on the side of voters to challenge such interference.

Having the above in mind, it is recommended that the right to vote in Nigeria be made a fundamental human right to be enforced like all other rights under the Constitution. This will not only confer appropriate constitutional legitimacy on the right, but also comply with the practices of several other jurisdictions, even those in Africa. It will further show Nigeria's openness to international and comparative best practices. In addition, the electoral law should be amended to allow voters the legal right to challenge the outcomes of elections where they do not represent their will as voters.