

**THE CHALLENGES OF ADJUDICATING PRESIDENTIAL ELECTION
PETITIONS IN NIGERIA: ESTABLISHMENT OF AN AFRICAN
SUPRANATIONAL COURT AS A POSSIBLE SOLUTION***

Abstract

It has been universally acknowledged that the best form of democracy is to allow people choose their leaders through free, fair and credible electoral processes. Unfortunately, elections in most of the African countries, particularly, Nigeria have been characterized by sharp practices and other irregularities. Save for Tanzania, the constitutions of other countries in Africa make provisions for the ways of seeking redress in court for candidates who are dissatisfied with the outcomes of presidential elections or other elections, instead of resort to violence and self help, as it is believed that the judiciary is the last hope of the common man. The study was necessitated by the need to have a credible judicial body for adjudication of presidential election petitions Nigeria. To contend with these problems, the specific objectives were set out as follows : (1) to examine the legal framework under which presidential elections are held in Nigeria (2) to examine how the Nigerian courts have fared in handling presidential election petitions (3) to consider the viability of establishing an African elections supranational court as a possible solution and how a viable supranational adjudicating body for presidential election may be established for the African region/sub region. We made recommendations thereto in line with these objectives and our findings.

1.1. Introduction

The major problem we face in Nigeria is not that elections are not held but those elections are marred and characterized by irregularities ranging from over voting, ballot box snatching and other electoral malpractices. Indeed, Africa has become well known for failed elections because the outcome of the elections, especially Presidential Elections are predetermined, hence coup and other forms of criminality have become a common way of showing discomfort and as the last resort for removal of the government that came into power through a flawed election.

Election disputes are highly sensitive and controversial so much that the process of disposing them seems as if the judiciary itself is on trial. Unfortunately, the judiciary has not lived up to the expectations, hence the need for a judiciary with impeccable integrity. The Nigerian judiciary has come under severe attack for their handling /mishandling of election petitions.

History is solidly in favour of any incumbent as it concerns electoral disputes and judgments of the courts. The past judgments delivered by the Presidential Election Petitions Tribunals in Nigeria lends credence to the fact that the courts had never had the guts to unseat a sitting

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president even in elections with less credulity and wanton violence, irregularities were held as insufficient to invalidate the outcome of the electoral process.

2.1. Concept of Election Petition

Election is the bedrock of the democracy. It is the means by which people choose their leaders¹. Similarly, it can mean a process through which citizens in the society choose their representatives and political leaders.² The National Election Watch defines Election Petition as a procedure for inquiring into the validity of the election results of Parliamentary or local government elections.³

In the contemporary society, election has become most appropriate and recognized means of changing government in a political system. The process or procedure for contesting election result under the *Electoral Act 2010* is by way of an election petition. This arises where an aspirant to the electoral office who is dissatisfied with the outcome and/or the declared result approaches the court for redress.

Election petitions basically complain about election or conducts of elections and technically are said to be *sui generis*-that is in a class by itself; a proceedings that is of its own kind; possessing an individualistic character unique or like only to itself.⁴

Electoral Tribunal is a type of court with the jurisdiction to entertain issues arising from the conduct of elections. The *Electoral Act* underscores the need for election tribunal and the procedure for challenging the return of a candidate as duly elected after election. It states thus:

No election and return at an election under this Act shall be questioned in any manner other than by a petition complaining of an undue election or undue return (in this Act referred to as an “election petition”) presented to the competent tribunal or court in accordance with the provisions of the Constitution of this Act and which the person elected or returned is joined as a party⁵.

Electoral tribunal is a mechanism fashioned to address the seemingly perceived deformities of the Nigeria’s chequered electoral process⁶. It is a strategy in the quest for strengthening the country’s democracy. How to achieve this important objective has continued to attract comments and criticisms from political observers and analysts in Nigeria⁷.

¹<http://www.fcnl.org/updates/ele...> accessed on 4/2/20

² *ibid*

³<https://adrindia.org/files> accessed 27/4/21

⁴ K.P. Ikorroha, *Modern Nigerian Election Petitions and Appeals Law* (Enugu: Chudanog Publishers Limited, 2017) p. 34

⁵ *Section 133 Electoral Act 2010* as amended.

⁶ C.I. Nwagboso, “Elections and Electoral Tribunal in Nigeria”, *African Research Review*, vol.5 (2), NO. 19, April, 2011, pp.42-55

⁷ *ibid*

2.1.1. Nature of Election Petition

Election petitions are not like civil or criminal cases. Rather, they are regarded as unique and as such accorded special treatment. In legal parlance, election petitions are said to be *sui generis* which implies special, unique or peculiar. In *Orubu vs. NEC*⁸, it was held thus:

An election petition is not the same as the ordinary civil proceedings. It is a special proceedings because of the nature of elections which, by reason of their importance to the well being of a democratic society are regarded with aura that places them above the normal day to day transactions between individuals which gives rise to ordinary or general claim in court. As a matter of deliberate policy to enhance urgency, election petitions are expected to be devoid of the procedural clogs that cause delay in the disposition of the substantive dispute⁹.

The above position of the law was also expressed by Ogundale JCA in *Abdulahi v. Elayo*¹⁰ when he said thus:

It must be born in mind that an election petition is not always to be treated as the ordinary civil suits in court. An election petition creates special jurisdiction and the ordinary rules of procedure in civil cases do not always serve to effectuate its purpose.

Fundamentally, justice delivery in election matters before the Election Tribunal or the Appellant Courts, as the case may be, are done by strict adherence to the Practice Direction even where the provisions appear to be too harsh or drastic.¹¹ It is such that in certain circumstances, the slightest default in complying with a procedural step which otherwise either could be cured or waived in ordinary civil proceedings could result in fatal consequences to the petition.¹²

2.2. Meaning of Supra-nationalism and Supranational Adjudication

Supra-nationalism can well be appreciated when compared with classical international law. International law is comprised of independent status which do not believe that they are inferior to any other states¹³. It is trite that only states are acknowledged as subjects of international law¹⁴.

Supra-national bodies deal directly with persons and non state entities within a state and are authorized to pass resolutions which directly affect state parties, individuals, business entities

⁸ (1988) 5 NWLR (pt. 94) @ 323

⁹ Ibid

¹⁰ (1993) NWLR 332

¹¹ *Ogunmodede Olayemi v Adams Fatai & Ors* (2008) LPELR -4756

¹² P. Ikorroha, *Modern Nigerian Election Petitions and Appeals Law* (Enugu: Chudanog Publishers Limited, 2017) p. 34

¹³ Shaw , M, *International Law* (Cambridge University Press Cambridge , 1997) pg 194

¹⁴ *ibid*

etc¹⁵. This is different from international law bodies which are just mere forum for inter state corporation and can only act on the consent of member states¹⁶.

Peter Hay pointed out four major ingredients of supra-nationalism as follows:

1. Institutional autonomy of an organization from member states
2. Ability of an organization to build its member state by a majority or weighted majority votes
3. Direct binding effect of law coming from the organization on natural and legal persons.
4. Attribution of power which differ from powers on other organization
 - (a) Enacting contradicting legislation¹⁷

According to Heifer and Slaughter, supranational adjudication means:

Adjudication by a court that was formed by many states or the entire international Community. This court has powers to adjudicate on causes and matters involving private parties – be it matter before private party and a foreign government, a private party and her own government, private parties themselves or, on the criminal context, a private party and a prosecutor’s office¹⁸

There is no doubt that under the supranational arrangements, courts or tribunals created by states themselves are allowed to function independently without the direct influence of states. Thus court will be more accessible to all parties. This arrangement is opposed to international law adjudication is limited to state to state. Under the supranational adjudication, regular policies cannot determine how the law should be interpreted and applied¹⁹

2.3. Legal And Institutional Framework For Presidential Election Petitions Adjudication In Nigeria

The Constitution of the Federal Republic of Nigeria (1999) as amended, Electoral Act 2010 as amended, INEC Regulations and Guidelines for the Conduct of Elections and Election Tribunal and Court Practice Direction, 2011.

While it is the duty of the Independent National Election Commission to conduct elections in Nigeria²⁰, the Election Petitions Tribunal adjudicates over dispute arising from the conduct of those elections²¹. Both the *Constitution* and *Electoral Act* are pivotal to the adjudication of election petitions in Nigeria, as it is trite that election petitions tribunals shall be constituted

¹⁵ *ibid*

¹⁶P. , Hay, *Federalism and Supranational organizations* (Chicago: University of Illinois Press , 1966).pg 67

¹⁷*Ibid*

¹⁸*Ibid*

¹⁹J.K. Alter, “Agents or Trustees, International Courts in Their Political Context ‘, *European Journal of International Relation*”, volume 14 N0. 1 ,2008,pp33-63

²⁰ Section 153 the 1999 Constitution of the Federal Republic of Nigeria (1999) as amended. And section 1 of the Electoral Act, 2010 as amended.

²¹ Section 285 of the 1999 Constitution of the Federal Republic of Nigeria (1999) as amended.

not later than 14 days before an election and when constituted, open their registries for business 14 days before the election²² .

2.3.1. Courts with Jurisdiction in Presidential Election Petitions in Nigeria

2.3.1.1 The Court of Appeal

The Court of Appeal has the original jurisdiction to hear dispute arising from the conduct of Presidential Elections in Nigeria.²³The Constitution provides that the Court of Appeal shall to the exclusion of any other court of law in Nigeria have the original jurisdiction to hear and determine disputes on²⁴ :

- a. Whether a was validly elected to the offices of President or Vice President²⁵
- b. Whether the tenure of the President or Vice President has elapsed.²⁶
- c. Whether the office of the President or Vice President is vacant²⁷

2.3.1.2 The Supreme Court

The Supreme Court has the appellant jurisdiction to hear appeals from the Court of Appeal with regard to dispute arising from the conduct of the Presidential Elections in Nigeria.²⁸ The law provides that the Supreme Court shall have the exclusive jurisdiction to hear appeals from the Court of Appeal with regard to the Appeal Court decisions on:

- a. Whether a person was validly elected to the offices of President or Vice President²⁹
- b. Whether the tenure of the President or Vice President has elapsed.³⁰
- c. Whether the office of the President or Vice President is vacant³¹

2.3.1.3 Composition of the Presidential Election Petition Panel

The Court of Appeal shall be composed of at least 3 Justices of the Court of Appeal in hearing and determination petitions arising from the conduct of Presidential Elections in Nigeria.³² Similarly, the Supreme Court shall be composed of 5 Justices of the Supreme Court in hearing and determination of appeal arising from the decision of the Court of Appeal with respect to the arising from the conduct of Presidential Elections in Nigeria.³³

3.1 Overview of the Presidential Election Petitions in Nigeria

Like stated earlier, this work deals with the challenges of adjudicating presidential election petitions in Nigeria. In order to effectively discuss these challenges as would be seen in below,

²² Section 133(3) of the Electoral Act 2010

²³Section 239 of Constitution of Federal Republic of Nigeria 1999 (as amended)

²⁴ Section 239 Constitution of Federal Republic of Nigeria 1999 (as amended)

²⁵ Section 239 (a)Constitution of Federal Republic of Nigeria 1999 (as amended)

²⁶ Section 239(b)Constitution of Federal Republic of Nigeria 1999 (as amended)

²⁷ Section 239(c)Constitution of Federal Republic of Nigeria 1999 (as amended)

²⁸ Section 233 of Constitution of Federal Republic of Nigeria 1999 (as amended)

²⁹ Section 233 (i) of Constitution of Federal Republic of Nigeria 1999 (as amended)

³⁰ Section 233 (ii) of Constitution of Federal Republic of Nigeria 1999 (as amended)

³¹ Section 233 (iii) of Constitution of Federal Republic of Nigeria 1999 (as amended)

³²Section 239(2) of Constitution of Federal Republic of Nigeria 1999 (as amended)

³³ Section 234of Constitution of Federal Republic of Nigeria 1999 (as amended)

it is important we analyse the past Presidential Elections Petitions from 1979 when the first Presidential Election was held in Nigeria till date.

3.1.1 1979 Presidential Election and Post Election Disputes

The first Presidential Election in Nigeria was held on 11th August, 1979. The results announced by the FEDECO showed that Alhaji Shehu Shagari came first and was returned as the winner of the said election. Chief Obafemi Awolowo who came second was not satisfied with the outcome of the election and as such filed a petition on the following grounds:³⁴

1. That Alhaji Shehu Shagari was at the time of the election not duly elected by a majority of lawful votes cast at the election as he did not satisfy the provisions of section 34(a) sub *section 1(i) (ii) of the Electoral Decree 1977*.
2. That although the said Alhaji Shehu Shagari received 5,688,857 votes at the said election, he had less than $\frac{1}{4}$ of the votes cast at the election in each of at least $\frac{2}{3}$ of all the states in the federation, and
3. That the election of the said Alhaji Shehu Shagari was invalid by reason of non compliance with the provisions of the *Electoral Decree, 1977*, which include the provisions of section 34A (i) (ii) of the said decree.

The fulcrum of this petition borders on the interpretation of the *Electoral Decree 1977* which provides for the requirements for person to be declared a winner of presidential election in Nigeria as follows³⁵:

When there are two or more candidates, the winning candidate must score the highest number of votes and in addition he must score not less than $\frac{1}{4}$ of votes cast at the election in each of at least $\frac{2}{3}$ of all the states.³⁶

As at 1979, there were 19 states in Nigeria and by simple mathematical calculation, $\frac{2}{3}$ of 19 is 12.666. By the results of the election, Alhaji Shehu Shagari scored 25% in 12 states of the federation and got 19.14% in Kano State. It was based on this result that the petitioner contended that the election should be nullified on the ground that the 1st respondent did not meet the requirement of the law.

The Election Tribunal sitting in Lagos dismissed the petition and on further appeal to the Supreme Court, the apex court in interpreting section 34A (i) (ii) held that Shehu Shagari met the requirements of the *Electoral Act*.

3.4.2 The 1983 Presidential Election and Post Election Dispute

The second presidential election in Nigeria was held on 6th day of August, 1983. The result was a victory for the incumbent Shehu Shagari who won 47.5% of the vote cast³⁷: This result was

³⁴ (1979) LPELR –SC. 62/1979

³⁵Section 34(a) of the *Electoral Decree 1977*

³⁶ *Ibid*

³⁷ *ibid*

however challenged by Alhaji Waziri Ibrahim at the Tribunal.³⁸ The grounds of the petition were that the conduct of the election was marred by malpractice, corrupt practices and failure to comply substantially with the provisions of the *Electoral Act 1982*. It was also alleged that the result sheets were altered, amended and obliterated in at least 15 states. The Supreme Court dismissed the Appeal and held thus:

An amended document by itself does not speak of the motive behind the amendment. Without more, an altered or amended document is a genuine as an unamended one. Therefore, the admission of exhibits B and B1 were collated without any evidence to add a sting to the innocent amendment appearing on some of them offers no help to the case of the Appellant.³⁹

3.4.3 The 1993 Presidential Election and Post Election Dispute

The third Presidential Election in Nigeria was held on 12th June, 1993. Chief Moshood Abiola of the SDP won the election.⁴⁰ However, this election was subsequently annulled by the then military Head of State, General Ibrahim Babangida.

3.4.4 The 1999 Presidential Election and Post Election Dispute

The 4th Presidential Election in Nigeria was held on 27 April 1999 with Olusegun Obasanjo emerging as the winner of election⁴¹:

Chief Olu Falae who came second in the election filed a petition challenging the return of General Olusagun Obasanjo as the President- Elect of the Federal Republic of Nigeria.⁴² The petition was premised on the following grounds:

1. That Olusegun Obasanjo being a member of a secret society, the Ogboni was not qualified for election to the office of President.
2. That Olusegun Obasanjo has been adjudged guilty of treason/ treasonable felony by a tribunal
3. That Olusegun Obasanjo being a public officer by virtue of being a member of the National Council of States was not qualified to contest the election.
4. The 1st Respondent was disqualified from being elected to the office of the President for non compliance with the Decree NO. 6 and INEC Guidelines.

The Supreme Court resolved all the above issues against the Petitioner. On the alleged membership of a secret cult, the court held that no evidence was led to prove the allegation. On the allegation of conviction, the Respondent's Counsel had argued that the pardon granted to the 1st Respondent wiped out whatever forfeiture or disabilities suffered by the 1st Respondent. However, the issue that was canvassed strenuously by both Counsel centered on pardon and full pardon. The Appellant Counsel had urged the court to hold that what was granted to the 1st

³⁸*Alh. Waziri Ibrahim v Alh. Shehu Shagari & Anor (1983) NSCC 431*

³⁹*ibid*

⁴⁰<https://en.m.wikipedia.org>. wiki accessed 2/1/20

⁴¹<https://en.m.wikipedia.org>. wiki accessed 2/1/20

⁴² (1999) 6 NWLR (pt. 66) 435

Respondent was just pardon and not full pardon, relying on *Okongwu v State*.⁴³ The Court in resolving the issue held thus:

In my view, under the Nigeria Law, pardon and full pardon has no distinction. a pardon is an act of grace by the appropriate authority which mitigate or obliterate the punishment the law demands for the offence and restores the rights and privileges forfeited on act of the offence. The effect of pardon is to make the offender a new man, Novus Homo, to acquit him of all corporal penalties and forfeitures annexed to the offence pardoned.⁴⁴

With regard to issue as to whether the 1st Respondent was a public officer, the court held that the 1st Respondent was not a public officer under the Decree⁴⁵. The court finally resolved the alleged act of campaigning on the Election Day when it held thus:

I am of the view that though PDP or Senator Anietie Okon contravened S.14 of the Decree that cannot be visited on the 1st Respondent. There was no evidence whatsoever that he authorized the offending publication nor that he ratified it.⁴⁶

3.4.5 The 2003 Presidential Election and Post Election Dispute

The fifth Presidential Election in Nigeria was held on 19th April, 2003. The incumbent, Olusegun Obasanjo was reelected. However, General Muhammadu Buhari filed a petition challenging the victory of Chief Olusagun Obasanjo at the Court of Appeal⁴⁷. He prayed the court to invalidate the whole election on the grounds of non compliance with the provisions of the *Electoral Act 2002*. He further alleged that at the time of the election, Chief Olusegun Obasanjo was not qualified to contest the election.

Upon the service of the petition on the Respondents, the 1st Respondent filed a Notice of Preliminary Objection praying the court to strike out the petition for being incompetent. The crux of this application was that the Petitioner failed to join PDP as one of the Respondents and as a party which sponsored, campaigned and funded the election of the candidate whose victory was being challenged. The Court of Appeal refused this application, hence an appeal was entered at the Supreme Court. The Supreme Court further dismissed the appeal.

3.4.6 The 2007 Presidential Election and Post Election Dispute

The 6th Presidential Election held in Nigeria was on 21st APRIL, 2007. Umaru Musa Yar'Adua was declared the winner of the election.

Dissatisfied with this result, General Muhammadu Buhari filed a petition challenging the victory of Umaru Musa Yar 'Adua.

⁴³ (1986) 5NWLR (PT. 44) 721

⁴⁴ *ibid*

⁴⁵ *ibid*

⁴⁶ *ibid*

⁴⁷ (2003) LPER – 813 SC, (2003) 17 NWLR (PT. 850) 587 (2003 11 S.C

The Supreme Court resolved all the issues raised against the Appellant and further held that the Appellant had failed to prove that non compliance with the *Electoral Act* had substantially affected the election.

3.4.7 The 2011 Presidential Election Petition and Post Election Dispute

The 7th Presidential Election held in Nigeria was on 16th day of April, 2011. Dr. Goodluck Jonathan was declared the winner of this election.

Aggrieved by the result of the election, the CPC and its Presidential Candidate filed a petition challenging the victory of Dr. Goodluck Jonathan of the PDP. The main thrust / ground of this appeal was the alleged non compliance with the *Electoral Act* and provision of *section 134 (2) of the 1999 Constitution* with regards to scoring the highest number of votes and mandatory $\frac{1}{4}$ of the votes cast at the election in each of at least $\frac{2}{3}$ of all states of the federation including FCT.⁴⁸ In all, the Supreme Court dismissed the appeal for lacking in merit.

3.4.8 The 2015 Presidential Election and Post Election Dispute

The 8th Presidential Election held in Nigeria were on 28th and 29th March, 2015. Muhammadu Buhari was declared the winner of this election. In 2015, Dr. Goodluck Jonathan did not approach the Presidential Election Petition Tribunal even though it was constituted by the President Court of Appeal, Justice Zainab Bulkachuwa.⁴⁹

3.4.9 The 2019 Presidential Election Petition and Post Election Dispute

The 9th Presidential Election in Nigeria was held on 23rd February, 2019. The incumbent President, Muhammadu Buhari was declared the winner of this election⁵⁰. Aggrieved by the above results, the PDP candidate, Alhaji Atiku Abubakar filed a petition at the Court of Appeal⁵¹

Alhaji Atiku Abuabakar, the PDP Presidential Candidate maintained that Muhammadu Buhari does not possess the educational qualification to contest the election to the office of the President of the Federal Republic of Nigeria as provided under *section 131(d) of the 1999 Constitution* and *section 31(1) of the Electoral Act 2010*. The second aspect of his claim is that the 2nd Respondent swore to affidavit containing false information of fundamental nature that is stating that his certificates are with the Army. It was further contended that the schools the 2nd Respondent claimed he attended were at the material time nonexistent.

It was also the case of the Petitioner that the certificate enlisted in the CV of the Respondent was not attached and that the 2nd Respondent Muhammadu Buhari does not possess the said certificates, contending that it is compulsory for the certificates to be attached. The Petitioner relied on *section 31(1) and (2) of the Electoral Act* which states thus:

⁴⁸ (2012) ALL FWLR (pt 617) @ 605

⁴⁹ <https://allAfrica.com/stories> accessed 2/1/2020

⁵⁰ <https://en.m.wikipedia.org/wiki> accessed 2/1/2020

⁵¹ *Atiku Abubakar & Anor v INEC & ORS* (LER (2019) CA /PEPC/002/2019)

31(1) Any person may apply to the Commission for a copy of nomination form, affidavit and any other document submitted by a candidate at an election and the Commission shall upon payment of a prescribed fee, issue such a person with the Certified True Copy within 14 days.

31(2) The list of information submitted by each candidate shall be accompanied by an affidavit sworn to by candidate at the Federal High Court, High Court of the State or High court of Federal Capital Territory indicating that he has fulfilled at the constitutional requirements for election to that office.

Evidence led at the trial, however showed that the 2nd Respondent attended Primary School and that he attended Katsina Provincial Secondary School (now Government College) Katsina in 1956-1961 and went to Nigerian Military Training from 1961 -1963. The Petitioner argued strenuously that failure of the 2nd Respondent to attach certificates listed in the FORM CF001 to the said FORM means that 2nd Respondent does not possess the certificates he claimed he possesses.

The court in resolving the issue as to whether the 2nd Respondent gave false information of fundamental nature in aid of his qualification held that the reasonable inference or plausible meaning attachable to the above provision of the *Electoral Act* is that candidate can list information concerning evidence of his qualification or other relevant information about himself. The demand or information required in Form CF001 cannot be more or higher than the statutory requirements. It is settled that a candidate is not required by the constitution or the Electoral Act to attach his certificate in FORM C F001 before the candidate can be considered or adjudged to have requisite educational qualifications to contest election. In summary the Supreme Court held as follows:

1. *Section 318 of the 1999 Constitution* of Nigeria provides that educational qualification up to Secondary School level suffices as qualification without actual possession of the certificate.
2. A person needs not obtain a certificate, mere attendance in a school up to secondary school certificate level is what is required.
3. Person who possesses a secondary school certificate or Grade 2 Teachers Certificate or its equivalent, the City and Guild Certificate is qualified to contest for the election into the office of the President Federal Republic of Nigeria.

3.5. Challenges Associated with Domestic Adjudication of Presidential Election Disputes in Nigeria

In the preceding chapter, we examined the past presidential elections in Nigeria starting from 1979 till date and having done so, we now identified some of the challenges facing the judicial adjudication as follows:

- a. All cases are decided in favour of status quo
- b. Cases are dismissed on mere technicality
- c. Cases are delayed in the tribunal.
- d. Coming to no Decision

e. Burden of Proving Non Compliance

4.1.3. Integrating the Elections Supranational Court into the AU Judicial Framework

This section looks at how the proposed supranational elections tribunal could relate to and be integrated into the AU judicial framework. It should be recalled that the election supranational court is suggested to be at the continental level and have jurisdiction, therefore, looks at the judicial structures already in existence at the continental level and proposes how they can be adjusted in order to accommodate supranational adjudication over presidential election disputes.

The first African continental court to be established is the African Court on Human and People's Rights (ACtHPR). The establishment of the Court sprung from a growing sense of "the inadequacy of the protection and enforcement of human rights offered" by the African Commission on Human and People's Rights (The Commission), the treaty body responsible for supervising the implementation of the ADHPRs.⁵²

Although the ACtHPR does not have express jurisdiction over electoral disputes, election disputes alleging violation of recognized human rights could still reach the court. Such was the case in *Mtikla*,⁵³. The applicant, challenged the Tanzanian Constitutional amendment restricting presidential candidacy to those sponsored by political parties, thereby excluding independent candidates.⁵⁴ The applicant, *inter alia*, alleged violation of the right to political participation as enshrined under the ACHPR. The court found for the applicant and ruled that the restriction or prohibition of independent candidates was not proportional to the alleged aim of fostering national unity and was, therefore, a violation of the right to participate freely in the government of one's country.⁵⁵ The Tanzanian government responded positively to this decision and omitted the impugned provision in its draft constitution, which shall be subjected to a referendum in April 2015.

The second continental court established in Africa is the African Court of Justice (ACJ). The court was established by the Constitutive Act of the AU and in July 2003 the AU Assembly adopted the Protocol on the Court of Justice of the African Union.⁵⁶ The ACJ was established as the principal judicial organ of the AU.⁵⁷

However, before the ACJ was inaugurated, the AU in July 2004 decided to merge the ACtHPR with the ACJ,⁵⁸ in order to create one continental court, the African Court of Justice and Human Rights (ACJHR). In 2008, the AU adopted the Protocol on the Statute of the African

⁵²ibid

⁵³Christopher Mtikila and The Tanganyika Law Society vs. The United Republic of Tanzania Consolidated Applications Nos. 009/2011 and 011/2011 [African Court of Human and Peoples' Rights]

⁵⁴ Ibid para 107.2

⁵⁵Ibid para 111

⁵⁶ibid

⁵⁷ Article 2(2) Protocol on the Court of Justice of the African Union 2003

⁵⁸ ibid

Court of Justice and Human Rights,⁵⁹ together with the Statute of the African Court of Justice and Human Rights (annexed to the Protocol), while formally merged the two courts.⁶⁰

The ACJHR has two sections. These are the General Affairs Section composed of eight judges and the Human Rights Section composed of the remaining eight other judges⁶¹. Although this is the current status, as shall be discussed below, the AU adopted another Protocol in 2014 that increases the sections of the court to three. The 2014 protocol is however, not yet in force. The Human Rights Section is competent to hear all cases relating to human and/or peoples' rights while the General Affairs Section hears all other cases the Court is competent to hear⁶². The ACtHR has not yet become operational as the required minimum number of 15 ratifications to trigger it into operation has not been reached. By the end of February 2014, only five states had ratified the protocol on the ACJHR⁶³. These are Benin, Burkina Faso, Congo, Libya and Mali.⁶⁴ The material jurisdiction of the ACJHR is set out in Article 28, which clothes the court with competence to adjudicate on the following:

- a. The interpretation and application of the Constitutive Act;
- b. The interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the OAU
- c. The interpretation and application of the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, or any other legal instruments relating to human rights, ratified by the state parties concerned;
- d. Any question relating to international law;
- e. All acts, decisions, regulations and directives of the organs of the Union;
- f. All matters specifically provided for in any other agreement that state parties conclude among themselves, or with the Union and which confer jurisdiction on the Court;
- g. The existence of any fact which, if established, would constitute a breach of an obligation owned to a state party or to the Union
- h. The nature or extent of the reparation to be made for the breach of an international obligation.⁶⁵

While this exposition represents the current status of the AU judicial framework in terms of treaties in force, there was a major development in 2014, when the African leaders decided to cloth the ACJHR with criminal jurisdiction. This was done through the adoption of the protocol on Amendments to the protocol on the Statute of the African Court of Justice and Human Rights (the 2014 Protocol) on 27 June 2014. The Protocol is yet to come into force.

⁵⁹ Article 2 Protocol on the Statute of the African Court of Justice and Human Rights 2008

⁶⁰ *ibid*

⁶¹ Article 16 Statute of the African Court of Justice and Human Rights 2008

⁶² Article 17 Statute of the African Court of Justice and Human Rights 2008

⁶³ [http://www.au.int/en/sites/default/files/protocol%20on%](http://www.au.int/en/sites/default/files/protocol%20on%20)

⁶⁴ *ibid*

⁶⁵ Article 28 Statute of the African Court of Justice and Human Rights 2008

ANEKE: The Challenges of Adjudicating Presidential Election Petitions in Nigeria: Establishment of an African Supranational Court as a Possible Solution

The 2014 Protocol renames the ACJHR as the African Court of Justice and Human and Peoples' Right (ACJHPR)⁶⁶. The Protocol vests the court with jurisdiction over international crimes⁶⁷. The international crimes over which the court shall have jurisdiction are:

- Genocide;
- Crimes against humanity;
- War crimes;
- The crime of unconstitutional change of government; piracy; terrorism
- Trafficking in persons;
- Trafficking in drugs;
- Trafficking in hazardous wastes;
- Illicit exploitation of natural resources; and
- The crime of aggression⁶⁸

Each of the listed crimes is further defined in the protocol. But of interest to this research is the crime of unconstitutional change of government, which is defined further in the following terms:

For the purpose of this statute, unconstitutional change of government means committing or pondering to be committed the following acts, with the aim of illegally accessing or maintaining power;

- a. A putsch or coup d'état against a democratically elected government;
- b. An intervention by mercenaries to replace a democratically elected government;
- c. Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;
- d. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
- e. Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the constitution;
- f. Any substantial modification of the electoral laws in the last 6 (six) months before the elections without the consent of the majority of the political actors⁶⁹.

The grounds of what constitutes an unconstitutional change of government are the same as those listed under ACDEG, except for ground (f) which is a new inclusion and seems to have been borrowed from ECOWAS Governance Protocol. The decision by African leaders to prosecute unconstitutional changes of government as an international crime could be taken as fulfilling a growing desire of African peoples to ensure that Africa is rid of governments that

⁶⁶ Article 8 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2014

⁶⁷ Article 3(1) Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights 2014

⁶⁸ Article 14 Statute of the African Court of Justice and Human Rights 2008

⁶⁹ Article 28E Statute of the African Court of Justice and Human and Peoples' Rights 2014

ascend to power unconstitutionally. This then reinforces the importance of democratic elections as the sole legal basis for ascending into power in Africa. This notwithstanding, there are at least two points that need to be noted as they might militate against this development.

First, while prosecuting those assuming office unconstitutionally might be a positive development, it leads to an anomaly. That is, it creates a situation where alleged perpetrators of unconstitutional change of government may be tried but there is at the same time no forum for those alleging, for example that the election was stolen by the incumbent, to seek redress. When an election is disputed, it is usually difficult to determine who truly won without a credible adjudication process. This is more significant, especially in relation to ground (d) of unconstitutional change of government which relates to an incumbent refusing to relinquish power having lost an election. Where there are competing claims about who won, as was the case, in Kenya in 2007, there would be no basis for determining if an incumbent holds power legitimately unless there is first a determination of who won the election.

The second point to note is that the 2014 protocol provides for the prosecution of those who come into office unconstitutionally. Where the unconstitutionality alleged relates to disputed elections, such leaders will in reality not be prosecuted as the 2014 state offers them immunity. The protocol provides incumbent African leaders immunity in the following terms.

No charge shall be commenced or continued before the court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other state officials based on their function, during their tenure of office.⁷⁰

This overview of the continental judicial framework reveals at least things in relation to supranational adjudication. The first point to note is that there is an existing judicial framework in place. The framework however, is still relatively young and at the same time undergoing restructuring, following the merger of the ACtHPR with the ACJ to form the ACJHPR, and the adoption of the 2014 Protocol, which confers criminal jurisdiction on the court. Second, access of individuals to the ACJHPR is constrained by the requirement of state declaration. Although this could have been designed as an incentive to encourage ratification by states, it is at the same time constraining the Court from being fully supranational and relevant to individuals in member states. There can be no supranational adjudication where individuals have no access to an international court.

Third, the ACJHPR, as well as the two courts is subsumed, has no clear or express mandate to enforce the continental electoral and democratic normative frameworks (such as ACDEG). It was noted in the preceding section that ACDEG lacks an efficient enforcement mechanism. Giving the Court express mandate over the continental electoral and democratic norms would help mitigate the weak enforcement mechanism for ACDEG and other democratic norms.

⁷⁰Article 46A Statute of the African Court of Justice and Human Rights 2014

Fourth and finally, ACJHPR and its two predecessors, lack a clear indication of how to relate with national courts and sub-regional courts.

5.1. Summary of Findings

The first objective of study was to examine the legal framework under which presidential election petitions are held in Nigeria. These legal frameworks were identified to be the Constitution, Electoral Act 2010 (as amended), INEC Regulations and Guidelines for the Conduct of Elections and Elections Tribunal and Court Practice Direction, 2011. The second objective was to find how the domestic courts have fared in handling presidential election petitions. We embarked on the review of the judgments delivered by the courts on past presidential elections in Nigeria and we found among others that the courts have always favoured the incumbent. On the third objective, we found that the African Union as a continental supranational body has the powers to oust out any government that assumed power through any unconstitutional means. If this is possible, there is nothing wrong if the African Court assumes jurisdiction over disputed presidential elections. We say so because assumption of office by a president through a flawed electoral process is akin to unconstitutional change of government.

5.2. Recommendations

In order to transform the current judicial framework into a fully-fledged supranational adjudication judicial framework, that can be counted on to support the resolution of presidential election dispute in Africa, it is suggested that the following two elements must be attended to:

- a. The material and personal jurisdiction of the Court: and
- b. Cooperation mechanism with national courts and sub-regional courts.

With regard to the first element (material and personal jurisdiction), it has already been noted that the ACJHPR. does not have express jurisdiction to hear and determine electoral disputes in member states. The Court, however, has jurisdiction over the interpretation and application of “other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union”⁷¹. This arguably includes all the binding AU electoral and democratic normative frameworks. If that were the case, it would mean the ACJHPR already has jurisdiction to hear and determine electoral disputes that would allege violation of AU normative frameworks like ACDEG.

However, giving the Court express jurisdiction in the Court Protocol could arguably be advantageous as it would remove any ambiguity and clearly indicate how the Court should go about in resolving such disputes. It would also be advantageous in that it would possibly give the Court Protocol but not the democratic frameworks like ACDEG. This approach is affirmed in the jurisprudence of both the EACJ and the ECOWAS Court⁷².

⁷¹Article 28(b) Statute of the African Court of Justice and Human Rights 2008

⁷²See the cases of James Katabazi and 21 Others vs Secretary General of the East African Community and the Attorney General of the Republic of Uganda Reference NO. 1 of 2007 9judgment of 1 November 2007)

5.3. Conclusions

An effective continental supranational court offers the possibility of strengthening domestic courts, especially in states where courts lack democratic space for independent fact finding and decision. Such national courts may be enabled to “to take risky and courageous steps by relying on a continental jurisprudence.” The very nature of supranational adjudication entails that the continental court ‘pierces’ the state veil of judicial sovereignty and interacts directly with nationals of the concerned state. This ultimately ensures that standards agreed upon by African leaders do not just end up as paper commitments, but that people participate meaningfully in their realization and effectuation. This may also potentially play a major role in ensuring that nationals of AU member states are aware of the transnational institutions.