



A Contemporary Legal Overview Of Party Switching Of Elected Legislators Of The National And State Assemblies Under The Nigerian Constitutional System

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ABSTRACT

The 1999 Nigerian Fundamental law came into effect on May 29 1999. It provides that an elected legislator in the National and State Assemblies shall vacate his legislative seat if he switches from the sponsoring political party to another political party during his tenure in the legislative house, save on the ground of division or factionalisation in the sponsoring party. The Constitution is, nevertheless, mute on the issue, regarding political executives, including a governor. The relevant statutory provisions, that is sub-section (1)(g) of sections 68 and 109 of the Constitution above have been abused, as some Nigerian courts have utilised them to sack elected legislators above for party switching of the same during their tenure in the legislative houses despite their constitutional rights, including the equal protection of the law and not to be discriminated against right, as enunciated in section 42(1) of the Constitution above. The article undertakes a contemporary legal overview of party switching of elected legislators of the assemblies above against the backdrop of relevant case-law and statutory provisions. The research methodology used by the authors is fundamentally doctrinal analysis of relevant primary as well as secondary sources. The article finds that the sacking of elected legislators above by some Nigerian courts on account of party switching as indicated above is unconstitutional. The article suggests that Nigeria should expunge from its Constitution the said relevant statutory provisions in tune with what obtains in other countries such as the United States of America (USA), United Kingdom (UK), Canada and Australia.

Keywords: Legislator, 1999 Nigerian Constitution, Political party, Party switching, Nigeria.

1. Introduction

The Constitution of the Federal Republic of Nigeria, 1999 (the 1999 fundamental law) ¹, predicated on the USA-styled presidential system of government was inaugurated on May 29 1999, signaling the starting of the fourth Republic.

In Nigeria a nation with 36 States and a Federal Capital Territory (FCT), Abuja practicing the common law, there is provision for election of a legislator who shall have been sponsored by a party into membership of the constitutionally-established central legislature, which is the National Assembly constituted by the House of Senate or Senate and House of Representatives and constitutionally-established State legislature, that is the House of Assembly for a term of

¹ Cap C 23 Laws of the Federation of Nigeria (LFN) 2004.

four years. He may be re-elected under a political party sponsorship into membership of the Senate, and so on for subsequent terms, as the case may be.

It is disappointing that since the 1999 Nigerian Constitution came into effect, some elected legislators have been sacked or removed from membership of the legislative house by some Nigerian courts on account of switching to political parties other than the political parties which sponsored them to membership of the legislature during their tenure or membership in the legislature. There is an upsurge of this problem in recent times. A classic example is the case of Governor David Umahi of Ebonyi State, Deputy-Governor Eric Kelechi Igwe of Ebonyi State and 15 elected legislators of the Ebonyi State House of Assembly. It should be pointed out that on November 17, 2020, Governor Umahi, Deputy-Governor Igwe and 15 elected legislators of the Ebonyi State House of Assembly switched from the Peoples Democratic Party (PDP) to the ruling All Progressives Party (APC) without vacating their offices and seats in the Ebonyi State House of Assembly, respectively.² On 8 March 2022, a Federal High Court in Abuja sacked or removed Governor Umahi, his deputy Igwe and 15 elected legislators from their offices and seats, respectively.³ On appeal by Umahi and Igwe, the Court of Appeal (per Haruna Tsunami, JCA) in its judgment on 28 October 2022 re-instated Governor Umahi and Deputy-Governor Igwe into their offices, after holding that there was no constitutional provision concerning the removal of a serving governor or deputy-governor that switched from the political party that sponsored him to power.⁴ It further held that the only option open to an aggrieved political party is to explore the option of impeachment of a governor or his deputy under the Nigerian Constitution.⁵

The National Assembly of Nigeria (NAN) is largely to blame for the problem, as its enactment in the 1999 Nigerian Constitution provides in its sub-section (1)(g) of section 68 as follows:

A member of the Senate or the House of Representatives shall vacate his seat in the House of which he is a member if-

being a person whose election to the House was sponsored by a political party, he becomes a member of another political party before the expiration of the period for which that House was elected:

provided that his membership of the latter political party is not as a result of a division in the political party of which he was previously a member or of a merger of two or more political parties or factions by one of which he was previously sponsored.⁶

It can be discerned from the provisions above that the purpose of sub-section (1)(g) of sections 68 and 109 above is two-fold. First, they seek to visit the constitutional sanction of disqualification for remaining a member of the legislative house or vacation of seat in the legislature on any member of the legislative house who switches political parties during his tenure in the legislative house for selfish or personal interest. Second, they seek to allow any member of the legislative house retain his seat in the legislative house if the same switches political parties during his tenure in the legislative house for clearly no fault of his, that is as a result of a division in the sponsoring political party or a merger of two or more political parties or factions

² See 'Ebonyi Governor, Umahi Dumps PDP, join APC' <<https://saharareports.com>> accessed 3 October 2022.

³ (Unreported) Suit No.FHC/ABJ/CS/920/2021, Judgement of Inyang Ekwo, J of the Federal High Court, Abuja delivered on 8 March 2022. Also, see 'Court sacks Ebonyi Governor Umahi, deputy, 15 lawmakers' <<https://www.premiumtimes.ng.com>> accessed 3 October 2022.

⁴ See 'Appeal Court Reverses Judgment sacking Umahi, Deputy' <<https://www.vanguardngr.com>> accessed 30 October 2022.

⁵ *Ibid.*

⁶ Section 68(1)(g) above is the same in verbiage with s 109(1)(g) of the 1999 Nigerian fundamental law which contains provisions on vacation of seats of members of the State House of Assembly on account of party switching.

by one of which he was initially sponsored.⁷ The 1999 Nigerian Constitution in its sections 68(2) and 109(2) bestows on the head of the legislative house, including the President of the Senate, the authority to declare vacant the seat of the elected legislator by reason of party switching, save in the circumstances indicated above.

It is true that the fundamental rights to freedom of thought, conscience and religion as well as free association and right to assemble peacefully, guaranteed by sections 38(1) and 40 of the 1999 Nigerian fundamental law to all Nigerians, including an elected legislator, among other fundamental rights encapsulated in sections 37, 39 and 41 of the fundamental law above, are not absolute and can be derogated from under section 45(1) of the 1999 Nigerian fundamental law, by a law which is justifiable reasonably in a democratic society in the defence interest, safety of the public, public health, order of a public nature, public morality and for the purpose of protecting the right and freedoms of other people.⁸ However, the 1999 Nigerian fundamental law fails to define the elastic terms of 'defence', 'public order', 'public safety', 'public health', and 'public morality', as employed in sub-section (1) of section 45 above in order to forestall unreasonable restrictions of the fundamental rights above, among other fundamental rights envisaged in section 45(1) above.

Regarding sub-section(1)(g) of sections 68 and 109 above, the 1999 Nigerian fundamental law, also, fails to define the words 'division' and 'faction', as utilised in the proviso to the sections above. Additionally, as disclosed before, the 1999 Nigerian Constitution, penalises an elected legislator who switches parties during his tenure in the legislative house, save on the ground of a division or factionalisation in the sponsoring political party with the constitutional sanction of vacation of seat in the legislative house but fails to impose a similar sanction on an elected political executive such as a governor or deputy-governor who switches political parties during his term of office. These are the gaps this article seeks to address. Put differently, the above gaps constitute the rationale behind conducting this study.

A point to note is that these *lacunae* in Nigeria's fundamental law would not augur well for the system of democratic governance in the nation, as they are prone to abuse as has been the case since the coming into effect of the 1999 Nigerian fundamental law. The case of *Ifedayo Sunday Abegunde v Ondo State House of Assembly and Others*⁹ is a classic example. In the case, the Nigerian Supreme Court affirmed the decisions of the trial Federal High Court and Appeal Court, removing the appellant/plaintiff a member of the House of Representatives representing Akure North/South Federal constituency of Ondo State in breach of section 68(1)(g) above, as he had switched from the Labour Party (LP), the sponsoring political party to the Action Congress of Nigeria (ACN), formerly known as Action Congress (AC) (but now APC) in 2011, because, as he claimed, there was a division of the LP in Ondo State. Thus, his suit filed at the Federal High Court, Akure on 26 January 2012 seeking a declaration that by virtue of the proviso in sub-section (1)(g) of section 68 above he was entitled to a retention of his seat in the House above, despite his switching to the defunct ACN ended in fiasco.

Of course, the practice in the country contrasts with the practice of other countries like the USA, the UK, Canada and Australia. In Australia, for example, sections 44 and 45 of the Commonwealth of Australia Constitution Act 1901, dealing with Disqualification of elected members of Parliament and Vacancy on happening of Disqualification of elected members of Parliament, respectively are silent on the fate of elected legislators in the Senate and House of Representatives who switch parties during their tenure in the legislative house. Thus, elected legislators in both the Australian Senate and House of Representatives could switch political parties without vacating their seats in the legislative house.

⁷ See, also, OI Eme and Ogbuchie, 'The Legal Constitutional basis of Political Party Defection in Nigeria' (2014) 3 (11) *Kuwait Chapter of Arabian Journal of Business and Management Review* 27.

⁸ See *Phamabase Nigeria Ltd v Ilegbusi Olatokunbe* [2020] 10 NWLR (part 1732) 379, 386, Court of Appeal (CA), Nigeria.

⁹ [2015] All FWLR (Pt.786) 432, Supreme Court (SC), Nigeria.

A pertinent question to ask is: is the behaviour of an elected legislator who refuses to vacate his legislative seat after switching parties amoral, undemocratic and unlawful? Another relevant question is: should an elected legislator who switches parties during his tenure in the legislative house not be allowed to remain in the legislative house like the political executives, including governors who remain in office in spite of switching political parties during their term of office? A further relevant question is: should the Nigerian Constitution not remain silent like the 1960 and 1963 Nigerian Constitutions, the USA, the UK and Australian constitutions on the fate of elected legislators who switch parties during their tenure in the legislative house? These questions constitute the basis of this article.

The purpose of this article is to undertake a contemporary legal overview of the practice of elected legislators in the National and State Assemblies switching parties before the expiration of their tenure in the legislative house under the Nigerian constitutional system. It gives the meaning of party switching and political party. It analyses relevant laws, including the Constitution of Nigeria, international human rights' norms or treaties and case-law on the practice of elected legislators switching parties during their tenure in the legislative house in the nation. It indicates the practice in other countries. It takes the position that the sacking or removal of elected legislators from membership of the legislative house who switch parties during their tenure in the legislative house in Nigeria is discriminatory, unconstitutional, unlawful, undemocratic and contrary to international human rights' norms or treaties and postulates suggestions, which, if executed, could bring an end to the problem of sacking elected legislators from membership of the legislative house who switch parties during their tenure in the legislative house in Nigeria.

2. Conceptual framework

The words 'political party' are keywords in this article. In Nigeria, statute gives the meaning of a political party. To be specific, section 229 of the 1999 Nigerian fundamental law defines a political party as including any association whose activities include canvassing for votes in support of a candidate standing for election to membership of a local government council or of a legislature or office of the Governor, Deputy-Governor, President and Vice-President.

It is pellucid from the statutory definition above, that the PDP and APC are political parties, since one of their activities involves canvassing for votes in support of candidates for elections into the office of the President, Vice-President, Governor, Deputy-Governor or membership of legislative houses or of local government councils in the country. Arguably, the definition of statute above is weak, as it is not encompassing. For instance, it does not state or provide that a political party is an association, which advocates certain policies and principles for the conduct of government at large and society, based on shared political belief or ideology or philosophy of government.

A better definition of a political party is that it is:

...the voluntary organisation of citizens advocating certain principles and policies for the general conduct of government and society based on shared political ideology or philosophy of government and which, as the most immediate means of securing their adoption nominates and supports some of its members as candidates for elections into political offices.¹⁰

In order to tackle the concerns raised above, it might be wise to amend section 229 above to incorporate the definition above.

The words 'party switching' are, also, key-words in this paper. They are made-up of two words, namely 'party' and 'switching'. The word 'party' has the same meaning of a 'political party', as indicated above. It's noteworthy that the word 'switching' is derived from the English word 'switch'. This means 'a change from one thing to another, especially when this is sudden and

¹⁰ Andrew Ejovwo Abuza, 'Political Office Holder and Party Switching under the 1999 Nigerian Constitution: A Review of the Practice and Law' (2013) 5 *Ekiti State University, Ado-Ekiti Law Journal* 434.

complete.¹¹ Party switching, therefore, means the sudden and complete change from the membership of one political party to the membership of another political party.¹² Other terms utilised to describe 'party switching', include 'decamping', 'defection', 'crosstitution', 'waka jumping' or 'party hopping' and 'carpet crossing' or 'floor crossing'.¹³

3 Case-law analysis on party-switching of elected legislators of National and State Assemblies under the constitutional system of Nigeria.

Nigerian courts have undertaken a discourse on party switching of elected legislators of the National and State Assemblies practice under the constitutional system of Nigeria in numerous cases. A discussion on a small number of these cases would be sufficient in this section. A significant case that is on point is *Ifedayo Sunday Abegunde v Ondo State House of Assembly and Others*.¹⁴ In the case, Honourable Justice Musa Dattijo Muhammad JSC, giving the lead judgment of the Nigeria's apex Court on March 19, 2015 to which was supported by six Justices of the Court, relied on sub-section(1)(g) of section 68, sections 222 and 229 of the 1999 Nigerian fundamental law, the Electoral Act 2010 in its section 80 as well as the apex Court's decision in the *Attorney-General of the Federation of Nigeria v Atiku Abubakar*¹⁵ and held that it is only a division or factionalisation or splintering or fragmentation which makes it not to be possible or practicable for a political party to operate that can justify the switching of a legislator from one party to another, otherwise the switcher automatically lost his seat.

Another noteworthy case on point is *David Umahi and Eric Kelechi Igwe v Peoples Democratic Party*.¹⁶ It should be re-called that in its judgment of 8 March 2022, a Federal High Court, Abuja (per Inyang Ekwo, J) sacked the said 15 elected legislators from their seats in the State Legislative house. Justice Ekwo who relied heavily on section 221 of the 1999 Nigerian Constitution, held that votes cast in a Nigerian election belonged to the parties and not belonging to parties' candidates and, therefore, if an elected legislator switched from the sponsoring political party to another political party during his tenure in office he must vacate his seat.

¹¹ P Phillips et al (eds), *AS Hornsby's Oxford Advanced Learner's Dictionary-International Student's Edition* (Oxford: 8th edn, Oxford University Press 2010) 1513.

¹² Abuza (n 10) 436.

¹³ *Ibid.* Note that party switching of elected legislators' dates back to the period between 1861 and 1960 when Nigeria was under the colonial rule of Britain. It first occurred officially in 1951 when 20 National Council of Nigerian Citizens (NCNC) elected legislators in the Western Region House of Assembly switched to the Action Group (AG). *Ibid.*, 440. It should be pointed out that the First Republic of Nigeria which lasted from 1 October 1963 to 15 January 1966 was hinged on the West Minister parliamentary Constitution of the Federation 1963. Section 44(1) and 49(1) of the Independence Constitution of Nigeria 1960 and the Constitution of the Federation 1963, respectively and the regional constitutions are silent on the fate of elected legislators who switch political parties during their tenure in the legislative house. Thus, elected legislators could switch parties during their tenure in the legislative houses without vacating their seats in the legislature, save the nation's prime minister such as Tafawa Balewa of the Northern Peoples Congress (NPC) and the regional premiers who were also elected legislators and had gained their positions by virtue of being leaders of the political parties with majority seats in the legislature. Party switching of elected legislators in Nigeria is consistent with the practice in other countries, including the UK. Note that in 1904, Wilson Churchill of the British House of Commons switched from the Conservative Party to the Labour Party. He switched back to the Conservative Party in the 1920s.
<<https://news.bbc.co.uk/.82032stm>(BBC news, 14 August 2008) accessed 12 August 2009, quoted in *Ibid.*, 443.

¹⁴ See (n 9).

¹⁵ [2007] 150 LRCN 1632, 1683-1685

¹⁶ See (n 3). Also, see 'Appeal Court Reverses Judgment sacking Umahi, Deputy'
<<https://www.Vanguardngr.com>> accessed 30 October 2022.

Finally, the case of *Peoples Democratic Party v Ben Ayade and Others*.¹⁷ In the case, the first defendant, Cross River State Governor Ben Ayade along with second defendant, Deputy Governor Ivara Esu of Cross River State, House of Representatives' two assembly men representing Cross River State and 18 House of Assembly men of Cross River State switched from PDP to the ruling APC on 20 May 2021. The Plaintiff filed a suit at High Court of Justice of the Federation Abuja claiming, among other reliefs, the declaration of Court, that is the offices of first defendant and second defendant as well as the seats of the 20 elected legislators had become vacant by reason of their switching to the ruling APC. The legislators claimed that there was a disagreement in the PDP which led to their expulsion from the same. In the judgment delivered on March 21, 2022, the Court above (per Taiwo, J) dismissed the claim by the legislators above. It held that votes cast in a Nigerian election belonged to sponsoring parties. According to the Court above, the electorates voted for the legislators, because they contested under the platform of the PDP and not in their individual capacities. The learned Justice Taiwo Taiwo further held that the affected Federal and State Legislators could not continue to occupy their seats in the legislative house, having switched from the political party that brought them into office or their positions. His Lordship, therefore, ordered them to vacate their seats in the legislative house on account of their switching from PDP to APC, relying on sub-section (1)(g) of sections 68 and 109 of the 1999 Fundamental law.

Regarding first defendant as well as second defendant, the trial High Court deferred its judgment to on the 16 April 2022. In its judgment delivered on the date above, the Court above dismissed suit challenging the first defendant as well as second defendant and held that party switching of governors or deputy-governors was not illegal or an offence under the Nigerian Constitution. In the end, the trial High Court declined to sack the first defendant and second defendant from their offices.

It's pellucid, going by the decisions of the Nigerian apex Court and the other Nigerian ordinary courts, that the same are not ready to allow the elected legislator who switched parties during his tenure in the legislative house to retain his seat in the same, save in the case of a division or factionalisation of the sponsoring political party. Their stance is hinged on sub-section (1)(g) of sections 68 and 109 above.

The authors take the position that the judgment of the trial High Court of Justice, Appeal Court and Nigerian apex Court of in the *Abegunde* case as well as the judgment of the trial High Court of Justice in *Umahi* case and the judgment of the trial High Court of Justice in the case of *Ayade*, regarding 20 elected legislators cannot be correct. They are unacceptable for the ensuing reasons. First, the impugned decisions above are contrary to the right to assemble peaceful and freedom to associate constitutionally-bestowed on all citizens of Nigeria, including elected legislators in section 40 of 1999 Nigerian fundamental law. It bestows on an individual the right to free assembly and association with others, including the right to create or join a trade union, party or other associations for the purpose of protecting the interests of the individual.

A relevant point which one must have in mind is that the approach of the 1999 fundamental law, as can be seen in its section 40 is consistent with what obtains in other countries, including Tanzania, Zambia, Malawi, Zimbabwe, Kenya, Portugal and South Africa where the constitution gives to an individual, such as the elected legislator peaceful assembly and association rights.¹⁸ Also, it is in alignment with international instruments, including the United Nations (UN) Universal Declaration of Human Rights (UDHR) 1948, European Convention on Human Rights

¹⁷ See (Unreported) Suit No FHC/ABJ/CS/975/2021, Judgment delivered by Taiwo Taiwo, J on 21 March 2022 and 16 April 2022. See, also, 'Court refuses to sack Ayade over defection' <<https://www.thecable.ng>> accessed 1 November 2022.

¹⁸ See, for instance, the Tanzanian Constitution, as altered by the Eighth Constitutional Amendment Act No 4 of 1992, art 20(4); the Zambian Constitution of 1991, as altered by the 2016 Act No 2, art 21; the Malawian Constitution of 1994 (revised in 2017), art 32(1) & (2); the Zimbabwean Constitution (Amendment) Act No 17 of 2005, art 21(2); the Kenyan Constitution 2010, s 36(1); the Portugal's Constitution 1976, as altered in 2005, art 46; and the South African Constitution 1996, s 18.

(ECHR) 1953, UN International Covenant on Civil and Political Rights (ICCPR) 1966, American Convention on Human Rights (AMCHR) 1969, the African Union (AU) African Charter on Human and Peoples' Rights (ACHPR) 1981, and the Arab Charter on Human Rights (ACHR) 2004 where the instrument confers on an individual, such as the elected legislator peaceful assembly and freedom of association rights.¹⁹

True, section 40 above does not expressly accord to Nigerians, including elected legislators the right against being compelled or forced to remain in an organisation. All the same, it's settled law that the freedom of association right, also, includes the right against being compelled to belong or remain in any organisation. To be sure, in *Young, James and Webster v The United Kingdom*,²⁰ the European Court construed the freedom of association right to, also, include the right for a person to choose not to join a union of trade or any other association. It would be helpful if the fundamental law in Nigeria above is amended to include incorporate the right against being compelled to an association in tune with what obtains in countries like Zimbabwe as well as Malawi²¹ and approach under international law²²

Balarabe Musa, former Chairman of the defunct Conference of Nigeria Political Parties (CNPP) says that although switching of individuals who play politics from one political party to another political party undermines development politically of the nation, there is nothing wrong with the switching from one party to another.²³ In his right view, party switching is democratic and the utilisation of the constitutional provision for freedom of association and choice.²⁴ Musa maintains that the phenomenon of party switching happens in all countries of the world.²⁵ He, nevertheless, points out that in the developed countries of the world, including the USA and the UK party switching happens rarely²⁶ and when it occurs there must be honourable reasons for it.²⁷

It is argued that if the freedom of association is being misused in view of the switching of political parties by elected legislators during their tenure in the legislative house in a manner reminiscent of the way a woman changes her wrapper there are several ways to deal with it, other than vacation of seats in the legislature. For instance, an erring elected legislator may be recalled by members of his constituency for loss of confidence under sections 69(a) and (b) and 110(a) and (b) of the 1999 Nigerian Constitution. In view of the provision above, it can be argued that the fundamental law of Nigeria has addressed the situation. Again, people might refuse to return an elected legislator, who is adjudged to be mis-using the freedom of association to switch parties during his tenure in the legislative house, to his seat.

It should be noted that the Court of Appeal in Nigeria (per Chinwe Eugenia Iyizoba, JCA) decided in *President, Federal Republic of Nigeria v Isa*,²⁸ that the right to free association guaranteed in section 37 of the 1979 fundamental law of Nigeria (now section 40 of the 1999 fundamental law of Nigeria), like other rights embedded under Chapter Four provisions of the fundamental law cannot be an absolute right but instead a qualified right which can be derogated from in alignment with sub-section(1) of section 41 of 1979 Nigerian basic law (now sub-section (1) of section 45 of the 1999 Nigerian basic law). In a recent case in point, that is *National Unity Party*

¹⁹ See, for example, UN UDHR 1948, art 20(1) & (2); the ECHR 1953; art 11; the UN ICCPR 1966, art 22(1); the AMCHR 1969, arts 15 & 16; the AU ACHPR 1981, arts 10 & 11; and the ACHR 2004, art 28.

²⁰ [1981] 1 RLR 408.

²¹ See, for example, the Constitution of Zimbabwe 2013, s 58(1) & (2) and the Constitution of the Republic of Malawi 1994, revised in 2017, art 32(1) & (2)

²² See, for example, the UN UDHR 1948, art 20(1) & (2).

²³ See Eme and Ogbuchie (n 7) 22-23.

²⁴ *Ibid.*, 23.

²⁵ *Ibid.*

²⁶ Note that Senator Arlen Specter of the USA was actually the 13th Senator to switch parties since 1913 in the country above. See 'Longtime GOP Sen. Arlen Specter becomes Democrat' (CNNTV Channels) <CNN.www.cnn.com> accessed 25 October 2022.

²⁷ *Ibid.*

²⁸ [2017] 3 NWLR (Pt. 1553) 347, 352-364, Court of Appeal (CA), Nigeria.

v Independent National Electoral Commission,²⁹ the Nigerian apex Court declared that the right to free association was a right to voluntary association or disassociation from a group. It, however, pointed out that the freedom above was not absolute. According to the apex Court, the freedom of association could be curtailed in a bid to guarantee the people's safety, national security, morals and the right or freedom of other people.

The pronouncement of the apex Court above is obviously predicated on section 45(1) of the 1999 fundamental law of Nigeria. It states that nothing in sections 37, 38, 39, 40 as well as 41 of the basic law must be perceived to render any law invalid which is justifiable reasonably in a society that is perceived democratic in the interest of safety of the public, defence, public order, health of the public, morality of the public or for the purpose of protecting other people's freedom and rights.³⁰

A contention can be put-forth that the anti-party switching law, as encapsulated in sub-section (1)(g) of sections 68 and 109 above is a law that is justifiable reasonably in a society perceived to be democratic in the interest of defence, order of a public nature and so on and, therefore, in order or acceptable.

Perhaps, it should be pointed out that the provisions of section 45(1) above which is called the derogation phrase are consistent with what obtains in countries like South Africa, Tanzania, Ghana as well as India.³¹ Be that as it may, it is argued that the clause above is of doubtful utility and, thus incapable of being relied upon. This is so, because the fundamental law of Nigeria does not give the meaning of the terms- 'defence', 'public order' and so on, regarding intention of the drafters of the fundamental law of Nigeria in section 45 above. It is apparent that these terms are unclear. A germane question to pose is: can the sections of the 1999 Nigerian fundamental law be of help to determine if the anti-party switching law above is justifiable reasonably in a democratic community in the defence interest, order of the public interest and so on? The answer is in the negative.³²

Second, the impugned decisions above are contrary to the fundamental right to change political belief and to manifest as well as propagate the same publicly in practice and observance, bestowed on all Nigerians, such as the elected legislator under 38(1) of the 1999 basic law. For instance, the section above states that every individual shall have the right to think freely, right to freedom of conscience and religion, including right to alter his belief or religion, and the right to be alone or in community with others, and in private or public, to show as well as espouse his belief or religion whether in worship, practice, observance and teaching.³³

Another noteworthy point is that the approach of the 1999 fundamental law of Nigeria, as could be seen from section 38(1) is consistent with other countries practice such as in Tanzania, Zambia, Malawi, Zimbabwe, Kenya, Portugal and South Africa where the constitution guarantees to every individual, including the elected legislator the right to think freely, right to freedom of religion and conscience which includes the right to alter political belief and to show as well as

²⁹ [2021] 17 NWLR (Pt. 1805) 305, 321, SC, Nigeria.

³⁰ Section 45(1) was upheld by the Supreme Court of Nigeria (per Christopher Mitchell Chukuma-Eneh, JSC) in *National Union of Employees and Another v Bureau of Public Enterprises* [2010] 7 NWLR (Pt. 194) 539, 546-575, SC, Nigeria.

³¹ See the South African Constitution 1996, s 36; the Tanzanian Constitution 1977, as altered by the 2005 Act No 1, art 30; the Ghana's Constitution 1992, arts 21(4) & 31; and the Indian Constitution 1949, art 19(2) - (5).

³² For details on the criticism of s 45 above, see Andrew Ejovwo Abuza, 'Derogation from Fundamental Rights in Nigeria: A Contemporary Discourse' (2017) 7 (1) *East African Journal of Science and Technology* 121-22.

³³ This right was upheld by the Court of Appeal in Nigeria (per Ali Abubakar Gumel, JCA) in *Abdulkareem v Lagos State Government* [2016] 15 NWLR (part. 1535) 177, CA, Nigeria. On 17 June 2023, the Nigerian apex Court upheld the right on appeal brought by the Government of Lagos State against the Court of Appeal judgment.

propagate the same publicly in practice and observance.³⁴ Also, it is in consonance with international instruments, including the UN UDHR 1948, UN ICCPR 1966, ECHR 1953, AMCHR 1969, ACHR 2004 and the AU ACHPR 1981 where the instrument guarantees to every individual, including the elected legislator the fundamental right to think freely, right to freedom of religion and conscience, which includes the right to alter political belief and to show as well as propagate the same publicly in practice and observance.³⁵

Richard Akinjide a former Nigerian Justice Minister as well as Federal Attorney-General has expressed support for elected legislators who had switched to his political party, that is PDP without vacating their seats in the legislative house. He argues that their actions are not undemocratic, unethical or odious but in consonance with the constitutionally-guaranteed rights to change political belief and political loyalty, as embedded in sub-section (1) of section 38 and section 40 of the 1999 fundamental law of Nigeria, respectively. In order to buttress his points, Akinjide gives examples of Arlen Specter a USA Senator from Pennsylvania who switched from the Republican Party (RP) also known as the Grand Old Party (GOP) to the Democratic Party (DP) on 28 April 2009 and Wilson Churchill a British parliamentarian who switched from the party called Conservative Party (CP) to the Party of Liberals (LP) in 1904 and switched back to the CP in 1925.³⁶

Third, the impugned decisions above are contrary to the fundamental right guaranteed to every individual, including an elected legislator, that is freedom from discrimination on the ground of political opinion and so on, as encapsulated in sub-section (1) of section 42 of the 1999 fundamental law of Nigeria. It declares that a Nigerian belonging to a particular community, place of origin, sex, ethnic group, political or religion must not, by reason only that the same is such a person- (a) be made subject neither expressly by, nor in the application practically of, any law in effect in the nation or any governmental administrative or executive action, to disabilities /restrictions to which Nigerians of other communities, places of origin, sex, ethnic groups, political opinions or religions are not subjected to; or (b) be given neither expressly by, nor in the application practically of, any law in effect in the nation or any such governmental administrative / executive actions, an advantage /privilege that is not given to Nigerians of other communities, places of origin, ethnic groups, sex, political opinions / religions. The provisions form part of the principle of 'equal protection of the law and non-discrimination'.

Another important point to stress is that the approach of the 1999 fundamental law of Nigeria, as be seen in sub-section (1) of section 42 is in consonance with what obtains in other countries, including Tanzania, Zambia, Malawi, Zimbabwe, Kenya, Portugal and South Africa where the constitution guarantees to every individual, including the elected legislator the right to be protected equally by the law and never to be discriminated against on account of political opinion and much more.³⁷ Also, it is in consonance with international instruments, including the UN UDHR

³⁴ See Constitution of Tanzania, as altered by the Eighth Constitutional Amendment Act No 4, art 19; the Zambian Constitution 1991, as altered by Act No 2 of 2016, art 19; the Malawian Constitution 1994 (revised in 2017), art 33; the Zimbabwean Constitution 2005 (Amendment) Act No 17, s 60(1); the Kenyan Constitution 2010, s 32(1) & (2); the Portugal Constitution 1976, as altered in 2005, art 41; and the South African Constitution 1996, s 15(1).

³⁵ See the UN UDHR 1948, art 18; the UN ICCPR 1966, art 18(1); the ECHR 1953, art 9; the AMCHR 1969, art 12; the ACHR 2004, art 26; and the AU ACHPR 1981, art 8.

³⁶ See *The Guardian* (Lagos: 1 August 2009), quoted in <<http://www.ngrguardiannews.com.policy.poll>> accessed 14 August 2009 and Abuza (n 10) 456. Also, see Encyclopedia.com, Churchill, Sir Wilson Leonard Spencer" <<https://www.encyclopedia.com/people/hstory/british-and-irish-history-biographies/winston-churchill>> accessed 30 September 2018, quoted by KO Mrabure and UM Ogisi, 'Appraising the Law Governing Political Defections in Nigeria' (2022) 10 (1) *Ebonyi State University Law Journal* 2.

³⁷ See the Tanzanian Constitution, as altered by Act No. 15 of 1984, art 13 (11)-(15); the Constitution of Zambia 1991 as amended by Act No 18 of 1996, art 23 (1)-(3); the Constitution of the Republic of Malawi 1994 (revised 2017), art 20; the Constitution of Zimbabwe 2013, s 56 (1)-(5); the Constitution of Kenya 2010, art 27(1) & (2); the

1948, UN ICCPR 1966, ECHR 1953, AMCHR 1969, ACHR 2004 and AU ACHPR 1981 where the instrument guarantees to every individual, including the elected legislator the right to protection of the law equally and not to be discriminated against on account of political opinions and much more.³⁸

The words to emphasise in sub-section(1)(a) and (b) of section 42 of the 1999 fundamental law of Nigeria above are 'a political community' and 'political opinions'. Arguably, elected legislators in the central and State Assemblies of the nation are of a particular community, which is community of legislators. A point to note is that many elected legislators in the legislative house such as the National and State Assemblies in Nigeria are legal practitioners, accountants, teachers and medical practitioners like their counter-parts in the executive. Why should the 1999 Nigerian Constitution deny elected legislators the right to retain their seats in the legislative house after switching parties during their tenure in the legislative house, save on the ground of division/ factionalisation in the sponsoring party and fails to deny elected political executives, including the governor and deputy-governor the right to retain their offices after switching parties during their term or tenure in office³⁹ who may have similar qualifications as elected legislators and are Nigerians as well? The authors do not think it should be so.

Also, why should the 1999 Nigerian Constitution deny elected legislators the right to retain their seats in the legislative house after changing their political beliefs or opinions during their tenure in the legislative house, save on the ground of a division or factionalisation in the sponsoring political parties and fail to deny elected political executives above similar right after changing their political beliefs or opinions during their term or tenure in office, as exemplified in the *Abubakar* case, who may have similar qualifications as elected legislators and are Nigerians as well? The authors do not think it should be so.

The position of the authors above is buttressed by sub-section (1)(b) of section 42 of the 1999 fundamental law in Nigeria, which forbids the granting of any privilege or advantage to citizens of a particular community such as the community of elected political executives or political opinion or belief which is not given to Nigerians belonging to other communities such as community of elected legislators / political opinions / beliefs.

Section 42(1) above is not included in the sections specified in sub-section (1) of section 45 above for which the Nigerian law-making bodies, including the Judiciary could enact a law which derogates from the rights considered fundamental conferred by the 1999 Nigerian Constitution, provided the same is justifiable reasonably in a democratic society in the defence interest and so on.

The only qualification to sub-section (1) (a) and (b) of section 42 above, as can be seen in section 42(3) of the fundamental law above is that it shall not render invalid any law by reason only that the same imposes restrictions regarding the recruitment of any person to any office under the State created directly by any law in effect in Nigeria and so on. It's argued that a legislative house in Nigeria is not a body to which a person can be appointed into, save the administrative officers, clerks and other staff who are not imbued with the authority to exercise legislative powers or perform legislative functions. Thus, the election of legislators is not caught by this qualification.

Constitution of Portugal 1976, as altered in 2005, art 26(1); and the South African Constitution 1996, s 9 (1).

³⁸ See the UN UDHR 1948, art 7; UN ICCPR 1966, art 26; ECHR 1953, art 14; AMCHR 1969, art 24; ACHR 2004, art 9; and AU ACHPR 1981, art 3 (1) & (2).

³⁹ Note that neither s 180 of the 1999 fundamental law of Nigeria, dealing with the issue of Tenure of Office of the Governor /Deputy-Governor nor s 188 of the 1999 fundamental law of Nigeria, dealing with the issue of Removal of the Governor / Deputy-Governor provides for the vacation of office of the governor or deputy-governor or the removal of same from their offices on the account of party switching. This is also, the case of the President/Vice-President in ss 135 & 143 of the 1999 Nigerian fundamental law and the case of the President of other countries like Ghana. See the Constitution of Ghana 1992, s 57(1)-(4).

Needless to re-iterate that the rights guaranteed under 38(1), 40 and 42(1) of the 1999 fundamental law in Nigeria are fundamental rights in Nigeria. With respect to fundamental rights on a general note, the Court of Appeal in Nigeria had emphasised the importance of fundamental rights in *Mallam Abdullah Hassan and Four Others v Economic and Financial Crimes Commission (EFCC) and Others*⁴⁰ and *Nigeria Security and Civil Defence Corps and Others v Frank Oko*⁴¹. To be specific, in the latter case, the Court of Appeal (per Obande Festus Ogbuinya, JCA) stated that⁴²:

- a. fundamental rights is a basic condition to exist in a civilised manner
- b. fundamental rights are rights connected to man as a man due to his humanity
- c. fundamental rights fell within the scope of species of rights and stood on top of the pyramid of laws and other rights which are positive
- d. due to fundamental rights' kingly position in the human rights firmament, section 46 of the 1999 Fundamental law of Nigeria gave to every Nigerian citizen whose fundamental right was or has been breached, even *quiatiment*, the right to go to the State High Court of Justice or Federal High Court of Justice to seek redress.

A good admonition to give is that due regard should be accorded to the importance of Chapter Four of the 1999 fundamental law provisions of which sections 38(1), 40 and 42(1) of the 1999 fundamental law of Nigeria are a part. The truth is that, they are sacrosanct. Should any of the provisions demand alteration, the 1999 fundamental law Nigeria makes provision for a very difficult procedure in sub-section (3) of section 9. The country, in this connection, should apply, and exhibit respect for, the Constitution. It's significant to put in mind that in the country, the provisions of the fundamental law are supreme and binding on every person and authorities throughout the Nigerian Federation such as the courts.⁴³

It is conceded that the UN UDHR 1948 is an agreement termed 'soft-law' and not a treaty itself and, thus it is not binding legally on countries which are members of the UN, including Nigeria. Nonetheless, it has emerged as customary international law which has been warmly-accepted world-wide in human rights protection.⁴⁴

With respect to the AU ACHPR 1981, it is postulated that the Charter has not only been signed as well as ratified by the Nigerian State but has also been instituted as a part of domestic law, as directed by the provisions of the Charter and sub-section (1) of section 12 of the 1999 fundamental law of Nigeria.⁴⁵ In *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation*,⁴⁶ the apex Court of Nigeria (per Chima Centus Nweze, JSC) held that since the said Charter had been incorporated into the domestic law of Nigeria, the Charter formed part of the Nigeria body of laws. It went further to hold that for as long as Nigeria remained signatory to the Charter above and other international treaties on the environment and other global issues so long would the Nigerian courts give protection to rights regarded as belonging to every human being encapsulated in the same.

Furthermore, the court has held that the ICCPR 1966 now has the effect of an enactment that is domesticated, as required by section 12(1) of the 1999 fundamental law of Nigeria and,

⁴⁰ [2014] 1 NWLR (part. 1389) 607, 610, Court of Appeal, Nigeria, quoted in Andrew Ejovwo Abuza, 'An Examination of the Power of removal of Secretaries of Private Companies in Nigeria' (2017) 4(2) *Journal of Comparative Law in Africa* 50.

⁴¹ [2020] 10 NWLR (Pt. 1732) 314–15, Court of Appeal, Nigeria.

⁴² *Ibid.*

⁴³ See s 1(1) of the 1999 fundamental law of Nigeria.

⁴⁴ See K.M. Danladi, 'An Examination of Problems and Challenges of Protection and Promotion of Human Rights under the European Convention and African Charter' 2014 6(1) *Port Harcourt Law Journal* 83.

⁴⁵ See the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 2004.

⁴⁶ [2019] 5 NWLR (Pt. 1666) 518, 542, SC, Nigeria.

consequently has the effect of law in the country, due to the fact that the Covenant guarantees labour rights to workmen in its article 22(1) and the same having being ratified by Nigeria.⁴⁷

Regarding the ACHR 2004, ECHR 1953 and AMCHR 1969 above, it must be pointed out that the nation is not obligated to implement the provisions of the same, as the Nigerian State is not a member-State of the Council of the league of Arab States, Council of Europe and Organisation of American States as well as State-Party to the ACHR 2004, ECHR 1953 and AMCHR 1969.

It's sensible to postulate that as a UN and AU member and a State-Party to the AU ACHPR 1981 as well as UN ICCPR 1966, Nigeria is under obligation to apply the UN ICCPR 1966 and AU ACHPR 1981. The Nigeria State, in this light, should exhibit respect for international law as well as its treaty obligations, as mandated in section 19(d) of the 1999 fundamental law of Nigeria.

A related provision is section 17(2) of the 1999 Nigerian basic law which provides thus: (a) all Nigerians shall be accorded equality of opportunities, obligations and rights under the law; and (b) the human dignity sanctity shall be acknowledged and there shall be maintenance of human dignity. This provision is, equally, contravened with the sacking of elected legislators from their seats on account of party switching during their tenure in the legislative house, save on the ground of a division or factionalisation in the sponsoring political party whereas elected political executives, including governors and deputy-governors who switched parties during their tenure or term in office are allowed to remain in their offices. It can be seen that Chapter II of the 1999 Nigerian fundamental law, dealing with 'Fundamental Objectives and Directive Principles of State Policy', of which section 17(2) above is a part, has been rendered non-justiciable⁴⁸ and, thus an elected legislator cannot seek sanctuary under the same. Nonetheless, it can be argued that section 17(2) above is justiciable and, thus an elected legislator in Nigeria can seek sanctuary under the same for the ensuing reasons. To begin with, going by the decision of the Nigerian Supreme Court in *Attorney-General of Ondo State v Attorney-General of the Federation*,⁴⁹ any of the provisions of Chapter II above can be made justiciable and, thus enforceable if the NAN enacts a specific law for the enforcement of the same. Arguably, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 2004 is a specific law enacted by the NAN which in its article 3(1) and (2) guarantees to every Nigerian, including the elected legislator equality before the law right and the equal protection of the law right. In this way, the right to equality of rights before the law, as enunciated under section 17(2) above has become justiciable and, consequently enforceable by Nigerians, including elected legislators.

In the second place, it can be argued that Chapter II provisions, including sub-section (2) of section 17 above form the basis of the contract among Nigerians and leaders of government. All organs of government like the courts are enjoined under section 13 of the 1999 Nigerian Constitution to conform, observe and apply its provisions, of which section 17(2) above is one. In the third instance, section 17(2) above is justiciable and, thus an elected legislator can rely on the same in view of the apex Court's decision in the *Centre for Oil Pollution Watch* case where the apex Court held that the proper approach to Chapter II of the Nigerian Constitution interpretation must be mutual conflation of other constitutional provisions. According to the learned Justice Nweze JSC, this was so, because, if the fundamental law provides otherwise in another section, which makes a section of Chapter II justiciable, it would be so construed by the courts of law. It can be argued, therefore, that sub-section (1) of section 42 of the 1999 Nigerian fundamental law which gives to every person like the elected legislator the equal protection of the law right makes section 17(2) above justiciable.

⁴⁷ *Aero Contractors Company of Nigeria Limited v National Association of Aircrafts Pilots and Engineers and Others* [2014] 42 NLLR (part 133) 64, 717, per Kanyip, Judge of the National Industrial Court of Nigeria (NICN).

⁴⁸ See s 6(6) (c) of the 1999 Nigerian fundamental law and *Musa Baba-Panya v President of the Federal Republic of Nigeria and Two Others* [2018] 15 NWLR (Pt. 1643) 395, 401-402, CA, Nigeria, quoted in Andrew Ejoywo Abuza, 'A Reflection on issues involved in the Exercise of the power of the Attorney-General to enter a Nolle Prosequi under the 1999 Constitution of Nigeria' (2020) *Africa Journal of Comparative Constitutional Law* 97.

⁴⁹ [2002] 9 NWLR (part 772) 222, 272, SC, Nigeria.

Fourth, the apex Court of Nigeria can be vilified for adopting the position in the *Abegunde* case that only a division or factionalisation or fragmentation that affects a political party at the National level which does not make it possible or practicable for the same to operate can justify the switching of an elected legislator from one party to another, otherwise the switcher automatically loses his seat. This implicates that the division relied upon must affect the National structure of the political party and not simply a minor division in the State chapter, ward chapter and local government chapter of the party.

The authors wish to recall sub-section(1)(g) of sections 68 and 109 of the 1999 Nigerian basic law. There are three key-words in the provisions above, namely 'shall', 'division' and 'faction'. The meaning of the word 'shall' is already well-known. It is disappointing that no provision of the Nigerian fundamental law defines the words 'division' and 'faction'.

On interpretation of 'shall' when employed in an enactment, the Nigerian apex Court in *Chuba Chukwuogor and Three Others v Chukwuma Chukwuogor and Another*⁵⁰ stated that the word 'shall' when utilised in a statutory provision means that the thing must be done without any discretion. According to the apex Court, 'shall' is a word of command or compulsion and denotes obligation.

The above apex Court pronouncements, mean that an elected legislator must vacate his legislative seat if the same switched parties during his tenure in the legislative house, except as result of a division in the sponsoring party or the switching was occasioned by a merger of two or more parties or factions by one of which the elected legislator was initially sponsored.

A division or factionalisation in the sponsoring political party must be established in order for the elected legislator who switches parties during his tenure in the legislative house to escape the constitutional 'hammer' of vacation of his seat in the legislative house. *The Oxford Advanced Learner's Dictionary* defines 'division' as: 'the process or result of dividing into separate parts; the process or result of dividing something or sharing it out or a disagreement or difference in opinion or way of life etc, especially between members of a society or an organisation'.⁵¹ In short, a division is the result of dividing a society or an organisation into separate parts or a difference or disagreement in opinion or a way of life between members of an organisation. On the other hand, the word 'faction' can be defined to mean 'a small group of people within a larger one whose members have some different aims and beliefs to those of the larger group or opposition, disagreement, etc that exists between small groups of people within an organisation or political party: a party divided by faction and intrigue'.⁵² It can be aptly seen from the above that when there is factionalisation in a political party there is in existence a political party division.

A point to note is that a political party member is first and foremost a member of his party in the ward, before being a member of his party in the local government area, State and nation. It is argued that where it is shown by an elected legislator that there is a division or factionalisation in the sponsoring party at the ward level or level of local government area or State level, the court ought to hold that the proviso in sub-section(1)(g) of sections 68 and 109 above has been satisfied and, therefore, ought not to deny the affected elected legislator the right to retain his seat in the legislative house, as the Supreme Court did in the above case. If the drafters of the Nigerian Constitution wanted the division or factionalisation in the sponsoring political party to be at the National level only and which does not make it possible or practicable for the same to operate to justify the switching of an elected legislator from the sponsoring political party to another political party, they would have said so in the proviso above.

⁵⁰ [2021] 15 NWLR (Pt. 1799) 357, 360, SC, Nigeria.

⁵¹ Philips (n 11) 428.

⁵² *Ibid.*, 526.

In contradistinction to the of separation of powers doctrine warmly-embraced by the 1999 Nigerian basic law,⁵³ His Lordship Justice Muhammad attempted to promulgate law by substituting his own words for the words utilised in the fundamental law of Nigeria in a bid to accord them a meaning which is palatable to the apex Court. In the case of *Abdullahi Inuwa v Governor of Gombe State and Two Others*,⁵⁴ the Court of Appeal held that it is not the duty of any court to amend the fundamental law of Nigeria. The stance of the Court of Appeal (per James Shehu Abiriyu, JCA) in *Governing Board Rugipoly Ondo State v Ola*⁵⁵ is very apt. According to the Court: 'the duty of the court is to interpret the words contained in the statute and not to go outside the words in search of an interpretation which is convenient to the court or to the parties'.

A cardinal point to make is that a division in the party must not be confined to organisational division. In the light of the definitions of division or faction above, division in the party must be interpreted to encompass ideological differences.⁵⁶ Political parties are supposed to be predicated on ideology. Some elected legislators and citizens joined a particular political party, principally because of the party's ideology.⁵⁷ Any change in the party's ideology that runs contrary to what the members believe in would cause them to re-think their membership of the political party.⁵⁸ It is argued that whenever a political party changes its stance on major issues, elected legislators have a moral obligation to adopt a principled-stance and request changes.⁵⁹ In the event that the sponsoring political party refuses to change, a division exists in the same and an elected legislator who so elects can switch parties without vacating his seat in the legislative house.⁶⁰ In this way, the arrangement to protect elected legislators who switch parties, arising from a division in their parties, would be more effective if it extends similar protection to elected legislators who switch parties because of ideological differences within their parties.⁶¹ The point has been well-made that it would be certainly unfair or unconscionable under the circumstances to say that a division does not enure in the party when an elected legislator has ideological differences with his party.⁶²

Fifth, the High Court in the *Ayade* case can be criticised for dismissing the claim of the legislators that there was disagreement in the PDP which led to their expulsion from the party. The word 'faction' has been defined already to include a situation where disagreement enures between small groups of persons within a party. In this way, the disagreement between the legislators above and some other members of the PDP qualifies as factionalisation in the PDP, the sponsoring political party of the legislators above. It is argued that the legislators in the *Ayade* case, having shown that there was factionalisation in the PDP, the High Court above ought to hold that the proviso in sub-section (1)(g) of sections 68 and 109 above has been satisfied and, therefore, ought not to deny the legislators above the right to retain their seats in the legislative house.

In the last place, the High Court of Justice can be vilified for adopting the stance in the *Umahi* and *Ayade* cases that votes in a Nigerian election belonged to parties and not to the candidates. In *Rotimi Amaechi v Independent National Electoral Commission and Others*,⁶³ the appellant/plaintiff a PDP member in Rivers State did not participate in the April 2007 gubernatorial election in Rivers State. Rather, it was the then Governor of Rivers State- Celestine Omehia who was declared the winner of the PDP governorship primary election that participated in the gubernatorial election in Rivers State of April 2007. Nonetheless, the Nigerian apex Court

⁵³ See ss 4, 5 & 6 of the 1999 Nigerian Constitution which bestow legislative powers on the legislative house, executive powers on the executive branch of government and judicial powers on the courts of law, respectively.

⁵⁴ [2020] 5 NWLR (part 1716) 32, 36-7, CA, Nigeria.

⁵⁵ [2016] 16 NWLR (part 1537) 1, 9, CA, Nigeria.

⁵⁶ See, also, Eme and Ogbuchie (n 7) 28.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ [2008] 5 NWLR (Pt.1080) 227.

declared that the appellant/plaintiff was the person entitled to be governor of Rivers State, having held that Amaechi and not the incumbent-Celestine Omehia was the lawful candidate of the PDP in the gubernatorial election in Rivers State of April 2007, relying, among other provisions, on section 22 of the Supreme Court Act.⁶⁴

The apex Court (per George Oguntade, JSC) held in the case above that it was political parties which the electorate vote for at election period and not the candidates of the parties in Nigeria.⁶⁵ Thus, when an elected political office holder, including an elected legislator switches parties without vacating his seat in the legislative house he has re-allocated the votes in favour of his new political party. This decision of the Supreme Court of Nigeria did not go down well with many Nigerians. It is noteworthy that eminent legal practitioners like Ben Nwabueze and Gani Fawehinmi had faulted the decision above.⁶⁶ In their view, it does not represent the correct position of the law on the matter.⁶⁷ Also, Umaru Musa Yar' Adua, the then president of Nigeria had equally expressed reservations over the said decision.⁶⁸

In 2010, the Nigerian Electoral Act was amended in its section 141. It states that a court or an election tribunal must not under any situation declare any individual a winner of any election where the same has not fully-participated in all the election stages.

In 2017, the NAN took steps to reflect this thinking in an amended 1999 Nigerian Constitution, as can be discerned in the Constitution (Fourth Alteration) Act⁶⁹ 2017. Section 285(13) of the 1999 Nigerian fundamental law, as altered by the 2017 Fourth Alteration Act above re-iterated section 141 above. Arguably, by the provisions above, the NAN has set aside the apex Court's decision in *Amaechi's* case.⁷⁰

It's crystal clear from the foregoing that since 2010, the law has changed. Candidates and not the political parties which sponsored them are the ones voted for by the electorate at any election in Nigeria. The Appeal and Supreme courts have since held repeatedly that votes cast in any Nigerian election belonged to the live candidates and not the sponsoring party that simply served as a vehicle which enthroned candidates of the parties. To be specific, in *Chris Nwabueze Ngige v Dora Nkem Akunyili and Two Others*,⁷¹ the Court of Appeal (per Samuel Chukwudumbi Oseji, JCA) stated that going by section 221 of the 1999 Nigerian fundamental law a party canvassed for votes on behalf of the candidate of the party. Put in words differently, a party in the words of His Lordship was no more than an agent of the party's candidate in gathering votes for the election. Justice Oseji declared that it is against this background that the Electoral Act 2010 required the candidate of the party and not the political party of the candidate, who had the highest number of votes at the election to be declared as the winner of the election and provided for the means of challenging the return of the candidate of the party and not his party.

Also, in the *Congress for Progressive Change* case, while interpreting section 141 of the Electoral Act 2010, the Nigerian Supreme Court (per Nwali Sylvester Ngwuta, JSC) held that going by section 141 above, the NAN had set aside the Supreme Court decision in *Amaechi's* case. According to His Lordship, contrary to the judgment of the apex Court in *Amaechi's* case, section

⁶⁴ See Cap 424 1990 LFN (now Cap S 15 2004 LFN). For criticism of the decision of the Supreme Court in the *Amaechi's* case, see Abuza (n 10) 455.

⁶⁵ This was how Amaechi who was not a candidate in the said governorship election became the governor of Rivers State.

⁶⁶ See 'Supreme Court on a mission to redeem self' <<https://www.thisdaylive.com/index.php/2019/08/25/Supreme-court-on-a-mision-to-redeem-self/>> accessed 1 November 2022.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ No. 8 of 2017.

⁷⁰ See *Congress for Progressive Change and Another v Emmanuel David Ombugadu and Independent National Electoral Commission* [2013] 18 NWLR (Pt. 1385) 66, 78, SC, Nigeria or [2013] LPELR 21007, SC, Nigeria.

⁷¹ [2012] 15 NWLR (Pt. 1323) 343, 348-349, CA, Nigeria.

141 above implicated that while a candidate of a party at an election must be sponsored by a party, the candidate of the party who stood to lose or win the election is a candidate of the party and not the sponsoring party. Put differently, in the view of the learned Justice Ngwuta, political parties do not contest, lose or win election directly; they do so by the candidates of the parties they had sponsored and before an individual could be declared as having being elected by a court /tribunal such an individual must have fully-taken part in all the election stages beginning from nomination to the real voting.

In reliance on the judgment of the apex Court above, the Nigerian Supreme Court of (per Ejembi Eko, JSC) held in *Ogbuefi Ozomgbachi v Dennis Amadi and Two Others*⁷² that the Supreme Court of Nigeria had laid to rest finally, the argument that it's the party which contest as well as wins elections. Rather, according to His Lordship, it is individuals, as candidates, who contest and win elections. Justice Eko stressed that political parties do not contest or win elections.

Furthermore, in the case of *Nwankwo and Another v Independent National Electoral Commission and Others*,⁷³ the Court of Appeal in Nigeria held that it is only a natural person that could, in law, be declared as well as returned as the winner of any election in Nigeria. According to the Court above, the Nigerian 2010 Electoral Act only contemplated the declaration as well as return of a candidate in any Nigerian election and not the sponsoring party.

A more recent case in point is *Abdulrauf Abdulkadir Modibbo v Mustapha Usman and Two Others*⁷⁴. In the case, the apex Court of Nigeria (per Ejembi Eko, JSC) in its judgment on 30 July 2019 held that its decision in the *Amaechi* case was no longer a good law, as the same had been set aside by sections 141 and 285(13) above, as disclosed before. The apex Court, relying heavily on the provisions above, set aside the judgments of the trial Federal High Court and Appeal Court which ordered that first respondent/plaintiff an APC member should replace the appellant/first defendant an APC member who had won the general election held on February 23, 2019 to elect the House of Representatives member to represent Yola North/South/Girei Federal Constituency of Adamawa State with 80,453 votes. This was based on the fact that the first respondent/plaintiff did not participate in all the election stages, because his name was not contained in the ballot for the general election above.

Justice Eko, having declared that the second respondent, that is APC had no valid and lawful candidate at the general election above, since the appellant/first defendant participated in the second respondent's primary election on 7 October 2018 while he was still doing compulsory National youth service in Gombe State, contrary to section 13 of the National Youth Service Corps Act⁷⁵ 2004, ordered the third respondent, that is INEC to declare as well as return as elected Jafar Suleiman the PDP candidate who polled the majority of lawful votes cast in the said general election. The judgment of the apex Court is acceptable, being consistent with its earlier decision in the *Congress for Progressive Change* case, decided after the enactment of section 141 above. A relevant question to pose is: why should an elected legislator a candidate of the sponsoring political party in the legislative election switch parties during his tenure in the legislative house and be forced to vacate his legislative seat? The authors do not think it should be so. The right of elected legislators to switch parties in Nigerian politics can be gleaned from sections 38(1), 40 and 42(1) of the 1999 fundamental law, as expressed already.

It has been indicated before that the right to free association also includes the right not to be compelled to remain in an association. Thus, an elected legislator ought not to be punished by the constitutional sanction of vacation of seat in the legislative house, as enjoined by sub-section(1)(g) of sections 68 and 109 above, if he quits his sponsoring political party and joins another party during his tenure in the legislative house. One of the notable principles for the interpretation of Nigeria's Constitution is that the Constitution must be considered as an organic

⁷² [2018] 17 NWLR (Pt.1647) 171, 174-175, SC, Nigeria or [2018] LPELR 45152, SC, Nigeria.

⁷³ [2019] LPELR 48862, CA, Nigeria.

⁷⁴ [2020] 3 NWLR (Pt. 1712) 470, SC, Nigeria.

⁷⁵ Cap N 84 LFN 2004.

scheme of government to be treated wholistically.⁷⁶ Thus a particular provision like subsection(1)(g) of section 68 or section 109 above cannot be detached from the rest of the Constitution.⁷⁷ Also, it must be pointed out that the Constitutional provision are of equal strength and constitutionality.⁷⁸ None of its provisions is, indeed, inferior to the other provision and *afortiori* no provision of the Constitution is superior to the other provision.⁷⁹ A point to note is that the proponents of the 'change and quit' principle concede that the culprits could change their beliefs or political loyalties in line with sections 38(1) and 40 above, but that the same could not remain in office after such party switching without a fresh mandate of the people. This stance was largely hinged on the judgment of the Supreme Court in *Amaechi's* case that votes cast by the electorate in Nigeria belonged to the sponsoring political party. But this stance can no longer hold or be justified in view of the recent judgments of the Nigerian Appeal and Supreme courts that votes cast in any Nigerian election belonged to the candidates and not the sponsoring political parties, as exemplified in such cases like *Congress for Progressive Change's* case.

Also, votes of the electorate which ensured the triumphancy of the elected legislator at the polls may have come from members of the sponsoring political party, members of non-sponsoring political parties as well as voters who do not belong to any political party. They may have chosen him, because of his character, track-record and electioneering promises. It makes no difference if he switches to another political party, as he was the one the electorate voted for at the legislative election and not the sponsoring political party, as it has been exhibited above.

In the final analysis, it is contended that the decisions of the trial Nigerian Federal High Court, Appeal and Supreme courts in the *Abegunde* case and the decisions of the trial High Court in the *Umahi* as well as *Ayade* cases on the matter are null as well as void. This contention is fortified by the judgment of the apex Court in *Attorney-General of Abia State v Attorney-General of the Federation*⁸⁰ to the effect that a law, such as a decision of the court which is inconsistent with the Nigerian constitutional provisions is void to the extent of its inconsistency, in view of subsection (3) of section 1 of the 1999 Nigerian fundamental law of Nigeria. May be the judges or Justices of the courts whose decisions have been assailed above would have adopted a different conclusion if they had applied their minds to the above points.

In order to sum-up on the issue of case-law analysis on the practice of party switching of elected legislators of the National and State Assemblies under the constitutional system of Nigeria, it cannot be considered to be out of context to emphasise that the sacking of elected legislators from their seats in the legislative house on account of party switching during their tenure in the legislative house, save on the ground of a division or factionalisation in the sponsoring political party is undemocratic, illegal, against the constitution and contrary to international human rights' law.⁸¹

⁷⁶ See the *Abubakar* case (n 15) 1444-1645.

⁷⁷ *Ibid.*

⁷⁸ *Adams Oshiomhole and Anor v FGN and Anor* [2007] 8 NWLR (Pt. 1035) 58, 63, SC, Nigeria.

⁷⁹ *Ibid.*

⁸⁰ [2002] 6 NWLR (part 763) 264, Supreme Court, Nigeria.

⁸¹ For an incisive discourse on party switching of elected legislators under the Nigerian constitutional system, see Eme and Ogbuchie (n 7) 26 -30, Mrabure and Ogisi (n 36) 7 -13, and EM Akpambang and OA Oniyinde, 'Political Party Defection by Elected Officers in Nigeria: Nuisance or Catalyst for Democratic Reforms? (2020) 7 (2) *International Journal of Research in Humanities and Social Studies* 15-18. Note that there are reasons associated with party-switching of elected legislators of Nigeria's central and State Assemblies and other politicians. These, include: (a) pursuit of personal interest; (b) pursuit of personal political ambition; (c) the absence of transparency and internal party democracy and openness in the political party affairs; (d) fear of being prosecuted and persecuted by the administration in control of power; (e) the lack of execution of the political agenda of political party; and (f) the lack of a sound or clear-cut political ideology which differentiate one political party from another political party.

3. Practices on Party Switching of elected legislators in other nations

In this sub-section, the concern involves a discourse over the practices of party switching of elected legislators in selected nations. The applicable nations, regarding the practices on party switching of elected legislators are discussed below.

The United States of America

In a country such as the USA a common-law country practicing the presidential governmental system, sections 2 and 3 of the 1789 United States of America Constitution which provide for composition, qualification, vacation of seats and vacancies, among others, are silent on the fate of elected legislators who switch parties during their tenure in the legislative house. Thus, elected legislators of the House of Representatives and House of Senate, to be sure, could switch parties during their tenure in the legislative house without vacating their seats in the Congress. This was why Senator Arlen Specter who switched from the GOP to the Democratic Party on 28 April 2009, as disclosed before, retained his seat in the Senate until 3 January 2011 when he was succeeded by Senator Pat Toomey of the GOP as Senator representing Pennsylvania following his victory at the 2010 general elections.⁸²

4. Findings/Observations

In this section, the authors provide a brief summary of the findings /observations in the course of this research, as can be seen in the sections coming before this section.

It's glaring from the above contemporary legal overview concerning the practice of elected legislators of Nigeria's assembly men switching from their sponsoring political parties to other political parties during their tenure in the legislative house, save on the ground of a division or factionalisation is prohibited by sub-section(1)(g) of sections 68 and 109 of the 1999 Nigerian basic law. These provisions contain the anti-party switching of elected legislators law in Nigeria. They are in alignment with what obtains in other countries like Kenya, Zambia, Portugal, Malawi, Angola, Congo and Ukraine, as disclosed before. It is observable that in countries like the United State of America, Britain, Canada and the Australian nation there is no anti-party switching of elected legislators law.

Also, it was found that sub-section (1)(g) of sections 68 and 109as indicated before are being mis-used by certain Nigeria courts to deny elected legislators the right to retain their seats after switching parties. Two classic examples are the *Abegunde and Umahi* cases.

Finally, it was found that the sacking of elected legislators from their seats on account of party switching during their tenure in the legislative house, save on the ground of a division or factionalisation in the sponsoring political party is unconstitutional and, therefore undemocratic. This is so, because the same is against the right to freedom of association, guaranteed to all Nigerians, including elected legislators under the provisions of section 40 of the 1999

⁸² <<https://www.nytimes.com>> accessed 25 October 2022. Other countries whose statutes are silent on the fate of elected legislators who switch parties during their tenure in legislative house, include Canada, Australia and the UK-common law countries practicing the Westminster parliamentary governmental system. See, for example, sections 27(1) and 35 of the Parliament of Canada Act 1985, art 59.3 of the uncodified Constitution of the United Kingdom 1215, as amended in 2013, and ss 44 and 45 of the Commonwealth of Australia Constitution Act 1901, as revised in 1985. Thus, elected legislators in the Canadian House of Commons, the UK House of Parliament and Australian Senate and House of Representatives could switch parties during their tenure in the legislative houses without vacating their seats in the said legislative houses. The countries whose constitutions embrace the anti-party switching of elected legislators' law, include: Kenya; Zambia; Malawi; Angola; Portugal; Congo and Ukraine. See, for instance, the Kenyan Constitution 2010, art 103; the Zambian Constitution 1991, as altered by the 1996 Act No 18, art 71(1); the Malawian Constitution 1994, as revised in 2017, art 65(1); the Angolan Constitution of 2010, art 152(2)(c); the Portugal's Constitution 1976, as altered in 2005, art 160(1)(c); the of Democratic Republic of Congo's Constitution 2015, art 112 and the Constitution of Ukraine 1996, as amended in 2006, arts 78 & 81.

fundamental law of Nigeria, right to change political belief, guaranteed to all Nigerians, including elected legislators under the provisions of section 38(1) of the 1999 fundamental law of Nigeria and right to protection of the law equally and not to be subjected to discrimination on account of political opinion and so on, accorded to all Nigerians, including elected legislators in sub-section (1) of section 42 of the 1999 fundamental law. It's worth re-calling sub-section (1) of sections 135 and 180 of the 1999 Nigerian fundamental law which are silent on the fate of elected political executives, including governors who switch parties during their term of office. This is in alignment with what obtains in other countries, like Ghana, as disclosed before. Thus, an elected political executive can switch parties during his term of office without vacating his office, as exemplified in the *Abubakar* case. This is certainly discriminatory against elected Nigerian legislators.

A continuation of the problem of sacking elected legislators from their seats who switch parties during their tenure in the legislative house constitutes a serious danger to Nigeria's survival. The unpleasant effect of sacking elected legislators who switch political parties during their tenure in the legislative house should not be under-rated. The effect has, not only undermined but, as well as, hampered Nigeria's effective experimentation of democracy or the rule of law a key principle of a system of government that is democratic. It is noteworthy that Nigeria subscribes to social justice and democratic governance, going by sub-section (1) of section 14 of the 1999 fundamental law of Nigeria. In short, elected legislators sack from their seats on the ground of party switching during their tenure in the legislative house has adverse effect on the democratic experiment in Nigeria. To be precise, democracy suffers when an elected legislator is sacked from his seat on account of party switching before the expiration of his tenure in the legislative house. This is so, because it is tantamount to a subversion of the will of the electorate who voted the elected legislators into membership of the legislative house, contrary to social justice and democratic principles, as enjoined by section 14(1) above. In Nigeria as at present, votes that are cast at any election belong to candidates and not belonging to the parties that sponsored them into office, as exemplified in the *Congress for Progressive Change* case. Additionally, the sacking of elected legislators who switch parties during their tenure in the legislature has engendered a denial of the constitutional right to free association, right to freely change political belief and right to equal protection of the law and not to be discriminated against on account of political opinion and so on, embedded in Nigerian as well as international law, as expressed already.

It is note-worthy that sub-section(1)(g) of sections 68 and 109 above are not supported by many Nigerians, including members of the NAN. No wonder, the NAN recently rejected a bill seeking to compel political office holders, including elected legislators to vacate offices or seats upon party switching.⁸³ The two chambers of the NAN unanimously voted against or rejected the Bill while further amending the 1999 Nigerian Constitution.⁸⁴ Perhaps, the members of both chambers took the position they took on the Bill above, because they were convinced beyond reasonable doubt that the anti-party switching of elected political office holders law cannot be the panacea to the hydra-headed problem of party switching involving elected political office holders, including elected legislators ravaging Nigerian politics.

The problem of sacking elected legislators who switch parties during their tenure in the legislative house from their seats should be accorded the greatest consideration it deserves by President Muhammadu Buhari's civilian regime. This is aimed at preventing a situation where His Excellency is accused of pretending over his recent declaration that he is committed to stabilising the nation's democratic system, having found out that Nigerians have approved the democratic form of government.⁸⁵

⁸³ See 'National Assembly kills bill to compel Political office holders to vacate office or seats upon defection' <saharareports.com> accessed 25 October 2022.

⁸⁴ See Channels Television news broadcast at 8:00pm and 10:00pm on 27 October 2022 and at 6:00am on 28 October 2022.

⁸⁵ See 'We will stabilise Nigeria's Democracy with Next Year's Election - Buhari' <<https://www.leadership.ng>> accessed 1 November 2022.

5. Recommendations

The problem of sacking elected legislators from their seats who switch parties during their tenure in the legislative house must be adequately addressed in the country. In order for this problem to be solved, the authors vehemently suggest as follows:

Sub-section(1)(g) of sections 68 and 109 of the 1999 fundamental law of Nigeria must be expunged by the Nigerian Parliament. A Nigerian legislator who switches parties during his tenure in the legislative house should be allowed to remain in the legislature, irrespective of the reasons for the switching of political parties in line with sections 38(1), 40 and 42(1) of the Constitution above. As disclosed before, elected political executives are not constitutionally required to vacate their offices if they switch parties during their term of office. Whatever that is okay for the goose is also okay for the gander, as it's unjust and discriminatory, being contrary to the right to equal protection of the law and not to be discriminated against, as embedded in sub-section (1) of section 42 of the Constitution above, to deny elected legislators retention of their seats in the legislative house on account of party switching, save on certain conditions when their counterparts in the executive organ of government are not denied similar right. This recommendation is in tune with the first Republic of Nigeria's 1960 and 1963 Constitutions as well as the practice in other nations like Canada, Britain, the United States of America and the Australian nation, as disclosed before.⁸⁶

⁸⁶ Other recommendations of the author's include: (a) the Nigerian High Court of Justice, Appeal Court and apex Court, having been established under s 6 of the Constitution above must avoid being accused of partiality or corruption. Joseph Daudu, former Nigerian Bar Association (NBA) President says to the effect that some Nigerian Judges sell Justice. See *Vanguard* (Lagos) September 20 2011, 5 and 6, quoted in Andrew Ejovwo Abuza, 'The Law and Policy on Curbing desertification in Nigeria: A contemporary discourse' (2017) 42(2) *Journal of Juridical Science* 93. It is noteworthy that s 15(5) of the Constitution above and art 3(5) of the African Union Convention on Preventing and Combating Corruption (AUCPCC) 2003 are opposed to misuse of power and corruption; (b) Nigeria should amend its Constitution to give a definition of the terms 'defence', 'public order', 'public health', 'public morality', and 'public safety', utilised in sub-section(1) of section 45 of the 1999 fundamental law of Nigeria in order to checkmate the restrictions of the fundamental rights accorded Nigerians which are not reasonable under Chapter Four of the Constitution above. See Abuza (n 32) 128; (c) The Government of Nigeria must put in place lectures of a public nature and similar programmes to engage citizens of Nigeria, on the importance of the rights accorded to all citizens under international and municipal law and dangers associated with sacking elected legislators from their seats in the legislative house on account of party switching; (d) section 225A of the 1999 fundamental law of Nigeria, as altered by the 2017 Fourth Act of Alteration should be amended to include, as one of the reasons for which the INEC could de-register parties, a lack of sound or clear-cut political ideology. The INEC should de-register forthwith any political party bereft of a sound or clear-cut political ideology; (e) Nigerian political parties should warmly-embrace transparency and internal democracy in the conduct of their activities; (f) Nigeria should reinstate forthwith the elected legislators who were sacked from their seats by the court in the Umahi, Ayade and other cases, provided their tenure in the legislative houses has not come to an end; (g) Nigeria should embrace the systems of party-less or non-party democracy as well as democracy which is not based on election, details of which shall be fashioned out by a Nigerian Nation-wide conference which is sovereign. See Abuza (n 10) 464 and Andrew Ejovwo Abuza, 'Election-less or non-election democracy: a missing link in finding permanent solutions to the problem of electoral malpractices in the politics of Nigeria' (2020) 46(2) *Commonwealth Law Bulletin* 295-99. These are the permanent solutions to the menace of party switching of elected legislators during their tenure in the legislative house for whatever reasons, as there would no longer be party switching of elected legislators during their tenure in the legislative house since there would no longer be parties and election of legislators. These recommendations are actually new strategies geared toward tackling the menace of party switching of elected legislators during their tenure in the legislative house. The latter is not contained in existing literature on the subject, consulted by the authors.

6. Concluding remarks

A contemporary legal overview of party switching of elected legislators in Nigeria's central and State Assemblies under the constitutional system of Nigeria has been embarked upon in this article. The article identified gaps in applicable international and municipal laws and postulated that the sacking of elected legislators from their seats in the legislative house who switch parties during their tenure in the legislative house is undemocratic, illegal, against international agreements on human rights as well as against the fundamental law of Nigeria. This article, again, revealed other nations' practices and advanced remedies when executed could adequately put to an end the problem of some courts taking refuge under sub-section (1) of sections 68 and 109 of the 1999 fundamental law of Nigeria to sack elected legislators who switch parties during their tenure in the legislative house for whatever reasons from their seats in the legislative house.