ELECTORAL ADJUDICATION AND THE DISINGENUOUS PETITIONER: AN EXPLANATORY ANALYSIS

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ABSTRACT

This article contributes to the discourse on the democracy-enhancing roles of courts in transitional societies and fledgling democracies. It provides an explanatory analysis and legal history of judicial determination of disputes arising from the contested results of Nigeria's 1979 presidential election in order to elucidate the democracy-enhancing functions of courts in the context of electoral adjudication. The article demonstrates that the courts tailored their adjudicatory efforts towards securing two key democratic outcomes: enabling the successful completion of the 1979 transition programme and facilitating the consolidation of a democratic constitutional order. Although the first normative objective was achieved, the second was considerably undermined by the corrosive effects of anti-democratic litigatory strategies in the electoral arena as well as incendiary attacks in the public sphere on courts and other fledgling democratic institutions. The deleterious strategies

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of disingenuous petitioners—those who seek to leverage electoral adjudication as a springboard for the attainment of partisan and undemocratic objectives—pose severe normative challenges for the democracy-enhancing roles of courts.

KEYWORDS: *electoral adjudication, courts; transitional societies, anti-democratic litigation, democratic decline*

I. INTRODUCTION

There is no gainsaying that these are grim times for democracy across the world (Diamond 2015; Hellmeier et al. 2021). The resurgence of military rule in jurisdictions ranging from Myanmar and Mali to Sudan and Burkina Faso;[2] the emergence of authoritarian capitalism and digital demagoguery in the United States during the Trump presidency (Fuchs 2018);[3] the capture of the Afghan republic by Taliban forces (Halimi et al. 2022, 121–125; Rivas and Safi 2022); the incidence of democratic backsliding in parts of Eastern Europe (Sadurski 2019; Rohac 2021); the rise of right-wing populism in Brazil (Rocha et al. 2021, chap. 4) and authoritarian nationalism in India (Sinha 2021)—all vividly encapsulate the ongoing onslaught of the global democratic recession. Meanwhile, the eruption of the COVID-19 pandemic continues to pose formidable challenges for electoral processes, democratic systems of political participation, and the human rights of millions across the world (Durojaye et al. 2021; Mohee 2021).[4] Triumphalist accounts about the global upsurge of democracy (Huntington 1997) now seem to have been shattered (Mounk 2020).

Yet, it is significant that these are also interesting times for resistance to anti-democratic politics and practices (Laebens and Lührmann 2021). For instance, in a range of African jurisdictions,[5] courts, litigants, politico-constitutional actors, and pro-democracy activists have sought to mobilise judicial power as a remedial mechanism (Ezeh 2023; Gathii and Akinkugbe 2022)—with varying degrees of success and failure—against electoral malpractices and other forms of democratic decline (Kaaba 2015; Sekindi 2017, 179; Azu 2015). Indeed, comparative electoral jurisprudence has been reinvigorated by recent developments in the Global South,

2. See Quraishi (2021); Westcott (2022).

3. Cf. Ginsburg and Huq (2018, 120–63). See also Rowley (2021).

4. See also Palguta et al. (2022).

5. See Nkansah (2016).

particularly in certain jurisdictions on the African continent. In 2017, for instance, the Supreme Court of Kenya—in an intrepid display of judicial power—nullified the re-election of an incumbent president in polls that were marred by widespread illegalities and contraventions of constitutional norms.[6] "[T]o close our eyes to constitutional violations," the majority Court declared, "would be a dereliction of duty and we refuse to accept the invitation to do so however popular the invitation may seem" (*Odinga v. Kenyatta*, [399]).[7]

This valiant adjudicatory example was subsequently reprised in Malawi, where the judiciary intervened decisively within the political process by invalidating the 2019 presidential election—also characterised by pervasive electoral malpractices.[8] Affirming the centrality of vigilance to the quest for credible elections, the Malawi Supreme Court of Appeal observed that "in a constitutional democracy, nothing perches itself above and beyond legal scrutiny" (*Mutharika v. Chakwera*, 33). Chief Justice Nyirenda, delivering the unanimous judgement of the Court, also underscored the significance of "judicial review and such other relevant processes that are intended to ensure the supremacy of the very constitutions and laws upon which democratic values are affirmed" (*Mutharika v. Chakwera*, 33).

On these normative premises, the Court therefore posited its adjudicatory obligations to uphold "the sanctity of an election" and protect the society "from what might be a semblance of an election" (*Mutharika v. Chakwera*, 33). The 2020 re-run election, ordered by the courts, culminated in the defeat of the incumbent president (Siachiwena and Saunders 2021, 82–84)—and in the historic election of an opposition candidate—in circumstances that are widely regarded as having deepened Malawian democracy.[9] Amid the global resurgence of democratic decline, the courtroom is thus emerging as a critical terrain of democratic struggle (Ezeh 2023). Against this backdrop, enduring debates relating to the role of courts in fostering the consolidation of democratic governance[10] further assume normative and practical significance.

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6. See *Raila Odinga & Anor. v. Independent Electoral and Boundaries Commission & Ors. (Presidential Petition No. 1 of 2017)* (2017) S.C.K. (Kenya), http://kenyalaw.org/caselaw/cases/view/140716/ [https://perma.cc/A2JZ-6 TH8] ("*Odinga v. Kenyatta*"). See also Kanyinga and Odote (2019).

7. See also Okubasu (2018, 167–70).

8. See *Mutharika & Electoral Commission v. Lazarus Chakwera & Saulos Chilima* [2020] MWSC 1 ("*Mutharika v. Chakwera*"). See also, Nkhata et al. (2021).

9. See Tew (2021, 42–49). See also Chatham House Press Office (2022); Cheeseman and Matonga (2020).

10. See, e.g., Ely (1980); Barber and Vermeule (2016); Rosenberg (2008); Daly (2018); Verdugo (2021); Prendergast (2019).

A. Mapping the Research

This article seeks to contribute to the discourse on the democracy-enhancing roles of courts in fledgling democracies and transitional societies by providing an explanatory analysis and legal history of electoral adjudication in Nigeria, Africa's most populous country. Accordingly, it revisits the historical context of electoral adjudication during Nigeria's transition from military rule in 1979 in order to parse the democracy-enhancing roles of courts in transitional societies. Unfolding during the prefatory years of the vaunted "third wave of democratisation,"[11] Nigeria's 1979 transition marked an epochal phase in the democratisation discourse and comparative electoral jurisprudence of the Global South. Interestingly, the final stages of this transition unravelled in several courtrooms across the country as judges, litigants, electoral officials, and other constitutional actors grappled with highly charged legal issues arising from the contested results of Nigeria's 1979 presidential election.

As such, this article elucidates the democracy-enhancing functions assumed by Nigerian courts in the electoral sphere and unpacks the conditions constraining this normative role. It parses the complex ways in which the courts sought to facilitate the 1979 democratic transition and argues that the adjudicatory challenges flowing from this objective were particularly exacerbated by anti-democratic litigatory strategies adopted by political actors in the electoral sphere. By deploying the controversy over the 1979 presidential election results as a narrative frame, the article thus examines the ways in which the courts sought to promote a democracy-enhancing agenda within the volatile sphere of electoral adjudication.

In addition, the article finds that judicial institutions can make meaningful contributions towards the facilitation of democratic outcomes. However, the democratising role of courts is fraught with normative challenges when it collides with the strategic motivations of certain categories of litigants who seek to instrumentalise electoral adjudication in furtherance of partisan and anti-democratic objectives.

The article is divided into five main sections. The first section outlines some conceptual issues arising from the relationship between electoral adjudication and the democracy-enhancing roles of courts in transitional societies. The second section discusses the historical context of Nigeria's disputed 1979 presidential election. In turn, the third section unpacks and explicates the reasoning in key judicial decisions arising from the presidential election dispute in order to clarify the ways in which the courts sought to facilitate and safeguard the democratic transition

11. See Huntington (1991, chap. 2).

programme. Following from this, the fourth section discusses certain anti-democratic responses of litigants to adverse electoral and adjudicatory outcomes and underscores the normative challenges these developments posed to the democracy-enhancing project undertaken by the courts. The fifth section concludes the discussion and proposes some normative strategies for tackling the corrosive strategies of anti-democratic litigants within the electoral sphere.

B. Preliminary Issues

1. Courts, Electoral Adjudication, and Fledgling Democracies

Questions concerning the role of courts in promoting a democracy-enhancing agenda in transitional societies and fledgling democracies have exercised scholars and constitutional designers, among others, for decades (Berat 2005, 45–48; Kumado 1977, 217–220).[12] Crucial aspects of the scholarly discourse involve postulating normative justifications for judicial review and parsing the roles of courts within democratic processes (Nwauche 2010, 31–60).[13] Debates about the democratic legitimacy of judicial intervention within the electoral process are also particularly salient considering the significance this sector holds for rights of political participation in democratic societies.[14]

Commentators, such as Cheema, point out that courts in some fledgling democracies are caught within a double-bind in the area of electoral adjudication.[15] On the one hand, judicial determination of electoral cases is "fraught with danger" because it involves adjudicating on the most consequential disputes in the political process (Cheema 2016). Yet, courts that choose to disavow adjudicative roles in the electoral process risk seriously undermining their institutional legitimacy and relevance within the constitutional order (Cheema 2016).

As Issacharoff also reminds us—albeit in a different context—the electoral sphere "is not simply a forum for the recording of preferences, but a powerful situs for the mobilization of political forces" (Issacharoff 2007, 1410).[16] Systems of electoral adjudication are thus often embedded within a politicised terrain populated

12. See also Grove (1963); Ezejiofor (1967); Amidu (1991–1992).

13. See also Corder (2004).

14. See also Fowkes (2016, 66–70).

15. See Cheema (2016).

16. See also Rotman (2004, 290–91).

by social actors involved in conflictual processes of political mobilisation (Issacharoff 2007, 1410). Furthermore, courts can collide with political actors when exercising judicial functions within the electoral sphere—for instance, by adjudicating disputes, making findings of fact, expounding legal rules, and determining contentious issues involving political rights, interests, and obligations. In this regard, the electoral sphere particularly accentuates the boundaries of judicial power.

2. Courts and the Strategic Objectives of Electoral Litigants

While electoral adjudication may conduce to democratisation by promoting peaceful resolution of political conflicts in certain contexts (Aggrey-Darkoh and Asah-Asante 2017), some litigants in other instances may seek to leverage election petitions in ways that militate against the attainment of democratic ends (Erlich et al. 2019, 1–44). In this regard, some commentators have called attention to the strategic motivations underpinning certain lawsuits seeking to challenge election results (Erlich et al. 2019, 1–44). Erlich et al., for instance, have persuasively suggested the need for deeper consideration of the complex incentive structures that inform the litigatory strategies of unsuccessful election candidates.

A burgeoning line of enquiry in the field of comparative election studies also suggests that litiguousness in the electoral sphere is not always explicable as a normative response to electoral malpractices or other forms of electoral injustice.[17] On this perspective, petitioners and other unsuccessful election candidates may mobilise post-election litigation as a platform for accumulating "short-term power enhancing benefits beyond the electoral arena" (Hernández-Huerta 2020, 89–103).[18] For instance, litigants may strategically leverage the publicity afforded by election petitions to buttress their chances in subsequent electoral cycles, signal partisan narratives to their political supporters, or secure material benefits or political concessions from the government or political opponents (Erlich et al. 2019, 12–13).

As such, the volatile context of electoral adjudication can bring courts into conflict with disingenuous petitioners—defined as a category of litigants who seek to mobilise electoral adjudication as a springboard for partisan and anti-democratic objectives. Disingenuous petitioners may, for instance, seek to unduly leverage the judicial process as a mechanism for invalidating the electoral victories of political opponents. This category of litigants may also refuse to accept adverse electoral

17. See Hernández-Huerta (2020, 89–103).

18. See also Hernández-Huerta and Cantú (2021). Cf. Dube (2022, 221–22): arguing that within the context of electoral adjudication incumbent governments can also adopt dilatory tactics in order to frustrate attempts by opposition groups to access legal remedies for electoral injustice.

and adjudicatory outcomes by unjustifiably impugning the legitimacy and credibility of electoral, judicial, and democratic institutions. Beyond besmirching constitutional institutions, disingenuous petitioners may also operate by instigating popular disaffection and mobilising populist sentiments against electoral and democratic processes. In sum, certain litigatory and political strategies adopted by disingenuous petitioners may play out in ways that ultimately undermine electoral processes and democratic governance.

3. Electoral Adjudication and Political Death

As some commentators have observed, general elections often implicate fundamental issues affecting rights of political participation within democratic societies (Nwabueze 1985, 436). Presidential election petitions, arising from events that generate considerable national attention, particularly catapult courts to the centre stage of the political process (Nwabueze 1985, 436). Nearly four decades ago, Professor Ben Nwabueze argued that judicial decisions in election petition cases are fraught because they impact "the very essence of politics as a struggle for power between rival political parties" (Nwabueze 1985, 435). Accordingly, he contended that this situation is particularly aggravated within the unstable political context of some transitional societies "where so much hangs on the winning of political power" (Nwabueze 1985, 435). For Nwabueze, elections in such contexts may degenerate into an erratic political struggle akin to a matter of "life-and-death for those engaged in it" (Nwabueze 1985, 436). From the standpoint of some political actors, electoral adjudication can therefore assume an inexorably macabre quality because a judicial decision "award[ing] power to one party is like a death sentence for the loser" (Nwabueze 1985, 436).[19]

On this argument, an adverse judicial decision on an election petition involves heightened polycentric implications beyond the parties to the legal dispute because it also symbolises political death for the sympathisers and political party of the losing litigant (Nwabueze 1985, 436). Nwabueze offered this interesting perspective to emphasise that electoral adjudication "affects the entire people directly and intimately in a way that excites their deepest emotion for or against the court" (Nwabueze 1985, 436). The foregoing analysis usefully provides further insights

19. See also Nwabueze (1985, 464), observing that "a decision [on an election petition] which frustrates a political desire leaves the losing party disaffected towards the court or other tribunal. Thus, whichever way the decision goes, and however objective and impartial it is, it is bound to excite distrust and disaffection among the losers, simply because of the nature of election cases and the stakes involved."

into some of the political motives that may lead certain litigants to strategically reject adverse electoral and adjudicatory outcomes. More pertinently, Nwabueze's arguments also served to ground his conclusion that election petitions constitute an inapposite subject for judicial decision-making (Nwabueze 1985, 437).[20]

4. Judicialization and the Electoral Sphere

Yet, in many ways, the "judicialization of electoral processes"—which Ran Hirschl conceptualises as judicial resolution of fundamental political issues impacting electoral outcomes—has become a pervasive phenomenon in today's world (Hirschl 2008, 98).[21] Recent scholarship also suggests that judicialization is emerging as a conspicuous attribute of the electoral sphere across a range of jurisdictions on the African continent (Murison 2013; Hatchard 2015; Nyane 2019, 11–20). In this respect, Goldfeder's recent observation that litigation now features "as a common, even integral, component of electoral strategy" for aspirants to elective office (Goldfeder 2021, 337) also rings true beyond the US context. This then raises critical questions about the normative functions of courts—as opposed to the relevance of judicial intervention—in the electoral sphere. Issues relating to the capacity of judicial institutions to enhance democratic consolidation through strategic intervention in electoral politics thus assume heightened practical significance today.

5. Promoting a Democratic Agenda: The Role of Courts

Commentators have observed that the democracy-enhancing functions of courts in transitional societies and fledgling democracies are neither fixed nor stable. They are fluid and shifting, instead, as well as nimble and sensitive to the vagaries of local political contexts (Yap 2017). Landau posits that courts in such societies may have to re-adapt conventional notions of judicial authority in response to the debilitated state of core democratic institutions (Landau 2014). He contends that a normatively justifiable adjudicatory approach in such contexts would be for courts to promote a democracy-enhancing agenda. Following from this, Landau conceptualises the roles of courts as entailing "dynamic" and ameliorative functions that seek to "improve the performance of political institutions through time" (Landau 2014, 1503). On this proposition it would also follow that courts in such societies would have to be evaluated on the basis of their contributions towards enhancing and consolidating tenets of democratic governance.

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20. See also Nwabueze (1985, 467–68).

21. See also Yap (2016).

Landau distills this evaluative analysis into a bipartite framework comprising "plausibility" and "effectiveness" as conceptual rubrics (Landau 2014, 1504). The plausibility rubric entails the proposition that courts should deploy judicial power with the aim of securing pragmatic outcomes within the constraints of a given politico-legal context (Landau 2014, 1504). The effectiveness rubric involves even more consequentialist considerations that focus on the democracy-enhancing outcomes of judicial intervention (Landau 2014, 1504). On this test, assertions of judicial power in the political process would count as effective and normatively justifiable if they conduced to democratic consolidation in the long term. Landau rightly notes that the scholarly discourse is still at the stage of theory formulation, given the pressing need for further empirical research on the trajectories and long-term outcomes of certain patterns of judicial activism in nascent democracies and transitional societies (Landau 2014, 1542).

Daly similarly invites analysts to embrace productive scepticism in the discourse on the putative democratising capacities of courts (Daly 2017). On this perspective, "[w]e have yet to achieve a fine-grained understanding of the roles courts play as democracy-builders" as well as the normative contributions they can make towards preserving "the democratic order inaugurated by the political settlement itself" (Daly 2017, 129). In this regard, analytical scepticism can productively enable researchers to generate critical questions and systematic assessments concerning the (in)capacity of courts to advance a democratic agenda (Daly 2017, 129).

There is indeed much wisdom in the suggestion that judicial contributions to democratic consolidation ought to be unpacked—rather than uncritically assumed—through systematic research projects that thematise the complex factors which shape judicial power within diverse spatio-temporal contexts. With particular reference to the democratising roles of judicial institutions in systems of electoral adjudication, a productive research agenda would also entail detailed and systematic assessments of the ways in which courts project judicial power and constitutional authority within electoral processes. Such research projects may also involve interrogating the normative claims courts make to ground judicial intervention in the electoral sphere. By the same token, interrogating the strategic objectives of non-judicial actors can also conduce to a deeper understanding of the complex factors affecting the durability of certain democracy-enhancing efforts undertaken by courts in the electoral sphere.

This article pursues the latter line of inquiry by examining the ways in which the conduct and objectives of disingenuous petitioners shaped the outcomes of certain democracy-enhancing objectives pursued by Nigerian courts during the 1979 transition. Accordingly, the article mines the texts of judicial decisions, statutory frameworks,

and other historical accounts on the 1979 presidential election crisis in order to provide an explanatory analysis and legal history of the democracy-enhancing role of courts in transitional societies. By disinterring relevant conceptual insights from the historical analysis, the article also aims to contribute to the discourse on the roles of courts within contemporary democracy-building projects in transitional societies.

II. THE 1979 PRESIDENTIAL ELECTION DISPUTE

In 1979 Nigeria's democratic transition, aimed at terminating thirteen years of military rule, was nearly disrupted by an impassioned legal dispute over the presidential election results.[22] To facilitate the cross-regional acceptability and nationwide mandate of the incoming president, the legal framework regulating the 1979 presidential election required the successful candidate to satisfy two key electoral requirements. Such a candidate was required, first, to score "the highest number of votes at the election" and, second, to obtain not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the states in the federation."[23] Furthermore, if any candidate failed to meet these stipulated conditions after the first round of voting, an electoral college—consisting of members of the federal and state legislative assemblies—would then elect the president, by simple majority vote, from among the two leading candidates in the election.[24]

Given that the country comprised nineteen states at the time, it was significant that Alhaji Shehu Shagari, the candidate who eventually won the majority vote in the presidential election, obtained a quarter of the votes in twelve states but narrowly missed this threshold in the thirteenth.[25] As the country anxiously awaited the official announcement of the presidential election results, animated debates centred on the proper legal interpretation of two-thirds of nineteen states. Given its momentous political implications, an otherwise rudimentary arithmetical question thus rapidly emerged as an incendiary issue (Ofonagoro 1979, 224).

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22. See Ofonagoro (1979, 224–55); Read (1979); Oyediran (1981); Kurfi (1983, 183–206).

23. Electoral Decree No. 73 of 1977 (as amended), s 34A (1)(c)(i)–(ii).

24. Electoral Decree No. 73 of 1977 (as amended), s 34A(2): stipulating that the two candidates at the second election would be "a candidate who secured the highest number of votes" during the first ballot stage and "one among the remaining candidates who has a majority of votes in the highest number of States." See also Koehn (1981, 42).

25. Shehu Shagari obtained 19.94 percent of the total votes cast in Kano, the relevant thirteenth state. See also Panter-Brick (1979, 330–31).

The Federal Electoral Commission (FEDECO) clarified that "in the absence of any legal explanation or guidance in the Electoral Decree," it was duty bound to uphold "the ordinary meaning" of the relevant statutory provisions and interpret two-thirds of nineteen states as amounting to twelve and two-thirds.[26] Accordingly, a candidate would be deemed to have satisfied the second eligibility requirement for election as president by meeting the stipulated minimum threshold in twelve states and obtaining one-quarter of two-thirds of the total votes cast in a thirteenth state (Ofonagoro 1979, 190).[27] In the event, Shehu Shagari had fulfilled these requirements at the first ballot stage and the Federal Electoral Commission deemed it unnecessary to convene an electoral college. When on the strength of this interpretation FEDECO declared Shagari the winner of the presidential election, its decision was challenged by Chief Obafemi Awolowo, the runner-up candidate, in a landmark election petition that ultimately reached the Supreme Court.

In *Awolowo v. Shagari*,[28] the petitioner sought to invalidate the electoral success of the first respondent by contending that thirteen states constituted the minimum territorial unit for election as president. On this argument, FEDECO had misconstrued the election threshold unit, unduly fractionalised the thirteenth state, and unlawfully returned Shagari, the first respondent, as president-elect. Accordingly, Chief Awolowo sought two main legal reliefs aimed at nullifying Shagari's election and ordering FEDECO officials to convene an electoral college.

On one plane of analysis, the *Awolowo* election petition raised pertinent issues by calling into question the officious approach of the outgoing military regime towards certain aspects of the transition programme. By the same token, the petition positively highlighted some deficiencies in electoral administration and underscored the need for legal reforms.[29] In this respect, the judicial proceedings arising from the petition accentuated FEDECO's inability to facilitate a definitive clarification and authoritative settlement of the controversial territorial threshold issue well in advance of the presidential election.

Prior to FEDECO's decision, as some commentators have observed, the assumption was widely held that thirteen states constituted the threshold territorial

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26. See Federal Electoral Commission 1979 reproduced in Ofonagoro (1979, 190).

27. See also Boparai (1981, 390).

28. (1979) 6–9 SC 51 ("*Awolowo v. Shagari*").

29. In the aftermath of the post-election dispute, the legal provisions for an electoral college were deleted and replaced by provisions for a second popular election in cases where no winner emerged at the first-ballot stage. See Oyediran (1981, 151–52).

unit for election as president.[30] Considering that two-thirds of nineteen amounted to twelve and two-thirds, it was thus assumed that this fractional figure would be approximated to thirteen being the nearest whole number (Bolaji 1980, 126). According to Amadu Kurfi, the chief electoral officer for the 1979 general elections, this assumption "was the honest, if erroneous, interpretation given to the legal provision in the electoral law by many people, including FEDECO officials and political pundits" (Kurfi 1983, 209). However, shortly before the election, the view began to coalesce among senior FEDECO officials that the correctness of the assumed interpretation was doubtful (Kurfi 1983, 216–17).[31]

On the eve of the presidential election, Chief Michael Ani, the chairman of FEDECO, frantically sought legal advice concerning the issue from the federal Attorney-General (Kurfi 1983, 217–18). Reckoning that FEDECO's decision on the territorial threshold question could result in post-electoral litigation, the Attorney-General suggested that a literal interpretation of the contentious statutory provision would probably be less susceptible to invalidation by the courts (Kurfi 1983, 217–18). As an alternative measure, he requested the federal military government to enact urgent legislative amendments to the electoral legal framework aimed at clearly specifying the minimum territorial unit. The military government, in turn, declined to promulgate the amendments requested by the Attorney-General on the ground that "[t]his would have amounted to changing the rule of the game while the game was in progress" (Obasanjo 1990, 192). Meanwhile, the election proceeded as scheduled on 11 August 1979 (Isichei 1983, 478).

At a high-level meeting on 14 August, the military regime further resolved not to interfere with FEDECO's jurisdiction to interpret the territorial threshold and noted that any aggrieved parties could thereafter exercise their legal rights to seek redress within the judicial process (Obasanjo 1990, 192).[32] Following deliberations among electoral commissioners in FEDECO, a joint decision was then taken to apply twelve and two-thirds states as the territorial threshold, and the returning officer for the presidential election subsequently announced the results on 16 August 1979 (Kurfi 1983, 218). This announcement aroused controversy in some parts of the country and led to rumours that FEDECO's decision had been unduly

30. See Kurfi (1983, 209).

31. See also Obasanjo (1990, 191): pointing out that an academic analyst foretold the controversy shortly before the election by drawing parallels between the Nigerian context and the 1876 presidential election crisis in the United States. Samuel Jones Tilden, sponsored by the Democratic Party, lost the US 1876 presidential election despite winning the popular vote.

32. See also Oluleye (1985, 203); Iliffe (2013, 93).

influenced by the military regime and partisan political actors within Shagari's National Party of Nigeria (NPN).[33]

However, these rumours and innuendoes were misplaced and inaccurate.[34] FEDECO's tardy treatment of the contentious territorial threshold issue is best understood as a product of its institutional weaknesses as a fledgling and relatively inexperienced electoral management body, given the historical context of prolonged military rule.[35] Remarkably, the preceding general elections had occurred fifteen years earlier, in 1964, under a different electoral management body and constitutional framework (Jinadu 1981, 23, 38–39). Nonetheless, FEDECO's decision, although contentious, was neither irrational nor motivated by a capricious abuse of power.[36]

A. Political Grievances, Strategic Considerations, and Electoral Litigation

Yet, there are cogent grounds for re-evaluating the strategic considerations that may have informed Chief Awolowo's decision to file his election petition. As Falola and Ihonvbere aptly observed, "[o]f all the other [losing] presidential candidates, Awolowo was the most bitter."[37] He had come to prominence in the late 1940s as a leading figure in Nigeria's Independence movement and later served as the first Premier of the Western Region from 1954 to 1959. Despite mounting a vigorous campaign, he failed to win the office of Prime Minister during Nigeria's pre-Independence elections in 1959[38] and emerged as leader of the opposition in the

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33. See Bolaji (1980, 127–29); Babatope (1990, 31–35).

34. Chief Richard Akinjide, the legal adviser to Shagari's National Party of Nigeria (NPN), attempted to capitalise on the post-election controversy by publicly rejecting the thirteen-state threshold thesis shortly before FEDECO announced the election results. Although Akinjide's interpretation of the threshold unit coincided with the interpretive approach adopted by FEDECO in its declaration of the results, he was neither the original propounder of the idea that twelve and two-thirds states amounted to the minimum territorial unit nor did he collaborate with FEDECO officials on this point as was widely rumoured at the time. See Kurfi (1983, 218–19). See also Oyediran (1981, 151–52).

35. See Jinadu (1981, 17–39).

36. The phenomenon of fledgling and weakly institutionalised electoral systems has also been observed in other transitional contexts. See, e.g., Fowkes (2016, 67), noting that "South Africa did not have a working electoral system in 1998. The 1994 elections, [which ushered in the post-Apartheid era] thrown together at speed, had been run with no registration process and no voters roll."

37. Falola and Ihonvbere (1985, 72).

38. Awa (1960, 111–12).

federal House of Representatives upon Independence in 1960. In susbequent years his political career was curtailed by controversial circumstances. Charged with plotting to overthrow the federal government, he was convicted for treasonable felony in 1963 after a trial that became a cause célèbre during the First Republic.[39]

Following the collapse of the First Republic and the advent of military rule in 1966, Chief Awolowo was released from detention and pardoned by the Yakubu Gowon regime (Falola and Ihonvbere 1985, 72). During the Nigeria–Biafra War (1967–1970), he served as the Commissioner of Finance in the wartime cabinet of the federal military government and held office as vice-chairman of the junta's Federal Executive Council until 1971. When the Obasanjo military regime signalled its intention to disengage from politics by initiating a democratic transition programme in the late 1970s, "he was the first to launch a political party"—the Unity Party of Nigeria (UPN)—with a coherent manifesto and efficient organisational structure (Falola and Ihonvbere 1985, 72).[40]

Having suffered electoral defeat two decades earlier, Chief Awolowo "had put everything he had into the 1979 elections" by running an energetic and well-organised campaign (Falola and Ihonvbere 1985, 72).[41] Apart from his ethnic base in the old Western Region, he received tepid support from the electorate,[42] surpassing the 25 percent vote threshold in only six states of the federation at the presidential election. In addition, there was a considerable vote margin of 772, 206 popular votes (*Awolowo v. Shagari*, 55) between himself and the leading presidential candidate, Shehu Shagari, who, by contrast, attained the 25 percent vote threshold in twelve states (*Awolowo v. Shagari*, 111). In the circumstances, Chief Awolowo inevitably regarded the presidential election results as highly demoralising (Babarinsa 2003, 55) and "could not quickly reconcile himself to Shagari's so-called victory" (Falola and Ihonvbere 1985, 72) at the first ballot stage. Although two other defeated presidential candidates joined him in calling for a runoff election and denouncing FEDECO's declaration of Shagari as president-elect,[43] it

39. See Jakande (1966).

40. See also Babatope (1997, 87–88).

41. See also Iliffe (2013, 91): "By February 1979 [Chief Awolowo] could claim to have travelled 20,000 kilometres by road, visited every state, and held 401 rallies. He predicted that he would win 15 of the 19 states. Perhaps he even believed it."

42. See Joseph (1981, 19). See also Kurfi (1983, 220–22).

43. See "Text of the Joint Press Release of Dr. Nnamdi Azikiwe, Chief Obafemi Awolowo and Alhaji Waziri Ibrahim at the World Press Conference, Eko Hotel, Victoria Island" (20 August 1979) in Ofonagoro (1979, 291–94).

was noteworthy that he alone took the further step of instituting legal proceedings at the Presidential Election Tribunal.

Against this backdrop, there are plausible grounds for arguing that Awolowo's decision to file the election petition was underpinned by several strategic considerations. First, in view of the considerable publicity generated by the judicial proceedings, *Awolowo v. Shagari* tactfully dramatised the relative inexperience and inevitable institutional weaknesses of FEDECO—given the protracted period of military rule—in ways that unduly undermined the credibility of the electoral process. Second, the legal dispute presented Awolowo, qua petitioner, with strategic opportunities to displace an unsuccessful attempt at winning the presidency onto structural factors such as putative manipulation of the electoral process by the outgoing military regime and an allegedly partisan electoral management body. Third, the petitioner hoped to resuscitate his presidential aspiration by securing, through the judicial process, the option of a rematch with Shehu Shagari at the electoral college. It was significant, in this regard, that Awolowo urged the Presidential Election Tribunal to order FEDECO officials to "hold the election which should have followed on the failure of all the candidates to win at the first ballot."[44]

Yet, Chief Awolowo was undoubtedly aware of significant constraints on his attempts to revive his presidential ambition within the judicial process. Considering the narrow range of territorial support for his candidacy at the first ballot, the view was widely held within non-partisan circles that to offer him another chance—however remote—of winning the presidency at an electoral college would defy democratic principles.[45] Allied to this view were normative concerns that an electoral college, comprising a network of politicians elected into various legislative assemblies across the country, could easily descend into a forum for political horse-trading (Kurfi 1983, 215) with deleterious consequences for the Second Republic. Furthermore, there were some plausible legal grounds for doubting whether he was indeed the most eligible runner-up candidate to proceed to an electoral college alongside Shagari.[46] Remarkably, the jurisdiction of the Presidential Election Tribunal to order an electoral college was also debatable considering that the statutory timeline for convening one lapsed shortly after he filed his petition (Nwabueze 1982, 200).

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44. See the testimony of Chief Obafemi Awolowo at the Special Election Tribunal (Suit No. SET/1/1979) reproduced in Ofonagoro (1979, 300).

45. See Ofonagoro (1979, 237–38); Ojigbo (1983, 15–16); Bolaji (1980, 132–33, 181–82).

46. See Adamu and Ogunsanwo (1982, 252). See also Davies (1989, 291); Kurfi (1983, 213–15).

Given this situation, an alternative litigatory strategy open to Chief Awolowo would have been to impugn the validity of the entire presidential election as conducted by FEDECO. If the Tribunal upheld this approach, FEDECO's jurisdiction, would then become limited to organising a fresh presidential election in terms of the Electoral Decree.[47] However, Awolowo regarded this option as unsatisfactory because, as Professor Nwabueze rightly observed, it would have jeopardised "his precious position as the first runner-up" as well as "the prospect that he might emerge the winner in an election between him and Alhaji Shehu Shagari in the electoral college" (Nwabueze 1982, 200). Accordingly, his petition tactfully refrained from "attack[ing] the presidential election itself" while seeking to nullify "the electoral commission's declaration or return" of Shagari as president-elect (Nwabueze 1982, 200).

III. THE JUDICIAL RESPONSE

A. The Presidential Election Tribunal

Chief Awolowo's submissions before the three-judge Election Tribunal,[48] which determined the petition at first instance, rested on a series of interlocking arguments. While conceding that "two-thirds of 19 in the abstract by simple arithmetic is [twelve and two-thirds]," he strenuously argued that a state, within the context of a federation, was best conceptualised as an indivisible corporate entity that could not be fractionalised in legal terms.[49] According to the petitioner, the word "each"—in the contentious statutory provision stipulating 25 percent of the votes cast "in each of at least two-thirds of all the states in the federation"—was the keyword for unlocking the legislative intent concerning the territorial threshold (Ofonagoro 1979, 313). On this premise, he further contended that the statutory provision "denotes counting not measurement" and that each of the nineteen states in the federation constituted "an integral unit taken separately at a time" (Ofonagoro 1979, 313).

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47. Electoral Decree No. 73 of 1977 (as amended), ss 124(2), 134(2).

48. On 9 August 1979, the then Chief Justice of Nigeria, Sir Darnley Alexander, empanelled the Special Election Tribunal (comprising three justices of the Federal Court of Appeal) to hear petitions arising from the presidential election. The members of the Tribunal were Justice B. Oladitan Kazeem (chairman), Justice A. I. Aseme, and Justice A. B. Wali. See "The Election Tribunals (Appointments) (No. 5) Notice 1979" [L.N. 30 of 1979].

49. See the Judgement of the Presidential Election Tribunal reproduced in Ofonagoro (1979, 313).

The Tribunal unanimously rejected the foregoing arguments. In this regard, it framed the petitioner's submissions for an approximation of the territorial threshold to thirteen states as a subtle appeal for judicial legislation.[50] Declaring its refusal to indulge in a "naked usurpation of the legislative function under the thin disguise of interpretation" (Ofonagoro 1979, 318), the Tribunal averred that the legislature was cognisant of the nineteen-state structure of the federation when it enacted the Electoral Decree (Ofonagoro 1979, 320). Building on this premise, the Tribunal noted the absence of any provision in the statutory framework stipulating "that in the event of not being able to get a round figure as constituting two-thirds of 19 states, certain things should be done either by adding something thereto or by deducting something therefrom" (Ofonagoro 1979, 321). Following from this, the Tribunal affirmed the arguments, advanced by the respondents,[51] that the relevant statutory provisions admitted of no ambiguity or absurdity. If these propositions were correct, the Tribunal was duty bound, a fortiori, to adopt the literal rule of statutory construction:

> In our view, it does not require the opinion of an expert in mathematics or a computerist to work out what two-thirds of 19 means. It is enough to say that any student in a primary school, tutored in the subject of 'Fraction' in simple arithmetic will have no difficulty in getting 12⅔ if asked to find two-thirds of 19. The law makers of [section 34A(1)(c)(ii) of the Electoral Decree] must therefore be taken to have intended nothing more than that; and we so hold.[52]

In the unanimous judgement of the Tribunal, any interpretative approach that read the statutory provision as stipulating that a president-elect had to meet the vote threshold in an entire thirteenth state—qua indivisible unit of analysis—would work injustice by effectively requiring Shagari to "bear more burden in order to be elected, than what the legislature expressly require him to bear" (Ofonagoro 1979, 322).

Having reached these conclusions, the Tribunal then proceeded to rationalise the methodology adopted by FEDECO in declaring the presidential election results. In this regard, the Tribunal stated that although Shagari had clearly satisfied

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50. Ofonagoro (1979, 320): per Justice B. O. Kazeem quoting, approvingly, Bairamian JSC in *Okumagba v. Egbe* (1965) 1 All NLR 62.

51. Shehu Shagari, the Chief Electoral Officer of the Federation, and the Returning Officer for the presidential election, respectively, as the first, second, and third respondents.

52. Tribunal Judgement reproduced in Ofonagoro (1979, 321; emphasis appears in original).

the dual prerequisites—quantum of votes and territorial spread—for election as president in twelve states, he was also legally bound to fulfil threshold requirements concerning the "two-thirds state" fractional remainder. Following from this, the Tribunal averred, less convincingly, that the quantum of votes criterion was the "dominant requirement" (Ofonagoro 1979, 323). If this proposition was correct, it would follow that the putative "two-thirds state" was, ultimately, a quantitative or numerical—as opposed to territorial—unit of analysis (Ofonagoro 1979, 323).

Building on this premise, the Tribunal held that FEDECO was justified in reading down the territorial aspect by regarding the fractional "two-thirds state" as "synonymous with two-thirds of the total votes cast" within a thirteenth state (Ofonagoro 1979, 323).[53] Having thus posited the relevant unit of analysis, the Tribunal then proceeded to apply the 25 percent vote threshold stipulated by the Electoral Decree. Accordingly, the Tribunal found that Shagari had obtained 25 percent of two-thirds of the total votes cast in Kano, the contentious thirteenth state. Delivering the unanimous decision of the Tribunal, Justice B. O. Kazeem thus concluded that FEDECO acted lawfully in returning Shagari as president-elect.

B. Safeguarding the Democratic Transition

The Tribunal had strategic reasons for advancing its circuitous and dubitable line of argument concerning the fractional two-thirds state. For instance, by reading down the territorial requirement in the thirteenth state, the Tribunal was alluding to a series of vociferous arguments made by Chief Awolowo against the calculative methodology FEDECO deployed in determining the presidential election result in Kano State. In this regard, Awolowo had correctly pointed out that the Electoral Decree contained no rubric for delineating the territory of any state into three equal parts that would form a coherent basis for determining relevant "two-thirds" units of its geographical area. In order to discredit the declared results in the disputed thirteenth state, he therefore relied on the expert evidence of Prof. Ayodele Awojobi, an applied mathematician, who testified that there were 38,760 possible permutations for demarcating the territorial area of Kano State into three equal units.[54] By the same token, Awolowo emphasized that the returning officer for the presidential election had not conducted any such delimitation exercise in Kano State prior to the electoral contest.[55]

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53. For a forceful criticism of this interpretation, see (Dudley 1982, 173–74).

54. See *Awolowo v. Shagari*, 136–37. See also Kurfi (1983, 187); Bolaji (1980, 167).

55. See *Awolowo v. Shagari*, 136. Professor Awojobi's testimony indicated that in the absence of computerised

As such, the Tribunal felt compelled to rationalise and expatiate on FEDECO's contentious calculative methodology in the putative two-thirds state, despite having already faulted the petition on other legal grounds. Beyond providing additional justification for the decision to dismiss the petition, the Tribunal's debatable analysis of the fractional state was also aimed at ameliorating the deleterious impacts of intemperate criticisms sustained by the transitional electoral management body over its conduct of the presidential polls. As the historian Walter Ofonagoro persuasively argued, "FEDECO had become everybody's whipping boy, particularly among the losers, and most sections of the Press" (Ofonagoro 1979, 228) in the aftermath of the announcement of the presidential election results. Yet, amidst the post-election controversy, "none of these parties that attacked FEDECO so savagely had seen it fit to reject FEDECO's verdict in any of the constituencies where their candidates had won" (Ofonagoro 1979, 228).[56] S. Labanji Bolaji, who wrote a historical account entitled *Shagari: President by Mathematics*, also corroborated Ofonagoro's sympathetic analysis and argued that FEDECO faced an insuperable "dilemma" because a decision to conduct a second ballot would have proved equally controversial (Bolaji 1980, 181). The Tribunal's approach to the question of "whether or not" FEDECO's declaration of Shagari as president-elect was "justified and valid" (Ofonagoro 1979, 322-23) thus alluded to these tensions, and its sympathetic rationalisation of the contentious fractional state stood out in stark relief against this backdrop. Furthermore, the judgement can be read as a normative attempt to avoid disrupting the ongoing transition programme.

Yet, the Tribunal could have anchored this aspect of its decision on firmer grounds. Having rejected the contention that the thirteenth state amounted to an indivisible unit of analysis, the Tribunal could still have taken judicial notice of the corollary fact that FEDECO had not apportioned the applicable territory through a relevant delimitation exercise. This line of reasoning did not negate the overarching decision to dismiss the petition given that Shagari's election was amply supported by a doctrine of substantial compliance enshrined in the statutory framework governing the presidential polls. Accordingly, section 111(1) of the Electoral Decree provided that

> [a]n election shall not be invalidated by reason of non-compliance with Part II of this Decree if it appears to the Tribunal having cognisance of the question that

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or technological assistance, it would have taken the electoral officials one year, at a minimum, to complete the process of delimiting and declaring the election results in respect of two-thirds area of Kano State.

56. See also Ofonagoro (1979, 222–23, 228–29).

> the election was conducted substantially in accordance with the provisions of the said Part II and that the non-compliance did not affect the result of the election.

It was beyond debate that Shagari had fully satisfied the first criterion for success in the presidential election by clearly winning the majority vote. He had also achieved substantial compliance with the second criterion, relating to the territorial threshold, even assuming the correctness of the petitioner's arguments positing thirteen states as the relevant unit of analysis. As such, the Tribunal could have held that his failure—by a shortfall of 5.06 percent—to meet the 25 percent vote threshold in the thirteenth state nonetheless fell within the scope of the substantial compliance doctrine.

The notion that the territorial threshold amounted to a mandatory "statutory condition" beyond the ambit of the substantial compliance doctrine (Ojo 1985, 54), erroneously contradicts the express provisions of section 111 of the Electoral Decree. Similarly, the argument that the doctrine merely contemplated procedural matters affecting the operational conduct of elections as opposed to substantive conditions such as the territorial threshold (Nwabueze 1982, 197–198)[57] imports a distinction unsupported by the Electoral Decree. Part II of the Electoral Decree, expressly referenced in the doctrine, contained an amalgam of procedural and substantive rules—including the territorial threshold stipulated in section 34A(1)(c)(ii)—aimed at governing the electoral process.[58]

Alternatively, the Tribunal could have raised the jurisdictional point by ruling that it lacked competence to grant the petitioner's prayer for an order compelling the second and third respondents—the chief electoral officer of the federation and the returning officer for the presidential election—to arrange an electoral college. In this regard, the enabling provisions in the Electoral Decree conferred jurisdiction on the Tribunal to make two disjunctive determinations concerning an election petition.[59] On the one hand, the Tribunal possessed legal competence to make a positive determination identifying the "duly returned" presidential candidate and confirming the validity of the election.[60] Failing this, the Tribunal was legally empowered to issue a

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57. See also Nwabueze (1982, 198), where Nwabueze unduly elides "substantial" compliance with "precise" compliance.

58. Likewise, Chief Awolowo's extra-curial argument that "what was in issue was *not the conduct of but the return at* the election"—with the substantial compliance doctrine presumably applying only to the former situation—clearly overlooked the fact that Part II also contained provisions on the return of candidates and the declaration of election results. As such, the election petition was caught by the substantial compliance doctrine. See Awolowo (1981, 194, emphasis appears in original).

59. Electoral Decree No. 73 of 1977 (as amended), ss 124(2), 134(1)–(2).

60. Electoral Decree No. 73 of 1977 (as amended), ss 124(2), 134(1)–(2).

negative finding that "the election was void," thereby mandating FEDECO to conduct a "fresh election."[61] Accordingly, the Tribunal could have plausibly concluded that it lacked jurisdiction to simultaneously preserve the validity of the election (without a corresponding finding positively identifying the winner); declare the results as inconclusive; and order arrangements for an electoral college. Nonetheless, it was preferrable that the Tribunal opted to decide the petition on its merits.

In view of the foregoing arguments, there are good grounds for holding that some aspects of the Tribunal's decision, suggesting that it was unnecessary to rule on the applicability of the substantial compliance doctrine, were given per incuriam. Although Shagari's counsel invoked the doctrine, it is noteworthy that "the petitioner did not make any submission on this point" during the proceedings (Ofonagoro 1979, 323). In the circumstances, however, the Tribunal considered its decision of 10 September 1979 justified on the aforementioned grounds, and Chief Awolowo subsequently exercised his right, under the Electoral Decree,[62] to bring a further appeal to the Supreme Court.

C. The Supreme Court Decision

The sole issue in the appeal before the Supreme Court, sitting as a court of seven judges, involved the legal question of whether the Tribunal erred in its interpretation of the statutory provision concerning the territorial threshold for the presidential election. Interestingly, by the time the petition reached the Court, Awolowo had abandoned the aspect of his prayers which sought judicial orders to compel the holding of an electoral college. As such, counsel for the petitioner reiterated arguments made at the Tribunal a quo by attacking FEDECO's calculative methodology in the disputed thirteenth state and urging the nullification of Shagari's return as president-elect. Conversely, the respondents defended the interpretive approach adopted by the Tribunal and relied, in the alternative, on the substantial compliance doctrine (*Awolowo v. Shagari*, 63).

In a majority decision, the Supreme Court dismissed the petition with costs. Fatayi-Williams CJN, who delivered the majority judgement,[63] observed that the petitioner

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61. Electoral Decree No. 73 of 1977 (as amended), ss 124(2), 134(1)–(2). See also Ofonagoro (1979, 312); Nwabueze (1982, 199).

62. Electoral Decree No. 73 of 1977 (as amended), s 118(2).

63. The majority Court comprised Chief Justice Fatayi-Williams and Justices Irikefe, Bello, Idigbe, and Uwais. Justice Obaseki delivered a separate concurring judgement, while Justice Eso issued a dissenting opinion.

himself had made the damaging concession before the Tribunal that his prayers concerning the electoral college had become "otiose" given the expiration of the applicable statutory deadline (*Awolowo v. Shagari*, 57). By the same token, the Court also noted the implications of the fresh election rule for the petitioner's case.[64] Upholding the Tribunal's decision to dismiss the petition, the majority Court took the view that notwithstanding its inelegant drafting, section 34A(1)(c)(ii) of the Electoral Decree was "devoid of any semantic ambiguity" (*Awolowo v. Shagari*, 68) and that the returning officer for the presidential election had acted with "unassailable justification" (*Awolowo v. Shagari*, 66) in adopting "a literal interpretation" of the provision (*Awolowo v. Shagari*, 68).

Mirroring the Tribunal's ruling on this point, the majority Court reasoned that the "literal" interpretive approach was most consistent with the legislative intent and the judicial obligation to ensure fidelity to law. In the considered view of the Court, the petitioner's arguments concerning the territorial threshold were untenable, given that "the Federal Military Government," as the supreme legislative authority, "must be deemed to know that two-thirds of 19 states will be 12⅔ states" when it promulgated the electoral framework (*Awolowo v. Shagari*, 67). The Court considered itself confirmed in this view by observing that the military legislator could have expressly decreed thirteen states as the election territorial threshold (*Awolowo v. Shagari*, 67), if this was its legislative intent. It was also pertinent, the Court reasoned, that the military regime had refrained from altering the statutory provision prescribing the territorial threshold opting, instead, to make other unrelated and inconsequential amendments to the legal framework governing the election (*Awolowo v. Shagari*, 67).

Following from this, the majority Court uncritically affirmed the debatable notion, first advanced by the Tribunal, that it was lawful to read down the territorial requirement in the thirteenth state by treating it as identical to the quantum of votes criterion. Remarkably, the majority Court also failed to accord sufficient weight to the fact that FEDECO had not conducted any delimitation exercise that could ground a coherent determination of the relevant two-thirds parts of the thirteenth state. Although this point was strenuously argued by the petitioner's counsel, the majority Court regarded it as immaterial. It reasoned, in this regard, that the complex permutations involved in such a delimitation exercise, as disclosed by the petitioner's own expert witness, rendered it "impractical and legally unacceptable" (*Awolowo v. Shagari*, 69) for the time being.

According to the majority Court, the question of imposing such an onerous obligation on the transitional electoral management body was a premature issue

64. See the foregoing discussion on pp. 82–83 of this article. See also Electoral Decree No. 73 of 1977 (as amended), ss 124(2), 134(1).

best deferred until a future date when "election results can be computerised in this country" (*Awolowo v. Shagari*, 68–69). On these premises, the majority Court held that the petitioner had failed to substantiate the argument that the Tribunal handed down an erroneous interpretation of the statutory provision in issue.

Having established that the appeal was based on defective legal grounds, the majority Court emphasised the importance of situating the petition within its proper factual context. Accordingly, the Court noted that of the five presidential candidates at the election, Shagari had won the majority vote. Furthermore, it reiterated that, on the facts of the case, Shagari's candidacy enjoyed the widest territorial support and observed that there was a considerable popular vote margin between himself and the petitioner. By the same token, the Court pointed out that even within Kano, the contentious thirteenth state, Shagari obtained 19.94 percent of the total votes cast (*Awolowo v. Shagari*, 69)—thus missing the 25 percent vote threshold by a slim margin—in marked contrast to the 1.23 percent obtained by the petitioner. Against this backdrop, the Court dismissed the petition on 26 September 1979.

Remarkably, the majority Court went further by declaring, obiter, that even if it had reached the conclusion that the statutory provision stipulated a thirteen-state threshold, it would have upheld the validity of Shagari's return on grounds of substantial compliance with the Electoral Decree. Thus, in another point of convergence with the Election Tribunal, the majority judges failed to posit the substantial compliance doctrine as the main premise of their judgement despite having the benefit, unlike the Tribunal, of hearing full arguments on this issue from all the parties (*Awolowo v. Shagari*, 146).

Encapsulating the futility of the appeal, the closing pages of the majority Court's judgement subtly chided the petitioner for contributing to the protracted post-election controversy by litigating—on his own admission—an "otiose" case:

> Realising, as we do, that the word "otiose" means futile, not required, or serving no useful purpose, we do not see the real purpose of this appeal except, perhaps, to enable this Court to interpret the words, percentage, and fraction, used in section 34A subsection (1)(c)(ii) of the Electoral Decree. (*Awolowo v, Shagari*, 71)

D. The Separate Concurring Judgement

Obaseki JSC, who joined the majority Court in dismissing the appeal—albeit on different grounds —accepted the thirteen-state threshold argument. Although he

characterised the fractional two-thirds state as an unascertained and "imaginary" entity (*Awolowo v. Shagari*, 108), Obaseki JSC nonetheless correctly anchored his decision on the substantial compliance doctrine (*Awolowo v. Shagari*, 108–114).[65] To this end, he reasoned that there was insufficient evidence to establish that non-compliance with the territorial threshold requirement "has affected the result i.e. but for the non-compliance, the petitioner would have won, to enable the tribunal declare the result invalid" (*Awolowo v. Shagari*, 111).

Yet, he could also have rendered this doctrine in a more nuanced form (*Awolowo v. Shagari*, 111).[66] On an alternative formulation of the doctrine, establishing an averment that substantial non-compliance affected the election result was not necessarily tantamount to an evidential burden to positively demonstrate that the petitioner would have otherwise won the election.[67] It should have been sufficient for the petitioner to establish that the election was not conducted substantially in accordance with the applicable statutory rules in circumstances that affected the reliability of the declared results. The petition could also have been justifiably dismissed on this more nuanced standard considering the petitioner's failure to establish substantial non-compliance with the territorial threshold rule, even assuming the correctness of the thirteen-state proposition. At any rate, the concurring judgement emphasised that the petitioner established "non-compliance in only one [s]tate."[68]

Obaseki JSC was undoubtedly attentive to the fact that the petitioner's political support was heavily concentrated within a section of the country, causing him to obtain the vote threshold, as Bolaji put it, "in only six contiguous states" comprising his ethnic base "as compared with Shagari's [twelve] states spread all over the country."[69] Alluding to this shortcoming, Obaseki JSC cogently characterised the presidential election as a contest in which "the whole country constitute the constituency" (*Awolowo v. Shagari*, 110), given the overarching policy objectives of the electoral statutory framework. In reaching his decision, he therefore underscored the doubtful merits of the case by observing eloquently that "no tribunal in any

65. See also Graham-Douglas (1980, 62).

66. However, Justice Obaseki's interpretation was not an indefensible reading of the substantial compliance doctrine as enshrined in the provisions of section 111 of the Electoral Decree.

67. Justice Obaseki could also have clarified more meaningfully the standard of proof beyond merely noting the petitioner's obligation to establish substantial non-compliance to the "satisf[action] [of] the court or tribunal having cognizance of the question." See *Awolowo v. Shagari*, 110.

68. *Awolowo v. Shagari*, 111, per Obaseki JSC.

69. See Bolaji (1980, 181). See also Boparai (1981, 399).

petition by a weak presidential opponent, can justifiably invalidate any election for non-compliance on a minimal scale" (*Awolowo v. Shagari*, 110).

E. The Dissenting Judgement

Of the ten judges who adjudicated on the election petition, at first instance and on appeal, only Kayode Eso JSC upheld the submissions of the petitioner. In a generally trenchant dissenting judgement, he faulted the distinct calculative methodolgy FEDECO applied to Kano on the basis that it was inapt to "measure the thirteenth state by votes and not by physical territory as it has been done with the first twelve [s]tates" (*Awolowo v. Shagari*, 140). He further censured the Tribunal for rationalising FEDECO's methodology by "equat[ing] the words 'two-thirds [s]tate' with 'two-thirds of the total votes cast in that [s]tate' and not the physical or territorial area of such [s]tate" (*Awolowo v. Shagari*, 141). Accordingly, he endorsed the argument that thirteen states constituted the appropriate minimum territorial unit for the presidential election.

Following from this, he averred, less plausibly, that the election was inchoate upon conclusion of the first round of voting and that Shagari's return as president-elect was therefore premature and unwarranted in the absence of a second ballot (*Awolowo v. Shagari*, 150–51). Eso JSC further characterised the substantial compliance doctrine as a red herring, given that there was as yet no decisive and valid election to which the doctrine could be said to apply (*Awolowo v. Shagari*, 151). As he put it, "[W]here it is necessary to have an election under section 34A [of the Electoral Decree containing provisions for an electoral college] and that election has not been held, then there cannot be a 'return'".[70] In sum, Shagari's failure to strictly fulfil the thirteen-state territorial requirement rendered the first ballot inconclusive (*Awolowo v. Shagari*, 150).[71]

The line of reasoning advanced by Eso JSC in his analysis of the first ballot stage was unsustainable for several reasons. First, it misconceived the juridical status of the first ballot as a valid, decisive, and self-sufficient election in its own right. The abstract and legalistic argument about the inconclusive character of the presidential election could be maintained only by discounting the fact that the results of the first ballot evinced the democratic preferences of the Nigerian electorate. Far from acting within a vacuum, FEDECO had upheld the first ballot victory of the

70. *Awolowo v. Shagari*, 150, per Kayode Eso JSC (emphasis in original).

71. For an extra-curial discussion of the Supreme Court's decision, see Eso (1996, 267–72).

presidential candidate who won the popular vote and received the relatively widest territorial support across the country.

Second, the dissenting judgement demonstrated an insufficient appreciation of the pragmatic consequences of the substantial compliance doctrine. By implicitly regarding strict conformity with the statutory framework (i.e., assuming the correctness of the thirteen-state threshold thesis) as a necessary condition for defining the first ballot as a conclusive election, Eso JSC effectively rendered the substantial compliance doctrine redundant and nugatory. The better view, incisively expressed by Obaseki JSC, was that the Electoral Decree contemplated a marginal degree of nonfulfillment and enshrined the doctrine of substantial compliance as a "limitation imposed on the powers of the court to invalidate an election" (*Awolowo v. Shagari*, 109).

Third, the dissenting judgement failed to situate the petition within its proper legal and factual context. Although Eso JSC granted the petitioner's prayer for an order nullifying Shagari's return, his judgement was conspicuously silent on the attendant factual consequences and legal implications of this decision. It is noteworthy that the dissenting decision also failed to address the concomitant questions of either arranging a fresh election or convening an Electoral College. However, the omission of the latter question was unsurprising considering that, as mentioned previously, Chief Awolowo earlier abandoned this aspect of his prayers upon appeal to the Supreme Court.

Thus, in framing his adjudicatory orders, Eso JSC failed to meaningfully consider the constitutional vacuum that invariably flowed from his decision to nullify the president-elect's mandate barely a few days to the pre-scheduled inauguration of the Second Republic. Conversely, the majority judgement of the Supreme Court brought a decisive end to several weeks of "cliff-hanging litigation"[72] during which the "fate of [the] nation hung so precariously on the thread of judicial interpretation" (Graham-Douglas 1980, 21).

F. Inaugurating the Second Republic

The majority Supreme Court decision, notwithstanding some aforementioned flaws in the reasoning, facilitated the successful completion of the transition programme. Shehu Shagari correctly extolled the decision as a "momentous and historic judgement" that "re-affirmed the verdict of the people" (Ojigbo 1983, 112). He declared that he harboured no malice against "those who have exercised their constitutional

72. Read (1979, 175).

right by seeking judicial interpretation and pronouncement" (Ojigbo 1983, 112) on the electoral dispute, and he urged all parties "to bury the hatchet and address their minds to what is good for all" (Ojigbo 1983, 112–13). On 1 October 1979, he was inaugurated as president in an epoch-making ceremony that marked an end to thirteen years of military dictatorship (Osaghae 1998, 95).

IV. POLITICAL INTRIGUE AND DISINFORMATION IN THE COURT OF PUBLIC OPINION

Yet, despite resolving the legal issues, the Supreme Court's decision did not mark a denouement to the political maelstrom surrounding the presidential election. Having lost out within the judicial process, Chief Awolowo took steps to ventilate his grievances, as Babarinsa put it, in "the court of public opinion."[73] On 11 December 1979, shortly after Shagari's inauguration, Awolowo delivered his presidential address at the annual congress of the Unity Party of Nigeria. Surrounded by throngs of party stalwarts and political sympathisers, he explicated what he considered to be "certain inferences" flowing from his unsuccessful attempt at winning the presidential election (Awolowo 1981, 103).

To this end, he excoriated what he described as the "perfidy of FEDECO" and the "inflexible determination" of the preceding military regime "to install Alhaji Shehu Shagari as President at all costs" (Awolowo 1981, 102). He also denounced Chief Michael Ani, the FEDECO chairman, by alleging that his failure to adopt a thirteen-state territorial thresold indicated "a strong and consuming desire to ensure success" for Shagari as well as a lack of "moral courage and a keen sense of self-respect and honour" (Awolowo 1981, 103). According to Awolowo, FEDECO perpetrated "a brazen subterfuge and deliberate falsehood" in its handling of the contentious territorial threshold issue (Awolowo 1981, 103).

Beyond alleging conspiratorial designs on the part of FEDECO and the defunct federal military government, Chief Awolowo also launched a blistering attack against the judiciary. Accordingly, he sought to discredit the majority Supreme Court decision in *Awolowo v. Shagari* by impugning the appointment of Justice Atanda Fatayi-Williams, who had been elevated to the office of Chief Justice of Nigeria during the course of the electoral dispute. As such, Awolowo announced to the UPN congress that "Shagari was consulted all the way in the appointment of the new [Chief Justice of Nigeria], and it was he who expressed preference for the present incumbent from among a number of candidates" (Awolowo 1981,

73. Babarinsa (2003, 54).

106). Following from this, he strongly implied that Fatayi-Williams CJN was a keen participant in a political conspiracy to scuttle the election petition at the Supreme Court (Awolowo 1981, 106). Chief Awolowo subsequently amplified these incendiary allegations in an inflammatory and widely published open letter addressed to General Olusegun Obasanjo, the former military Head of State:

> Is it proper, legally and morally, that a respondent to an election petition [i.e., Shehu Shagari], who has no constitutional right whatsoever to do so, should take part in the process of appointing the Chief Justice of Nigeria, let alone express preference for one from among [several] candidates when, at the time of the appointment, it was already known that the Chief Justice would preside over an appeal in which Alhaji Shagari might be appellant or respondent? It stands to reason that it was because you were inflexibly determined that, come what might, Alhaji Shagari was going to be installed President on October 1 [1979], that you allowed him to commit the unconstitutional abomination of choosing a new Chief Justice of Nigeria at a time when the validity of his election was *sub judice*. What did Nigeria gain by rushing the appointment? And what would it have lost by leaving the appointment to be made by the new President after October 1 [1979]?[74]

Against this backdrop, Awolowo clearly wished his audience to draw damaging inferences that the military regime hurriedly appointed Shagari's nominee as Chief Justice in order to sway the judicial proceedings in the Supreme Court and ensure an adverse verdict against the election petition. Notwithstanding their unfounded and unsubstantiated character, these allegations were well chosen insofar as they strategically displaced causes for his electoral defeat onto external factors such as a purportedly partisan electoral system and biased judicial process.

In the partisan narratives that emerged in the wake of the Supreme Court's dismissal of Chief Awolowo's petition (Babatope 1997, 115–17), the idea rapidly ossified that "he was robbed of victory"[75] by the conspiratorial efforts of the outgoing military regime, the Federal Electoral Commission, and the judiciary (Ogunsanwo 2009, 221).[76] An unfounded rumour was also widely disseminated in the press alleging that the "Chief Justice stated that the judgment of the majority of the

74. Reproduced in Fatayi-Williams (1983, 167–68).

75. See Ogunsanwo (2009, 221), providing a hagiographic and unbalanced account of Awolowo's role in the electoral crisis.

76. See also Babatope (1981, 111–15).

Supreme Court in the case should not be cited as a precedent in future cases" (Ajayi and Akinseye-George 2002, 259),[77] the innuendo being that he tacitly acknowleged that injustice was done to the petitioner. For several months thereafter, Chief Justice Fatayi-Williams "was singled out for persistent attacks, laced with disgusting innuendoes by the columnists of newspapers controlled by or sympathetic to [Awolowo's] Unity Party of Nigeria" (Fatayi-Williams 1983, 165).

As a result, the judiciary was caught up in a recrudescence of controversy and political intrigue early in the life of the Second Republic. Intemperate denunciations of the judiciary continued unabated, and as late as December 1980 Chief Awolowo was publicly clamouring for the resignation of the Chief Justice (Awolowo 1981, 195). At the 1980 annual congress of the UPN, he reiterated the theme of his presidential address the previous year and denounced Fatayi-Williams CJN as a partisan judge whose "continuance on the bench can only be a severe drawback on the effectiveness of the Supreme Court" (Awolowo 1981, 195). Evocatively entitled "On Man's Injustice to Man," Awolowo's address averred, *inter alia*, that there was "deep and widespread distrust" (Awolowo 1981, 181–82) for the judiciary, notwithstanding the new democratic dispensation. As he famously put it, "[F]ew persons," given the purported partisanship of the Chief Justice, "will be able to muster the required confidence and equanimity to come before his throne of justice" (Awolowo 1981, 199). Against this backdrop, the controversy surrounding the appointment of Fatayi-Williams as Chief Justice of Nigeria merits further consideration.

A. The Disingenuous Petitioner and the Beleaguered Chief Justice

The tenure of office of the erstwhile Chief Justice of Nigeria, Sir Darnley Alexander, an expatriate jurist, elapsed on 24 August 1979 while the dispute over the presidential election result raged (Fatayi-Williams 1983, 149). In this connection, the federal military government appointed Atanda Fatayi-Williams, a seasoned Nigerian judge, as Sir Alexander's successor on 21 August 1979 (Fatayi-Williams 1983, 149–50). It is noteworthy that this judicial appointment was warmly received at the time, including by some unsuccessful presidential candidates such as Dr. Nnamdi Azikiwe of the Nigerian Peoples Party (NPP), and Chief Awolowo, whose petition was then pending before the Presidential Election Tribunal (Fatayi-Williams 1983,

77. See also Abegunrin (2015, 160).

151–53). Awolowo had, in a cordial congratulatory letter to Justice Fatayi-Williams, characterised his "preferment" to the highest judicial office as "historic and richly deserved" (Fatayi-Williams 1983, 153). It is telling to note that he resiled from this initially favourable assessment of the new Chief Justice shortly after the Supreme Court dismissed his election petition.

The timing of this judicial appointment was perhaps injudicious and open to criticism, and Chief Awolowo was not incorrect to suggest, in his aforementioned open letter of December 1979, that the federal military government ought to have conceded the appointment to the succeeding democratic administration. Even so, it does not follow that the appointment was made with a view to subverting the integrity of the electoral adjudication system or otherwise compromising the independence of the Supreme Court. There are good grounds for arguing that the circumstances surrounding the appointment were rather more consistent with the officious and interventionist role the outgoing military regime had come to play within the volatile context of the transition. It is noteworthy that this interventionist role was reinforced by the unprincipled conduct of members of the civilian elite who often invited the military regime to intervene in their favour during internecine political conflicts at critical stages of the transition programme (Ofonagoro 1979, 293).[78]

Chief Awolowo's allegations were untenable for several reasons. First, there was nothing untoward about the preferment of Atanda Fatayi-Williams, considering his extensive judicial experience and status as a senior member of the Supreme Court at the time. He had been due for appointment as Chief Justice four years earlier,[79] but was temporarily superseded after the coup d'état of 29 July 1975 when

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78. See "Text of the Joint Press Release" issued by Dr Nnamdi Azikiwe, Chief Obafemi Awolowo, and Alhaji Waziri Ibrahim, reproduced in Ofonagoro (1979, 291-94). For instance, despite affirming the need to resolve the post-election crisis within the judicial process, the three defeated presidential candidates saw no contradiction in simultaneously urging the Federal Military Government to interpose by overruling FEDECO and annuling Shagari's return. See also Ofonagoro (1979, 174–77, 226–28).

79. See Obasanjo (1990, 99, 188–89). As far back as 1975, the Federal Military Government, headed by Gen. Murtala Muhammed, anticipated the eventual appointment of Fatayi-Williams as a Chief Justice of Nigeria. He was temporarily superseded when the regime elevated Sir Darnley Alexander, the then Chief Justice of Cross River State, to the office instead in accordance with a controversial policy that aimed at "a break from the past without permanently depriving the incumbent judges of the Supreme Court the opportunity of headship of the court." See Obasanjo (1990, 99). A contemporary of Fatayi-Williams in the Supreme Court, Sir Egbert Udo Udoma, was not considered a likely successor of Sir Alexander as Chief Justice of Nigeria, sadly, on grounds of ill health. See Obasanjo (1990, 99). Ebenezer Babatope, a prominent acolyte of Chief Awolowo and antagonist of Fatayi-Williams's appointment as Chief Justice, nonetheless observed that Sir Udoma "was unfortunately afflicted by substantial physical disability" and also acknowledged that Justice Fatayi-Williams "was the longest serving

the military regime elevated Sir Alexander to the office, over senior members of the Supreme Court, as part of a controversial mass purge of the public services (Fatayi-Williams 1983, 141–43).

Furthermore, commentators have argued that a norm of seniority was established concerning elevation to the Chief Justiceship of Nigeria by the preferment of Fatayi-Williams in 1979 (Ukhuegbe 2011, 34–35). As a result, the process of appointments to this sensitive judicial office was depoliticised in ways that enhanced the institutional autonomy of the Supreme Court and the independence of the judiciary more broadly (Ukhuegbe 2011, 34–35).[80]

Second, Chief Awolowo failed to credibly establish the weighty allegation that Shagari participated unlawfully in the process of appointing Fatayi-Williams as Chief Justice (Awolowo 1981, 197–98).[81] The initial source of this allegation was Awolowo himself, whose contention in this regard rested solely on a series of unsubstantiated assertions and circular arguments that were, in turn, amplified by his acolytes.[82] Contrary to Awolowo's claim that "the appointment of a new Chief Justice would not have been rushed" had he not filed his election petition (Awolowo 1981, 198), the provisional nature of Sir Alexander's Chief Justiceship had been stipulated at the time of his appointment in 1975, and his retirement was announced in advance of the presidential election (Obasanjo 1990, 99; Fatayi-Williams 1983, 149).

Moreover, as a senior legal practitioner himself, Awolowo was undoubtedly aware of the constitutional rights of litigants to request the recusal of judges in

member on the Supreme Court Bench and whose performance from all indications had been good and was regarded as competent and able." See also Babatope (1990, 39). By the same token, it would have been inappropriate for the regime to appoint the distinguished lawyer Chief F. R. A. Williams SAN—who also featured in Awolowo's list of candidates allegedly shortlisted for the position—straight from the professional bar to the chief justiceship.

80. Remarkably, Obasanjo's account contestably characterised Sir Udoma as "the most senior Judge of the Supreme Court." See Obasanjo (1990, 99). While this description was correct in terms of age, both Fatayi-Williams (born in 1918) and Udoma (born in 1917) were jointly appointed to the Supreme Court of Nigeria on 1 October 1969 See *Federal Republic of Nigeria Official Gazette* No. 53 Vol. 56 of 9 October 1969. However, in terms of judicial experience, Fatayi-Williams was elevated to the bench earlier, in 1960, as a High Court judge of Western Nigeria, with Udoma following a year later, in 1961, as a judge of the High Court of Lagos.

81. He inferred the existence of a political conspiracy by stating that the judicial appointment was made a day after he filed his petition. His *ipse dixit* relied on a series of unproven assertions, including the circular argument that the appointment was hastily made because of his petition. According to him, "if no petition had been filed challenging the due election of Shagari, the appointment of a new Chief Justice would not have been rushed." Awolowo (1981, 198).

82. Babatope (1990, 39).

cases involving a likelihood of judicial bias.[83] That he did not raise allegations of bias against Fatayi-Williams CJN during the Supreme Court proceedings,[84] or disclose facts suggesting a probable infringement of his rights to fair hearing, further diminishes the credibility of the allegation. Likewise, Awolowo failed to substantiate his grave assertions concerning the putative conspiracy between General Obasanjo and Shehu Shagari to suborn the Chief Justice with a view to manipulating the Supreme Court's decision. Tellingly, he was himself uncertain about the moment when the conspiratorial discussions between both men purportedly occurred.[85]

It is interesting to note that on 20 August 1979—which fell within the conjectural timeline of the conspiracy alleged by Awolowo—General Obasanjo hosted a pre-scheduled meeting with all the presidential candidates to express appreciation for their participation in the recently concluded election and to solicit continued support for the ongoing transition. Considering that Chief Awolowo also attended this meeting (Obasanjo 1990, 201; Bolaji 1980, 139), it could hardly have served as a conducive occasion for hatching a complex conspiracy to appoint a pliable Chief Justice and manipulate future proceedings in the Supreme Court. Moreover, the prospect of the Supreme Court adjudicating on the election petition was at best a hypothetical issue on 20 August 1979, considering that Awolowo filed his election petition at the Special Tribunal on this day.[86] During the conjectural timeline of the

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83. For a contemporaneous discussion of the constitutional right to fair hearing see Okpaluba (1982, 87–103).

84. Justice Kayode Eso, who sat on the Supreme Court panel and upheld the petition in his dissenting judgement, would later speak out, albeit in a different context in 1987, in defence of the Court's reputation as an impartial arbiter: "I am not aware of a single instance in the whole history of the Supreme Court, when the Court has been requested to give an assurance of impartiality. . . . To charge a Court with bias is a very serious thing indeed. To ask for [the] Court's assurance is more serious still!" See *The Architects Registration Council of Nigeria (No. 2), In Re: Majoroh v. Professor M.A. Fassassi* (1987) SC.193/1986-J1, quoted in Sagay (1988, 167).

85. Chief Awolowo's alleged timeframe for the conspiratorial discussions between General Obasanjo and Shehu Shagari was conjectural. According to him, "[A]t the time Alhaji Shagari expressed his preference [for Fatayi-Williams] to you [i.e., General Obasanjo] *on 19/8/79 or 20/8/79*, both you and Alhaji Shagari knew very well that I had filed an election petition challenging the validity of Alhaji Shagari's election, and that the *matter might, more likely than not*, eventually end up in the Supreme Court." See Fatayi-Williams (1983, 167; emphasis added). Remarkably, the speculative and tactfully cautious formulation of this allegation soon gave way to absolute certitude in Awolowo's subsequent accounts. By December 1980, Chief Awolowo was publicly asserting that the Obasanjo regime "was so *supremely confident the Awolowo appeal would be dismissed* that it transferred power completely to Alhaji Shagari before judgment on the appeal was delivered" (emphasis added). See Awolowo (1981, 198).

86. See Awolowo (1981, 197).

alleged conspiracy, there were neither judicial proceedings nor decisions on the petition which could serve as a material basis for an anticipated appeal to the Supreme Court. On Chief Awolowo's incredible version of events, the putative conspirators would have had to accurately predict that the Special Tribunal would dismiss the petition; presume that an appeal would be filed by the petitioner; and assume the adjudicatory acquiescence, if not active collaboration, of the Chief Justice and several puisne justices of the Supreme Court. Given this convoluted patchwork of rickety assumptions, there are cogent grounds for dismissing the allegations.

B. Countering Disinformation in the Court of Public Opinion

Even more pertinently, Chief Awolowo's version of events did not go unchallenged by the principal actors involved. In his autobiographical account, Shagari maintained that his interactions with General Obasanjo occurred as part of a handover programme organised by the outgoing military regime after the Supreme Court "had quashed the legal challenge" to his democratic mandate (Shagari 2001, 232). Wondering "[w]hy Awolowo chose to pursue a case he knew to be politically and legally hopeless," Shagari opined that he was motivated by "the politics of spite" as well as a vengeful desire to discredit an opponent's electoral victory (Shagari 2001, 230). According to Shagari, Awolowo "had become very bitter, having repeatedly failed in his lifelong dream to govern Nigeria" and therefore "needed to portray himself as a victim of an unfair system" while simultaneously deflecting personal responsibility for his own dismal electoral performance (Shagari 2001, 230).

Fatayi-Williams, reflecting on the controversy surrounding his appointment some years later, lamented the "monstrous and unfounded allegation" made by Chief Awolowo "just because he was not elected the President" of Nigeria (Fatayi-Williams 1983, 170). Narrating the circumstances of his initial supersession and eventual appointment, he refuted the charge that he accepted preferment to the Chief Justiceship as a reward for scuttling an otherwise meritorious petition. In addition, Fatayi-Williams deprecated Chief Awolowo for "giv[ing] his supporters the untenable impression that the other five justices were mere rubber-stamps and merely signed the judgment" pre-determined by the Chief Justice (Fatayi-Williams 1983, 170). Yet, the eclectic lines of reasoning in the three separate judgements delivered by the Supreme Court, sitting as a court of seven judges, belied this impression created by Chief Awolowo's allegation.

In addition, Fatayi-Williams posited that Awolowo's insult to the integrity of the other majority judges who adjudicated on his petition in the Supreme Court

"was far greater than anything he had said or written about me" (Fatayi-Williams 1983, 170). Following from this, he reasoned that aspirants to elective office possessed normative obligations to promote respect for democratic institutions (Fatayi-Williams 1983, 170). On this premise, Fatayi-Williams concluded that Chief Awolowo, consumed by his presidential ambition, failed to carefully consider the ways in which his reckless and incendiary utterances served to erode public confidence in the judicial system and democratic process (Fatayi-Williams 1983, 170–71).

The most vigorous and detailed responses to Chief Awolowo's claims were advanced by General Olusegun Obasanjo. Recounting his experiences as the head of the lame-duck Federal Military Government in 1979, he argued compellingly that Awolowo's performance in the election was largely explicable on the basis of other factors such as his inability to build a sustainable political coalition beyond his ethno-cultural base. "The spirit or intent of the [1979] constitution," Obasanjo observed, "was to prevent a tribal baron from hijacking the leadership of the country through the votes of his tribesmen alone, otherwise a simple majority would have been enough to determine the presidency" (Obasanjo 1990, 191).[87]

Alluding to Awolowo's claim that the military regime "transferred power completely to Alhaji Shagari before judgment on the appeal was delivered" (Awolowo 1981, 198), Obasanjo maintained that, in fact, the handover to the 'President-Elect' occurred "after the Supreme Court decision" on the election petition (Obasanjo 1990, 16). From his vantage position at the helm of affairs at the material time, Obasanjo also corroborated Fatayi-Williams's account by discussing the historical background and circumstances informing the latter's temporary supersession and eventual preferment to the Chief Justiceship (Obasanjo 1990, 97–99). He also reasoned that irrespective of "the argument of two thirds of nineteen," it was evident that "the election results were clearly not in favour of Awolowo," and that "it was inconceivable and I do not know by what magic the FEDECO would have given the verdict in favour of Awolowo" (Obasanjo 1990, 191). On these premises, he further contended that while they could have regarded electoral defeat as an ordinary outcome of the democratic process, Awolowo's political supporters made unprincipled choices, instead, to uphold propagandistic narratives that cast him as the victim of political manoeuvring (Obasanjo 1990, 180–96).

87. For a similar argument characterising Awolowo's Unity Party of Nigeria (UPN) as "essentially a mono-ethnic political machine" with a "support base largely [confined] to an ethnic enclave," see Othman (1984b, 16).

C. The Afterlife of an Electoral Crisis

Despite the democratising efforts of the courts, the fallout from the *Awolowo* petition and related incendiary attacks on democratic institutions in the public sphere blighted the legitimacy of the Shagari administration from its inception. These developments unduly sullied key democratic institutions with "tarnishing mud," in Obasanjo's words,[88] and - but for judicial intervention - nearly upended the transition from military rule in 1979.

The ensuing climate of political recrimination, cynicism, and mistrust of the nascent electoral process and constitutional institutions had deleterious implications for the consolidation of democratic governance during the ill-fated Second Republic.[89] The aftermath of the next electoral cycle in 1983 proved even more turbulent and contentious than the post-election controversy of 1979. In the event, Shagari was re-elected for a second term in the widely disputed 1983 presidential election, although nuanced commentaries also suggest that the fragmented and disorganised character of the opposition parties contributed to their failure to win the presidency (Falola and Heaton 2008, 207).[90]

Embittered by yet another cycle of electoral defeat, Chief Awolowo declined to contest the results within the judicial process, declaring, instead, that this would be a futile exercise because "the judiciary has been terribly corrupted in this country."[91] This time, it was Waziri Ibrahim, the fourth runner-up candidate in the 1983 presidential election, who reprised the role of the aggrieved petitioner. Despite having obtained the 25 percent threshold in only one out of nineteeen states, he insistently litigated a meritless case up to the Supreme Court. Chief Justice Fatayi-Williams, stung by his bitter experience during the 1979 post-election crisis, declined to adjudicate on Waziri's case. In the event, a panel of seven puisne Supreme Court justices unanimously dismissed the meritless petition,[92] and this decision, in turn, provoked a renewed spell of intemperate attacks against the courts.[93] In the wake of acrimonious electioneering, cynicism and distrust of democratic institutions flourished, and several post-election disputes culminated in violent protests in some

88. Obasanjo (1990, 194).

89. See Diamond (1982, 652–63).

90. See also Othman (1984b).

91. Anonymous, "Awolowo Interviewed," *West Africa*, November 21, 1983, 2674.

92. *Alhaji Waziri Ibrahim v. Alhaji Shehu Shagari & Ors.* [1983] 2 SCNLR 176. See also Nwabueze (1985, 411–12).

93. See also Obe (1983, 2100); Awogu (1984, 128, 133–34).

parts of the country (Nwabueze 1985, 430–31, 463–66).[94] On 31 December 1983, the military staged a coup, toppled Shagari's administration, and overthrew the Second Republic.[95]

V. CONCLUSION

In resolving the legal dispute arising from the contested results of the 1979 presidential election, the courts largely tailored their adjudicatory efforts towards securing two key democratic outcomes: enabling the successful completion of the transition programme and facilitating the consolidation of a democratic constitutional order. The first normative objective was achieved, although the second was considerably undermined by the deleterious effects of anti-democratic litigatory strategies in the electoral arena and incendiary attacks in the public sphere on fledgling democratic institutions.

From the vantage point of historical hindsight, there are cogent grounds for affirming the justifiability of the judicial decisions that dismissed the 1979 presidential election petition. While they could have more plausibly anchored some aspects of their judgements on the substantial compliance doctrine, the vast majority of the judges correctly discerned the doubtful merits of the petition as well as the undemocratic objectives that underpinned it. In addition, the courts strategically sought to affirm the decision of FEDECO—qua transitional electoral management body—concerning the territorial threshold question in order to facilitate the termination of military rule and the concomitant emergence of a democratic government. Amidst the political maelstrom, judicial invalidation of the presidential election results could also have endangered the 1979 transition by providing a basis for the perpetuation of military rule.[96]

The subsequent failure to achieve democratic consolidation and the eventual collapse of the Second Republic in 1983 marked the culmination of several complex political, historical, and socio-economic causal factors.[97] However, the political fallout from the 1979 election petition and the resultant intemperate attacks on the courts and fledgling democratic institutions also featured as significant contributory

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94. See also Osaghae (1998, 148–49).

95. Anonymous, "The Election and the Coup," *West Africa*, January 30, 1984, 195.

96. See Iliffe (2013, 94), noting that Obasanjo faced considerable pressure to perpetuate himself in office from "eminent figures ranging from Presidents Kaunda of Zambia, Houphouet-Boigny of Côte d'Ivoire, and Eyadema of Togo, to senior officers, chiefs, and civil servants."

97. See, e.g., Osaghae (1998, chaps. 4–5); Ekwe-Ekwe (1985, 613–17); Othman (1984a).

factors to the failure of Nigeria's nascent democracy. The deleterious strategies of disingenuous petitioners—who unduly refuse to accept adverse electoral outcomes in good faith while seeking to leverage systems of electoral adjudication for the attainment of partisan ends—can facilitate the onset of democratic decline.

A. Possible Normative Responses to Political Backlash and Anti-Democratic Litigatory Strategies

Vexatious litigation by disingenuous petitioners has persisted well into the twenty-first century and continues to pose normative challenges to systems of electoral adjudication and democratic governance across the world.[98] In a diverse range of jurisdictions (Goldfeder 2021),[99] disingenuous petitioners have sought to instrumentalise electoral adjudicatory processes for political ends while paradoxically undermining the normative principles that sustain electoral processes, judicial independence, and the rule of law.[100] To appreciate more contemporary manifestations of this phenomenon, we need look no further than the recent fallout from the 2020 presidential election in the United States.

Apoplectic in the wake of electoral defeat, President Donald Trump filed a barrage of lawsuits in a bid to overturn the adverse outcome of the presidential election.[101] Commentators have pointed out the many ways in which Trump's reluctance to concede defeat defied norms of peaceful transition that have historically underpinned the democratic process in the United States (Goldfeder 2021, 360–368). The vexatious nature of his litigatory strategy was vividly underscored when a Pennsylvania district judge memorably remarked that Trump's legal "claim, like Frankenstein's Monster, [had] been haphazardly stitched together from two distinct theories in an attempt to avoid controlling precedent."[102]

Notwithstanding several judicial decisions invalidating his vexatious litigatory strategies, Trump continued to disseminate unsubstantiated and inflammatory allegations of electoral fraud (Luke 2021, 1–8). These frontal assaults on the democratic process culminated in the dramatic events of 6 January 2021 when hordes of Trump supporters invaded Capitol Hill and staged an unprecedented, albeit

98. See, e.g., Goldfeder (2021).

99. See also Okubasu (2018, 167–70).

100. See Dube (2022, 221–22).

101. See Goldfeder (2021, 360–68).

102. See *Donald J. Trump for President v. Boockvar*, 502 F. Supp. 3d 899, 910 (M.D. Pa. 2020), 11.

unsuccessful, insurrection aimed at disrupting procedures for certifying Joe Biden as president-elect (Smith and Santiago 2021, 1–10; Simon 2021, 7–16). Although the Capitol Hill insurrection has already inspired a burgeoning and animated scholarly discourse,[103] its long-term implications for democracy within the United States and across the world remain to be seen (Parmar 2021).

B. A Multidimensional Response

What are some possible normative responses to the corrosive activities of disingenuous petitions in the electoral sphere? There can hardly be totalising answers to this complex phenomenon, given its varied manifestations and iterations across different jurisdictions.[104] Yet, there are good grounds for arguing that sustainable solutions must involve coordinated and multi-pronged strategies that allocate specific obligations to democratic institutions, pro-democracy groups, and other stakeholders.

Accordingly, legislatures may, in some contexts, need to enact stringent legal frameworks to help filter out vexatious and frivolous suits in the electoral sphere. Appropriate legislative responses may include enacting more rigorous procedural requirements such as standing rules and pre-action protocols to preclude cases that fail to disclose meaningful causes of action from proceeding to the electoral adjudication stage. In other jurisdictions, liberalising access to electoral adjudicative systems may be more apposite considering the polycentric implications of certain electoral disputes for the broader political process. In such instances, courts may therefore need to play a more conspicuous regulatory role by evolving vigilant and even-handed adjudicatory approaches and parsing the complex incentive structures underpinning decisions to file election petitions.

Courts may also adopt consensus norms to guide the decision-making process in cases involving vexatious and frivolous petitions.[105] Unanimous decisions to dismiss meritless lawsuits may also potentially signal the wrongfulness of anti-democratic litigatory strategies and unify electoral courts in the face of intemperate criticism and political backlash.[106] Within the limits of judicial authority, courts may also

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103. See, e.g., Iglesias (2021, 10–16); Rowley (2021, 145–64).

104. See Goldfeder (2021); Okubasu (2018, 167–70).

105. See, e.g., normative concerns expressed by Justice Breyer about the tendency of split judicial decisions to undermine public confidence in systems of electoral adjudication: *Bush v. Gore* 531 U.S. 98 (2000), 157–58. See also Zink et al. (2009, 911).

106. Cf. Salamone (2014, 322), suggesting that dissenting opinions may have salutary effects insofar as

seek to mitigate the conflictual and adversarial character of electoral adjudication through innovative readaptations of court procedures. For instance, by inviting the participation of non-partisan amici curiae[107] through oral arguments and written briefs, courts may bring a wider range of democratic stakeholders within the orbit of the adjudicatory process in ways that may help diffuse tensions and enhance the quality of judicial decisions.[108] In contrast to disingenuous petitioners who seek to instrumentalise electoral adjudication for less salutary purposes, courts may also aim to repurpose the judicial process as a principled platform for signalling constitutional norms and disseminating democratic values.[109]

C. Networks of Solidarity

The consequences of anti-democratic litigatory strategies in the electoral sphere often reverberate beyond the courtoom.[110] Aggrieved by adverse verdicts against their frivolous lawsuits, vexatious litigants and disingenuous petitioners may seek to mobilise public opinion and political backlash against courts and other democratic institutions, with deleterious consequences for the electoral process (Nwabueze 1985, 465–66). Sustainable ameliorative strategies in such cases may thus involve mobilising networks of solidarity in defence of beleagured courts[111] and other democratic institutions.

The normative obligations of stakeholders within such solidarity networks may entail, for instance, undertaking solidarity campaigns and fact-checking schemes to counteract unfounded allegations of judicial bias, vote rigging, and electoral fraud. Given that courts, by inherent institutional design, are often ill-equipped to fend off intemperate attacks in the public sphere (Ellet 2013, 198-200), the need for stakeholders within solidarity networks to generate counteracting narratives in defence of democratic institutions can hardly be overemphasised. In extreme cases, courts may have to leverage judicial contempt powers, although this approach may

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they indicate elements of procedural justice in the judicial process. However, further empirical research is needed in this field to test the generalizability of these findings beyond the US context.

107. On the use of this procedure in advanced democracies see Garcia (2008, 315–58); cf. Anderson (2015, 361).

108. For comparable arguments, albeit in a non-electoral context, see Viljoen and Abebe (2014).

109. See Ezeh (2023).

110. See Nwabueze (1985, 465–66).

111. See Ellet (2013, 206), suggesting that the "formation of strategic off-bench alliances" may enhance the independence of beleaguered courts.

likely pose further difficulties if anti-democratic litigants and their allies successfully frame it as further evidence of putative judicial bias. In sum, the ability of courts to counteract political backlash (Ellet 2013, 198–200) and the corrosive effects of anti-democratic litigation will largely depend on the support and assistance they receive from other democratic stakeholders (Ghias 2010) within the broader political process.

Democratic stakeholders within civil society who enjoy greater proximity to the judicial process—such as members of the professional bar (Ellet 2013, 17–174; Ghias 2010; Masengu 2017, 12–15) and legal academy—may also weigh in to repel censorious and unwarranted attacks on democratic institutions as well as judicial and electoral officials.[112] In an age of widespread disinformation and conspiracy theories,[113] actors within the legal profession and broader civil society may also contribute towards safeguarding electoral processes by providing principled analyses of judicial decisions, as well as non-partisan public commentaries on the conduct of electoral management bodies and other democratic institutions.[114] The legal profession may further supplement the aforementioned normative strategies by instituting disciplinary proceedings, in appropriate cases, against legal practitioners who file vexatious suits and execute anti-democractic litigatory strategies aimed at destabilising electoral processes.

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112. See Gathii and Akinkugbe (2022, 213–14): highlighting the ways in which coordinated responses by local and international stakeholders effectively counteracted political backlash against the Malawian judiciary after the Supreme Court of Appeal invalidated the controversial 2019 presidential election.

113. See Walumbe (2019, 11, 40–41): discussing attacks on the Supreme Court of Kenya in the wake of its decision on the 2017 presidential election.

114. On criticisms of the deleterious role of certain sections of the Nigerian intelligentsia in propping up Chief Awolowo's litigatory and political strategies during the 1979 presidential election crisis, see Obasanjo (1990, 194–95); Shagari (2001, 231).

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