REFORM OF THE ELECTION LITIGATION PROCESS: AN OVERVIEW OF THE ELECTORAL ACT.

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Abstract
General elections are conducted in Nigeria every four years by the Independent Electoral Commission (INEC), the body entrusted with the conduct of elections in Nigeria. These elections are conducted presumably pursuant to the Electoral Act 2010 (as Amended) –the basic enactment providing the rules and regulations for the conduct of elections in Nigeria. Under democratic settings, the Electoral Act ought to encapsulate all the rules and guidelines for the conduct of the elections so that any part of the elections not done in consonance with the Electoral Act would be invalidated. Under the same settings also, the Electoral Act ought to make fair, equitable and just provisions for all the parties in the elections. However, in some instances, procedures not contained in the Electoral Act, like the use of the smart card readers, are given prominence in disregard to clear provisions of the Electoral Act. The Act also casts almost an impossible burden of proof on contestants who wish to challenge the outcome of the election. This causes a great misbalance in the election litigation processes in Nigeria and creates avoidable tension in the polity. This paper discusses some of the incidents that cause the misbalance through an examination of some provisions of the Constitution, the Electoral Act, the Practice Directions made for the conduct of general elections in Nigeria and some decided cases on the point. The paper concludes that real electoral justice is not served by adherence to procedures not provided by the law and by casting a hash burden of proof on persons challenging the outcome of elections. On the basis of conclusion, recommendations are made for the reform of the election litigation process in the better interest of electoral justice in Nigeria.

Keywords: Pre- Election, Smart Card Reader, Electoral Justice, Election Litigation Process

1. Introduction

It is a well-known fact that in Nigeria, general elections are conducted for most political positions every four years. It is also very well-known that it is the Independent National Election Commission that conducts the elections pursuant to the provisions of the Electoral Act. Under normal circumstances, the procedure and conduct of the elections ought to be strictly as provided by the law regulating the conduct of the elections which is the Electoral Act. The only exception to this is where rules or guidelines are made pursuant to the enabling enactment. Under the current dispensation as established by the Independent National Electoral Commission in the 2015 general elections, smart card readers are used for accreditation and authentication of voters notwithstanding that it is not provided for in the Electoral Act. This is not the only impediment to a fair litigation process in Nigeria as the Electoral Act itself imposes a herculean burden of proof on persons challenging the outcome of the elections they have participated in. These and other impediments are discussed in the paragraphs following, after which recommendations are made including the reform of the Electoral Act for a better election litigation regime.

2. Use of the Smart Card Reader

The Independent National Electoral Commission (INEC) introduced the electronic system of accreditation and authentication of voters by the use of Smart Card Reader machines for the first time during the 2015 General Elections. The provision for the use of the Smart Card Reader was made in the Manual for Election Officials. The Election Manual[1] still requires the election officials to tick the name of an accredited voter on the register of voters. By the thinking of INEC, the card reader information enjoys primacy[2] over the number checked on the register of voters where there is a discrepancy in the figures. Despite the technical hitches and failures suffered by a great number of the smart card reader machines in the election field which compelled INEC to issue a corrigendum allowing the use of incidence forms for accreditation of voters, the fact remains that a lot of people welcomed this innovation. It appeared to be an independent and sure method of authenticating and confirming the actual number of people accredited for an election instead of the method of ticking the names of accredited voters on the register of votes. It was easier to manipulate the manual accreditation.

Incidentally, the Electoral Act did not capture the innovation of the smart card reader. The courts have become an indispensable part of the election process in Nigeria because the average loser does not believe he lost fairly and will usually resort to the Tribunals and Courts to see if his fortune may be turned.

And so, after the general elections of 2015, the battle field shifted to the Tribunals, the Court of Appeal and the Supreme Court. The contention was the place of the smart card reader information vis-à-vis the register of voters in proving corrupt practices and/or non-compliance with the provisions of the Electoral Act, 2010 (as amended). Also, there was the issue of the status of the INEC Manual and Guidelines which introduced the smart card reader vis-à-vis the provisions of the Electoral Act, 2010 (as amended).
These matters were settled by the Supreme Court in favour of the register of voters for the reason that the smart card reader is not a creation of the Electoral Act. This was in the case of **Okereke v. Umahi & Ors**[3]**,** where the Supreme Court, per Nweze, JSC, held that:

> Indeed, since the Guidelines and Manual (supra), which authorised the use and deployment of the electronic Card Reader Machine were made in exercise of the powers conferred by the Electoral Act, the said Card Reader cannot,

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[1]Paragraph 2.4.2. Step 3, Manual for Election Officials, 2015

[2] Chapter 2, Section A, Paragraph 2.5 – 2.6, Manual for Election Officials, 2015

[3] (2016) LPELR-40035 (SC) at

> logically, depose or dethrone the Voters' Register whose juridical roots are firmly embedded or entrenched in the selfsame Electoral Act from which it (Voter's Register), directly, derives its sustenance and currency. Thus, any attempt to invest it (the Card Reader Machine procedure) with such overarching pre-eminence or superiority over the Voters' Register is like converting an auxiliary procedure – into the dominant procedure – of proof, that is proof of accreditation. This is a logical impossibility.

Also, in *Wike Nyesom v Peterside*,[4] referring to its earlier decisions in *Okereke v Umahi* (unreported) SC. 1004/2015 delivered on 5/2/2015 at pages 31-34, as well as the case of *Shinkafi v Yari*, the Supreme Court held that:

> This court in a number of recent decisions has commended the introduction of the Card Reader in the 2015 elections by INEC. The court has noted however, that its function is solely to authenticate the owner of a voter's card and to prevent multi-voting by a voter and cannot replace the voters' register or statement of results in appropriate forms.

The question that begs for answers is whether we are going to throw away the baby with the bath water? The pronouncements of the Supreme Court on the status of the card reader were made in 2016. From that time till now, INEC has conducted governorship elections in some states and also the 2019 general elections. The same monster that held our electoral process hostage is still prowling. The Anambra State governorship election is just by the corner. We cannot continue to do the same thing in the same manner and expect a different result.

A situation where INEC will have two official documents – the card reader and the voters register – contradicting each other on basic information (accreditation of voters) on the conduct of the election is an aberration. This sad reality is visible by the scenario painted by the Supreme Court in *Ikpeazu v Otti*[5] where the eminent jurist, Rhodes-Vivour, JSC said:

> Where a petitioner seeks to prove that there was over voting in the election in which he participated, he would succeed if he is able to show that the number of votes exceeds the number of would be voters in the voter register. If the petitioner decides to rely on card reader report as in this case to show that the number of votes exceeds the number of voters recorded by the card reader but less than would be voters on the voters register, he would fail. That explains the plight of the petitioner in this petition/appeal. The card reader

[4] (2016) LPELR-40036 (SC) per Kekere-Ekun, JSC
[5] (2016) 8 NWLR (Pt. 1513) 38

> may be the only authentic document if and only if the National Assembly amends the Electoral Act to provide for card readers. It is only then that card readers would be relevant for nullifying elections.[6]

The system cannot continue to prefer and enthrone the fraud- prone ticking of register of voters over the better and more authentic card reader report. Luckily, by the above decision, INEC has been given what students call "expo" on what to do to ensure a credible election. That "expo" was also given in plain language *in Wike Nyesom v. Peterside*[7], where the noble Lord, Kekere-Ekun, JSC stated that:

> The INEC directives, Guidelines and Manual cannot be elevated above the provisions of the Electoral Act so as to eliminate manual accreditation of voters. This will remain so until INEC takes steps to have the necessary amendments made to bring the usage of the Card Reader within the ambit of the substantive Electoral Act.

We all watched and marvelled at the beauty of electronic transmission of election results during the November, 2020 election in the United States of America. There is no reason why such cannot be replicated in Nigeria. It is ridiculous for Nigerians to rank themselves highly in terms of education, exposure and knowledge but when it comes to matters that affect the electoral system which has direct impact on our governance, we insist on remaining analogue. Certainly, persons who want a loophole to enable them continue the manipulation of the system, may resist the inclusion of the smart card reader in the Electoral Act. It is time for INEC to take definite steps to further amend the Electoral Act, 2010 to incorporate this scientific method of authentication of voters. It is long overdue.

The writer suggests that in making the amendment, INEC should not restrict itself to only the smart card reader machine. The amendment should make ambitious and ample provision for full electronic accreditation, voting and transmission of election results. It will now be left for INEC to know what equipment to deploy at every point depending on other factors in the country like infrastructure, network, and finance and so on. But let the enabling legislation be in place so that we do not have recourse to the gruelling procedure for amendment on the same matter in future.

3. Pre-Election Cases

Interestingly, in Nigeria, we have two main streams of challenging matters connected to elections - Pre-Election and Election proceedings. The waters of these streams flow in different and distinct channels and hardly meet. Both streams have the capacity of affecting the fortunes of an election. For the post-election litigation, it is easier to

[6] Supra at page 101

[7] (2016) LPELR-40036 (SC) at page 63

understand because the candidates have stood before the electorate who made their choices.

The pre-election litigation leaves the electorate confused and askance. Sometimes, the result of the pre-election litigation hits at the very foundation of the fundamental objectives and directive principles of State policy as enshrined in Chapter 2 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). For example, Section 14(1) and (2)(a) of the Constitution states:

> 14(1) The Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice.
>
> (2) It is hereby, accordingly, declared that –
>
> (a) Sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority.

The key words are democracy and sovereignty. Democracy is defined as the form of government in which the sovereign power resides in and is exercised by the whole body of free citizens directly or indirectly through a system of representation, as distinguished from a monarchy, aristocracy, or oligarchy.[8] Going by our democratic system of government, it is not envisaged that a person will assume elective office if not by the will of the majority of citizens duly expressed through the ballot. The big question is whether the method of pre-election litigation, as we presently practice, accords with this fundamental objectives of our State policy?

It is pertinent to begin by saying that pre-election litigation has statutory backing in Section 31(5)& (6) and Section 87(9) of the Electoral Act. It is intended to discuss briefly the two provisions on pre-election litigation and thereafter reflect on their impact on our democracy and then give an opinion on their usefulness or otherwise.

Section 31(5) and (6) provides:

> (5) Any person who has reasonable grounds to believe that any information given by a candidate in the affidavit or any document submitted by that candidate is false may file a suit at the Federal High Court, High Court of a State or FCT against such person seeking a declaration that the information contained in the affidavit is false.
>
> (6) If the Court determines that any of the information contained in the affidavit or any document submitted by that candidate is false, the Court shall issue an order disqualifying the candidate from contesting the election.

The recent case of *PDP & Ors. v Biobarakuma Degi-Eremienyo & Ors*[9] is a classical example of the invocation of the provisions of Section 31(5) and (6) of the Electoral Act.

[8] Black's Law Dictionary, 6th Edition

[9](2020) LPELR-49734(SC) or (2020) Vol. 305 LRCN 1. See also *Abubakar v. INEC* (2020) 12 NWLR (Pt. 1737) 37

In that case, the APC had submitted the names of her candidates for the offices of Governor and Deputy Governor of Bayelsa State which INEC published as required by law. The PDP approached the Federal High Court on the ground that the Deputy Governorship candidate presented false information in his Form CF001 to INEC with respect to the multiplicity or inconsistency in the names of the candidate. The Supreme Court in upholding the decision of the trial Federal High Court and disqualifying the candidates of the APC, stated the law, per Ejembi Eko, JSC, in these words:

> Section 31(5) of the Electoral Act complements Section 182(1)(j) of the Constitution. It empowers any person who has reasonable grounds to believe that any information given by a candidate (like the 1st Respondent in the affidavit i.e. Form CF001) submitted by that candidate is false to file a suit at the Federal High Court, High Court of a State or FCT against such person seeking a declaration that the information contained in the affidavit is false. The sanction for presenting to INEC Form CF001 containing false facts about the personal particulars or information of the candidate, by virtue of Section 31(6) of the Electoral Act, is an order issued by the High Court, disqualifying such candidate from contesting the election.

It is instructive to note that though the appellants in the Bayelsa case are the PDP and her two candidates for the Governorship election, the operative words used to describe who can question the information supplied in the INEC Form CF001 is "any person". This is very wide and means that any member of the public has the *locus standi* to initiate a court action on the matter of false information. That phrase attracted the interpretative mind of the Court of Appeal in *Audu A. Ganiyu v Kadiri Oshoakpemhe & Ors*[10]**,** where the erudite Georgewill, JCA, had this to say:

> Thus, it would appear that going by the succinct provisions of Section 31(5) of the Electoral Act, 2010 (As Amended) and on the authority of *Lawrence v PDP* (2018) 5 NWLR (Pt. 1613) 464 @ p. 481, the meaning of "a person" as used in Section 31(5) of the Electoral Act 2010 (as amended) presupposes any person, including the 1st Respondent, since it appears to be open-ended to all and at the same time inclusive of all and without any restriction or exclusion. Thus, whether or not one is a member of a Political Party or any particular Political party, as in the instant appeal, a PDP Card carrying member challenging the qualification of a candidate of

[10] (unreported) Appeal No. CA/B/12A/2021 delivered on 8th March, 2021.

> the APC, is of no moment as the law allows the 1st Respondent so to do!

On its part, Section 87 of the Electoral Act is on nomination of candidates by parties, and in subsections (1) and (9) states:

> (1) A political party seeking to nominate candidates for elections under this Act shall hold primaries for aspirants to all elective positions.
>
> (9) Notwithstanding the provisions of this Act or rules of a political party, an aspirant who complains that any of the provisions of this Act and the guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court or the High Court of a State or FCT, for redress.

Under Section 87(9) of the Electoral Act, only an aspirant or contestant in the primaries has the locus to approach the court for redress. In other words, the dispute is among members of the same political party. The point of who has *locus standi* to complain about a party primary was driven home in *Aisha Alhassan v Darius Ishaku & Ors*[11], where the Supreme Court in very lucid language held that:

> After an examination of decided authorities it is so clear that party primaries are the domestic affair of the political party which no outsider can complain about. Only aspirants at the primaries can complain about the conduct of party primaries. Furthermore an election tribunal has no jurisdiction to comment or examine how party primaries were conducted. Jurisdiction for such an exercise resides with Federal High Court, High Court of a State, or FCT High Court and only at the instance of a dissatisfied aspirant at the primaries.

The Supreme Court has maintained this position in other cases.[12]

This provision of Section 87(9) was fully activated in *A.P.C. v Marafa*[13]where the entire political offices in Zamfara State were at stake and concerned the conduct of primaries by the APC. The Supreme Court, per Galinje, JSC held that:

> This provision (section 87(1)) is mandatory and it is therefore the only way to sponsor candidates for general elections in this country. Where a political party fails to conduct primaries, then it is apparent that that political party cannot participate in the general elections.

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[11] (2016) LPELR-40083(SC)

[12] *Terhemen Tarzoor v OrtomIoraer* (2016) 3 NWLR (Pt. 1500) 463*; Daniel v INEC* (2015) 9 NWLR (Pt. 1463) 113*; Shinkafi v Yari* (2016) LPELR-26050(SC); *PDP v Sylva* (2012) 13 NWLR (Pt. 1316) 85; Emeka v. Okadigbo (2012) 18 NWLR (Pt. 1221) 55 or (2012) LPELR-9338(SC)

[13] (2020) 6 NWLR (Pt. 1721) 383

In his own contribution, Okoro, JSC stated the point as follows:

> Now, the question to be asked is whether the primary election conducted by the State chapter of the 1st appellant under the directive of the Governor of Zamfara State on 7th October, 2018 was valid in view of the party's Guidelines for conduct of primary elections and the Electoral Act, 2010. From the record before this court, it is clear that the primary election in issue was not conducted by the committees constituted by the National Working Committee of the party under the leadership of Engineer Abubakar Fari and Major General Abubakar Mustapha Gana (Rtd.), but by the State chapter of the 1st appellant under the instruction of the State Governor. I am of the opinion that the said primary election conducted at variance with the party's guidelines and therefore cannot be considered to be valid.

It is important to note that in the cases of *PDP v Biobarakuma Degi-Eremienyo & Ors (supra)* and *APC v Marafa (supra)* the INEC had gone ahead to conduct the elections and declared the winners before the final decisions were rendered. It is trite law that pre-election matter does not become academic or hypothetical merely because the election had taken place.[14]

An illustration on how far a pre-election case can go into the tenure of an office is the case of *Mato v Hembe.*[15] In the case, the seat in contention was for Vandeikya/Konshisha Federal Constituency in the House of Representatives. The primaries of APC took place on 10th December, 2014 for the general election fixed for 28th March, 2015. The appellant filed the originating summons at the Federal High Makurdi on 26th March, 2015 (two days before the election). The judgment of the Federal High Court was delivered on 19/11/2015. The decision of the Court of Appeal was delivered on 11/7/2016 and the final judgment from the Supreme Court came on 23/6/2017.

The Supreme Court speaking through Onnoghen, CJN, ordered the 1st respondent to vacate the seat and for the appellant to be sworn into office. His Lordship in coming to this conclusion stated that:

> The truth must be told and that is, that the 1st and 2nd defendants did not respect the provisions of the Electoral Act and the constitution of the 2nd defendant in the conduct of the primaries. This court has decided in quite a number of cases that political parties must obey their own constitutions as the court will not allow them to act arbitrarily or as they like.

[14] *Eligwe v Okpobiri* (2015) 2 NWLR (Pt. 1443) 348; *Lau v PDP &Ors* (2017) LPELR-43800(SC); *Dahiru &Anor v APC &Ors* (2016) LPELR-42089(SC)

[15] (2018) 5 NWLR (Pt. 1612) 258

In his contribution on the purpose of Section 87(9) of the Electoral Act, Kereke-Ekun, JSC aptly stated the position of the law as follows:

> While it is true that the courts will not interfere in the internal affairs of a political party nor its choice of candidate, section 87(9) of the Electoral Act ensures that in making their choice of candidate for elective office, political parties do not stray beyond the confines of the Electoral Act or their own electoral guidelines. The section seeks to curb the impunity with which political parties hitherto acted without regard to the democratic norms they profess to practice.

Though the appellant in *Mato v Hembe* won the case, the fact remains that two years out of the four years fixed legislative tenure have gone before the appellant took her seat in the House of Representatives and the years are not recoverable. This is unlike a Governorship seat where the victorious party will still have his four years tenure from the point of his swearing in[16].

4. Timelines for Pre-Election Cases

By Section 285(9)[17] of the Constitution, every pre-election matter shall be filed not later than 14 days from the date of the occurrence of the event, decision or action complained of in the suit. The most intriguing aspect is that the trial court hearing a pre-election matter is given the same 180 days[18] to deliver its judgment as an Election Tribunal and 60 days[19] for an appeal to be determined from the date of filing of the appeal. Meanwhile, the appellant shall have 14 days[20] to file an appeal against a decision in a pre-election matter.

To properly situate the impact of the pre-election suit within the constitutional timelines, it is necessary to juxtapose the timelines in Sections 31 and 87 of the Electoral Act which form the bedrock of the two types of pre-election suits.

Section 31(1) of the Electoral Act mandates every political party to submit to INEC, a list of the candidates the party proposes to sponsor at the elections not later than 60 days before the date appointed for a general election. On receipt of the list of candidates, INEC shall publish same in the constituency within 7 days[21]. From the date of this publication, any person who believes that the information supplied by a candidate is false may now file a suit[22] within 14[23] days of the publication.

[16] *Peter Obi v INEC* (2007) LPELR-24347(SC)
[17] Fourth Alteration Act No. 21 of 2017
[18] Section 285(10) of the Constitution (as altered by the Fourth Alteration Act No. 21 of 2017)
[19] Section 285(12) ibid
[20] Section 285(11) ibid
[21] Section 31(3) of the Electoral Act, 2010 (as amended)
[22] Section 31(5) ibid
[23] Section 285(9) of the Constitution

If one adds the 7 days it will take INEC to publish the list and the 14 days for any person to file an action, it will amount to 21 days. Subtract the 21 days from 60 days before the date of the election and we will be left with only 39 days. Given this scenario, the question to be asked is: will the trial court hear the case and give a decision within 39 days before the election is held? Of course, being a regular High Court, the rules of court on time allowed the defendants to enter appearance and file their defence shall apply. In effect, the case may not even be ripe for hearing before the election is conducted. And then, you consider the time to be spent on the possible journey on appeal from the Court of Appeal to the Supreme Court.

The same tight schedule applies to Section 87(9) of the Electoral Act where an aspirant or contestant at the party primaries is displeased with the outcome. Using the template of timelines allowed under Sections 31 and 87 of the Evidence Act and Section 285(10) and (12) of the Constitution, it is beyond argument that no pre-election case can be finished before the election is conducted.

The cases of *PDP v Degi-Eremienyo* (Bayelsa), *APC v Marafa (Zamfara)* and *Mato v Hembe* are on point in this regard**.** The reasoning of our revered Supreme Court is unassailable and very sound in law. One unmistakable line of thinking in the judgments is the resolve to whip errant politicians into the line of rectitude and obedience to the rule of law. But the issue is whether, by the timing of the judgments and their impact, they met the principles of democracy and the stipulation of our fundamental objectives of State policy that sovereignty belongs to the people?

It is important to note that this is not a situation where the Tribunal or Court, after hearing an election petition, held that there were unlawful or corrupt votes and thereby cancelled or nullified the votes. With regard to pre-election cases, the electorate have made their choices at the election and in some cases, the displeased aspirant who went to court may not be on the ballot for the election as happened in *Mato v Hembe (supra)* and *Amechi v INEC*[24] The result is that by the time judgment is finally delivered, the victorious party who goes on to occupy the seat may not be the choice of the majority of the voters as expressed at the election. In consonance with this, in *A.P.C. v Marafa (supra)*, the Supreme Court gave the following order –

> For the avoidance of doubt, a party that has no candidates in an election cannot be declared the winner of the election. This being so, the votes credited to the alleged candidates of the 1st appellant in the 2019 general elections in Zamfara State are wasted votes. For that reason, it is hereby ordered that candidates of parties other than the 1st appellant with the highest votes and the required spread stand elected into the various offices that were contested for in Zamfara State in the 2019 General Elections.

[24] (2008) 5 NWLR (Pt. 1080) 227

Again, in *PDP v Biobarakuma Degi-Eremienyo (supra),* the Supreme Court declared that:

> The sum total is that the joint ticket of the 1st and 2nd Respondents sponsored by the 3rd Respondent was vitiated by the disqualification of the 1st Respondent. Both candidates disqualified are deemed not to be candidates at the Governorship election conducted in Bayelsa State. It is hereby ordered that INEC (the 4th Respondent herein) declare as winner of the Governorship election in Bayelsa State the candidate with the highest number of lawful votes cast with the requisite constitutional (or geographical) spread.

The votes of the majority in the election have become "wasted votes". But it is not the fault of the voters. The majority of voters in Nigeria do not belong to any political party. The political parties and politicians may have acted wrongly, reprehensibly and irresponsibly, but the result on democracy and sovereignty is that persons who are not the choice of the majority of the people have become their rulers and representatives. In *Ikpeazu v Otti*[25], the Supreme Court in the lead judgment of Galadima, JSC said:

> Nowhere else is the need to do substantial justice greater than in election petition, for the court is not only concerned with the rights of the parties *inter se* but the wider interest and rights of the constituents who have exercised their franchise at the polls.

There is need to marry this "wider interest and rights of the constituents" with discipline for erring political parties with a view to protecting the wishes of the constituents in pre-election cases.

In all the advanced democracies of the world like the United States of America, United Kingdom, France, Germany, etc., it is unheard of that someone who did not win the election can get into any political office. Every elected official owe his election and assumption of public office directly to the ballot box. A situation where the votes of the electorate will go one way, and the decision of the Court will go another way will remain a puzzle and source of discomfiture to the citizens. If truly sovereignty belongs to the people, then the voice of the people `must always be heard loud and clear through the ballot box and not through the courts. This is to avoid a situation where someone who did not contest election or contested and lost will suddenly, courtesy of a pre-election decision, finds himself in public office taking powerful and far-reaching decisions over state affairs, as well as, that of her citizens.

It follows that pre-election matters must be controlled. By this position, it is not meant that politicians may not play their usual pranks, but a call is made for the amendment of the Electoral Act in the area of timelines for taking certain steps by INEC and the

[25] (2016) 8 NWLR (Pt. 1513) 38 at 97

adjudication of pre-election matters. It is the opinion of the author that all pre-election matters should be concluded before elections are held. This is to avoid mischief. For if it is not so, a party or court[26] may deliberately delay the case in order to see how the main election will go. After all, some pre-election cases determined after elections have been conducted would only be meaningful and beneficial to the winner if his political party won the election as it happened in *Amechi v INEC (supra)* and *Mato v Hembe (supra).*
From the nature of pre-election matters, it is not as complex as election petition. Accordingly, it is considered that the 180 days allocated to the High Court for trial of a pre-election matter is too long. In this regard, the overall suggestion for amendment of the Electoral Act as it concerns pre-election matters are as follows:

a. **Sections 31(5) and 87(9) Electoral Act:** Limit the hearing of pre-election cases to only the High Court as first instance and the Court of Appeal as final court. Our highly respected Supreme Court with a maximum number of 21 Justices (the Court has never had the full membership since 1999) cannot be available to hear all sorts and all manner of pre-election cases from the 36 States and FCT.

b. **Section 285(10) of the Constitution:** Reduce the time frame of trial of pre-election cases from 180 days to 90 days and 60 days for the Court of Appeal. (Making it a total of 150 days for both Courts).

c. The President of the Court of Appeal to have power to make Practice Directions for Pre-Election cases.

d. **Section 31(1) of the Electoral Act:** Amend INEC timeline for political parties to conduct primaries and submit the names of candidates such that the submission of list of candidates shall be made at least **180 days** (instead of the present 60 days) before the date fixed for election. This will accommodate the 150 days for judicial determination of any pre-election case, so that the winner will still be on the ballot and before the electorate for the election.

5. Restriction of Right of Appeal to the Supreme Court

Prior to 2007, the Court of Appeal had the final say on Governorship and Legislative Houses elections in Nigeria. The Supreme Court only heard appeals in respect of the Presidential election where the Court of Appeal is the Tribunal of first instance. However, the Constitution was altered to make appeals from the Governorship elections to travel from the Election Petition Tribunal through the Court of Appeal with the final bus stop at the Supreme Court.[27]This jurisdiction limiting the Supreme Court to hearing appeals on Presidential and Governorship elections is only with respect to election cases. There

[26]Emenike Owanta & Anor v. INEC & Ors (2011) 11-12 SC (Pt. II) 4.
[27] Section 233(2)(e) of the Constitution (as altered by the Second Alteration Act 2010)

is no such limitation for pre-election cases[28] which travel through the regular court system under the Constitution where there is right of appeal[29]from the court of first instance up to the Supreme Court.

It is the view of the author that there should be a limit of access to the Supreme Court in pre-election cases. This view is predicated on antecedents of our judicial jurisprudence. The Supreme Court is composed of the Chief Justice of Nigeria and such number of Justices not exceeding twenty-one.[30] Courtesy of the Supreme Court decision in *Obi v INEC & Ors*[31]**,** Governorship elections have been staggered in eight (8)States of Anambra, Edo, Ekiti, Ondo, Bayelsa, Osun, Kogi and Imo State has recently joined the pack. This means that while the general elections are held every four years, there is no year a State Governorship election may not hold. The judicial powers vested in the courts by Section 6(6)(b) of the Constitution is to be used for the resolution of all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

Section 6(5) of the Constitution created six courts[32] below the Supreme Court, namely the Court of Appeal, Federal High Court, National Industrial Court, High Court of the Federal Capital Territory and 36 States, Sharia Court of Appeal of the Federal Capital Territory and States, and Customary Court of Appeal of the Federal Capital Territory and States. As a matter of fact, the Constitution still opened a window for "such other courts"[33] as may be authorised by law to exercise jurisdiction on matters the National Assembly and House of Assembly may make laws. The final judgments of these courts can travel by way of appeal up to the Supreme Court once the parties can afford it.

The country has an average of 1,000 Judges at the High Court and Sharia/Customary Court of Appeal level. If each judge writes and delivers only one judgment in a month, it will translate to 1,000 judgments in a month. Let us assume that only 50% of the judgments are appealed. This translates to 500 appeals in a month which will come before the Court of Appeal that has a maximum capacity of 90 Justices. Dividing the 500 appeals to the 90 Justices means that each Justice will write a minimum of five judgments in a month. Let us again assume that only 50% of the said judgments of the Court of Appeal go on further appeal to the Supreme Court made up of 21 Justices. This translates to 250 cases. It means that a Justice of the Supreme Court will write a minimum of ten judgments in a month!

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[28] *PDP v Degi-Eremienyo (supra); APC v Marafa (supra*); *Mato v Hembe (supra)*

[29] Section 233(2); Section 240 and 241(1)(a) of the 1999 Constitution.

[30]Section 230(2) of the 1999 Constitution.

[31](2007) LPELR-2166(SC); (2007) 7 SC 268.

[32] Section 6(5)(b) – (i) of the 1999 Constitution (as amended)

[33] Section 6(5)(j) and (k) ibid. Courts like the Magistrates Court, Sharia Court, Area Court, Customary Court, Revenue Court and Rent Tribunal come under this provision.

The above statistics is on regular cases. We can now factor in election petitions and pre-election disputes where almost one year is devoted by the Supreme Court and Court of Appeal while stepping down the regular cases. If the truth must be said, the number of election- related cases is not up to 5% of the entire cases that are filed in our courts and yet they carry the highest propensity of threat to the reputation of the judiciary as an institution. Should 95% of regular cases continue to suffer because of 5%? Our Supreme Court and Court of Appeal are the busiest in the world. Presently, assuming no new appeals are lodged at the Supreme Court, it may take our very eminent and distinguished Justices of the Apex Court up to three years to clear the load of existing appeal cases.

In effect, a large chunk of time of the judicial system in Nigeria is devoted to serving only the interest of politicians who do not constitute 5% of the population. We cannot just continue this way. Something must snap if care is not taken, for justice delayed is justice denied. The overcrowded Correctional Centres is a pointer to the delay in administration of justice. The economic capital flight from the country is another pointer to our overburdened judicial system because no reasonable investor will be attracted to any nation where the judicial system is not prompt in resolving disputes. Furthermore, the general insecurity and surge in serious criminal activities point to our overburdened judicial system for as the Holy Bible puts it, "**Because the sentence against an evil work is not executed speedily, the hearts of the sons of men are fully set to do evil**."[34]

It is well-known that the Supreme Court and the Court of Appeal have not had the full compliments of their capacity. It is also well- known that the statistics of one judgment per month per Judge of the High Court is not what obtains in reality when the Performance Evaluation Committee of the National Judicial Council breaths down on judges of different cadres. The justices of the Court of Appeal who have sat in Divisions like Enugu (now Awka), Lagos, Port-Harcourt, Benin, Ibadan, Kaduna, Owerri, Abuja, Jos and others will continue to wonder the sheer volume of appeal cases waiting for their attention.

The Supreme Court sits in Abuja whereas the Court of Appeal sits in twenty Divisions across the country, which makes it nearer the States. Therefore, from the point of access to justice, cost, convenience and speedy disposition of pre-election cases, the advantage favours the Court of Appeal.

It is for all the above reasons that it is suggested that there be placed a limit to right of appeal to the Supreme Court in all pre-election matters. Put differently and succinctly, the Court of Appeal should be the final court for the determination of all pre-election matters.

6. Presumption of Regularity of INEC Results and the Burden of proof.

The main aim of election rigging or malpractice is to frustrate the democratic aspirations of citizens who have voted or would have voted into office someone instead of the

[34] Ecclesiastes 8 v. 11

victor.[35] Instances where the Supreme Court and the Court of Appeal have berated the conduct of elections by INEC are legion. The unfortunate roles played by INEC in collusion with politicians in some elections to thwart the genuine wishes of the voters have always painted a very bad image of this great country. The Courts have taken judicial notice of electoral rascality and impunity being exhibited by politicians in a "do or die" manner in elections in this county, which has made nonsense of the will of the people and the sovereignty of the people has become irrelevant.

But despite berating of INEC and taking judicial notice of the nefarious activities of politicians, the law has clothed the official acts of INEC with a presumption of regularity. Indeed, the first thing any lawyer or judge coming into election matters will learn and sing like a song is that there is a presumption of law that election results as declared by the electoral body is correct and authentic and the burden is on the person who denies the correctness and authenticity to rebut the presumption. This is the commonest preliminary pronouncements by the Tribunals and Courts in election petitions. See: *Nwobodo v Onoh* (1984) 1 SCNLR 1; *Omoboriowo v Ajasin* (1984) 1 SCNLR 108; *Hashidu v Goje* (2003) 15 NWLR (Pt. 843) 352; *Abubakar v Yar'Adua* (2008) 18 NWLR (Pt. 1120) 1*; Buhari v Obasanjo* (2005) 13 NWLR (Pt. 941) 1; *Agagu v Mimiko* (2009) All FWLR (Pt. 462) 1122; *Awuse v Odili* (2005) All FWLR (Pt. 261) 248; *Wali v Bafarawa* (2004) 16 NWLR (Pt. 898) 1; *Fayemi v Oni* (2009) 7 NWLR (Pt. 1140) 223; CPC v. INEC (2011) 12 MJSC 105; *Atikpekpe v Joe* (1999) 2 LRECN 302; *Mark v Abubakar* (2008) 1 LRECN 435.

Every respondent in election petition, particularly INEC, love and cherish that statement, as they use it as a cover for the atrocities committed during the conduct of elections.

With the greatest respect, it is now time to interrogate the presumption of regularity of INEC result as a combination of events have shown that the "INDEPENDENT "forming part of the name of the electoral body, INEC, may just be in the name and not in reality. We know that these legal presumptions are part of the borrowed principles from England which found expression in the Evidence Act, 2011[36]. We know how orderly and lawfully things work, and how public officials act with obvious and visible integrity in the land where we borrowed our laws of evidence.

From what we have seen of the conduct of elections by INEC and behaviour of politicians, can we confidently close our eyes to the irregularities and condone the mess using the presumption of regularity of official (INEC) acts as cover? That, in the opinion of the author, is playing the ostrich. The courts should not shield or condone the inefficiency or misconduct of INEC by employment of legal defences to give a stamp of legitimacy to electoral heists. In practice, INEC aligns with the declared winner of the election as respondents to the election petition. This gives undue advantage to the winner of the election and does not ensure the independence and neutrality of INEC.

[35] www.ccsenet.org/jpl Vol. 4, No.2; September 2011. The Electoral Process and Democratic Consolidation in Nigeria by Nwokeke P. Osinakachukwu and JayumAnakJawan

[36] Sections 145 - 168

In his timeless cerebral work, "Things Fall Apart", Professor Chinua Achebe said that "***since the eneke bird has learnt to fly without perching, the hunter has also learnt to shoot without missing.***" If from the advent of the current democratic experience in 1999 till date (spanning six general election circles of 1999, 2003, 2007, 2011, 2015 and 2019), we are still talking and complaining of corruption, falsification, substantial non-compliance and other sundry malfeasance in our elections, then it is time to shift the burden of proof to INEC. It is time to make INEC stand alone and be independent during the litigations that flows from their conduct of elections by making INEC to first show that the election was regularly conducted in accordance with the Electoral Act and its Guidelines.

This call for a shift on the burden of proof is not new. In *Ikpeazu v Otti*[37], His Lordship, Rhodes-Vivour, JSC joined in this call when he lamented that:

> Finally, an examination of the Electoral Act and a study of decided authorities on electoral matters reveals that a petitioner has a difficult task proving his petition in accordance with the Electoral Act. It is very difficult to prove criminal allegations beyond reasonable doubt. That explains why I am firmly of the view that the Electoral Act should be amended to shift the burden of proof to the Independent National Electoral Commission. It should be their burden to prove that they conducted an election properly.

It should be recalled with admiration that after the inauguration of President Umaru Yar'Adua in 2007, in a most unprecedented show of sincerity and humility, he acknowledged the irregularities in the conduct of the 2007 general elections that brought into power and gave his word to reform the electoral system. He then set up the Justice Uwais Electoral Reform Committee on 28th August, 2007 and the Committee submitted its report on 12th December, 2008.The Committee made far reaching recommendations on the entire structure of INEC, adjudication of electoral dispute, role of security agencies and so on. There are two specific portions of the Report[38] that are on point and they are reproduced here:

Paragraph 2.2: ***THE ROLE OF INSTITUTIONS, AGENCIES AND STAKEHOLDERS IN SHAPING THE ELECTORAL PROCESS***

2.2.3 ***The Role of the Judiciary in the Determination of Election Petitions***

a) The judiciary should ensure prompt resolution of election-related disputes by increasing the number of election petition tribunals and consolidating petitions.

[37](2016) 8 NWLR (Pt. 1513) 38 at 101 E-F.

[38] https://nairametrics.com/wp-content/uploads/2012/01/Uwais-Report-on-Electoral-Reform.pdf

b) *The Electoral Act 2006 should be amended to shift the burden of proof from the petitioners to INEC to show, on the balance of probability, that disputed elections were indeed free and fair and candidates declared winners were truly the choices of the electorate.*

c) *The procedure for producing evidence before tribunals should be re-examined in order to speed-up the hearing of electoral cases. Specific procedure rules should be made for election petitions.*

Paragraph 2.5: ***ENSURING THE CONCLUSION OF ELECTION DISPUTES BEFORE SWEARING IN OF NEWLY ELECTED OFFICIALS***

(a) *There is need to produce rules and procedures that enhance speedy disposal of election petitions.*

(b) *The law should shift the burden of proof from the petitioners to INEC to show that disputed elections were indeed free and fair and complied with the provisions of the Electoral Act.*

(c) *Rules of evidence should be formulated to achieve substantive justice rather than mere observance of technicalities.*

(d) *Elections to the office of the President and Governors should be held at least six months before the expiration of their terms. A maximum of four months should be devoted to hearing petitions by the tribunals and another two months for hearing appeals by the Court of Appeal or Supreme Court. No executive should be sworn in before the conclusion of the cases against him/her. In the case of legislators, no one should be sworn in before the determination of the case against him/her.*

(e) *INEC should have no right of appeal.*

The author is in total support of the above recommendations. On the issue of concluding election petitions before a person is sworn into office, it is to be added that the system now is that the 'victorious' party whose election is being challenged is already in office earning salaries and allowances. He uses State resources to defend his election petition.

Meanwhile, he is always in a dilemma on what the outcome of the election petition may be. As a result of this, he may resort to the ignoble task of siphoning State resources with his cronies so that he would have 'something' to show for his stay in office in the event that he is removed by the court. In effect, there is no level playing ground for the parties during the litigation. The recommendation cures this obvious loophole.

The recommendation on shifting the burden of proof on INEC is self-evident from the conduct of flawed elections and lamentations of the court on the impunity, criminality and rascality that holds sway in our elections. Just as has been earlier examined in this paper, it is most urgent, fundamental and expedient to the stability and rectitude in our electoral system to shift the burden of proof from the petitioner to INEC.

Once this is done, it will naturally result in a departure from the time- honoured judicial decisions and consign them to history. Let me just give two examples.

The First is on calling of a maker of a public document to testify before value can be ascribed to it. In the recent case of *Abubakar v INEC*[39], the Chief Justice of Nigeria authoritatively re-enforced the position of the law when he declared:

> The version of the law I know on the subject (i.e. if there are other versions) is that when documents are tendered from the bar, such documents have no probative value until the makers of such documents are called to testify on the document and are subjected to cross-examination on them. Whether it is a certified public document or any other document, the need for the maker to testify and be cross examined on it has not yet been jettisoned by this court. I have read the case of *Magaji v Nigeria Army (supra)* relied upon by the appellants… There is nothing in that judgment which suggests that whenever a certified true copy of Public Document is tendered in court the maker need not be called to testify. That would be strange.

This is a sound statement of the law which is like this because the burden of proof is on the petitioner. The said burden is hardly discharged except in rare cases. This is because it is extremely difficult to expect staff of INEC who made the public documents to come forward and give evidence against INEC. However, once the burden is shifted to INEC, then it becomes their lot to prove the veracity and credibility of their documents. After all, INEC knows the makers of the election result sheets because they hired them *ab initio* either as ad-hoc or permanent staff.

Where they fail to call the makers, then the court can safely give value to the documents by relying on Sections 146 and 148(e) of the Evidence Act, 2011 which states that the court shall presume every certified true copy of a public document produced before it to be genuine. Relying on such public document without oral testimony of the maker is not

[39](2020) 12 NWLR (Pt. 1737) 37 at 129 A-B; G-H. See also Andrew v. INEC (2018) 9 NWLR (Pt. 1625) 507.

out of place. After all, by Section 31(5) of the Electoral Act, 2010 as amended, any person who had reason to believe that information supplied to INEC by a candidate is false can apply to INEC for the copy of Form CF001 and by simply relying on that Form, without calling its maker, the candidate may be disqualified as we saw in *PDP v Degi-Eremienyo & Ors* (Bayelsa Governorship pre-election case).

The second example is the law that for a petitioner to prove non-compliance with the Electoral Act he must call the evidence of witnesses from the polling units complained of.[40] The challenge has always been how many witnesses can a petitioner in a Presidential or Governorship election call when the constituency is so large and also the Practice Direction has allowed him only 14 days[41] to prove his case. The odds are simply against the petitioner because of the demand that he must call witnesses from the polling units notwithstanding that he has tendered INEC certified election results from those units. If he fails to call the witnesses who saw what happened at the polling units, the courts will hold that he dumped the documents on the Tribunal or Court.

This obvious challenge placed by the law on the path of a petitioner attracted the attention of Hon. Justice Dr. Ibrahim T. Muhammad, the Chief Justice of Nigeria, in the recent case of *Atiku Abubakar v INEC*[42]which is the 2019 Presidential election petition. His Lordship stated:

> There is no doubt the task of establishing a petition on the ground of non-compliance is a herculean and daunting one placed on the petitioner by law. A petitioner who desires and urges the court to set aside the result of an election on ground of non-compliance with the Electoral Act has the onerous duty of proving the alleged non-compliance by calling witnesses from each of the polling units complained of. It has to be noted that he does not just call any witness. He must present eye-witnesses, i.e. those who were present at the various polling units across the election area. In the instant case, the entire country. It is indeed a daunting task…. It is more difficult now under the present legal regime of the Electoral Act, 2010 (as amended) where the Election Tribunal or court has 180 days to hear and determine petitions. Where is the time to call such number of witnesses? I say this to demonstrate the frustration of a petitioner seeking to set aside an election on ground of non-compliance.

[40] *Andrew v INEC* (2018) 9 NWLR (Pt. 1625) 507; *Buhari v Obasanjo* (2005) 13 NWLR (Pt. 941) 1; *Hashidu v Goje* (2003) 15 NWLR (Pt. 843) 352; *Abubakar v INEC* (2020) 12 NWLR (Pt. 1737) 37

[41] Paragraph 41(10) of the First Schedule to the Electoral Act, 2010 (as amended)

[42](2020) 12 NWLR (Pt. 1737) 37 at 125 A – C; F – G.

The legal mountain and daunting task placed before a petitioner means that INEC that conducted a flawed election usually escapes scrutiny. The tide will change if the burden is shifted. After all, it is INEC that conducted the election in all the polling units and should call the officers who officiated at the polling units complained of to answer for their actions. It is the considered view of the author that if we want to see the best of INEC, then time has come for a shift in burden of proof to her. Experience has shown that challenges bring out the best in people or organisations.

7. Conclusion

Real electoral justice brings peace to the land. Justice must aim at discovering the truth and have the courage to pronounce on that truth without fear or favour. There should be a conscious effort to build on peoples' confidence in the judiciary. The lesson here is that sometimes, the judiciary as an institution must pause to do an introspection, reflection and appraisal of her roles in the enthronement and sustenance of democracy in Nigeria. The judiciary is a major stakeholder in the sustenance of our democracy. If the ship of State will capsize due to bad governance, all of us, including the judiciary, are in it and will sink together with the ship. Therefore, since the Constitution has vested on the judiciary the authority of a watchdog of democracy, it must play that pristine role with thirst and hunger for enthronement of justice, probity, integrity and credibility in the electoral process for the sake of our conscience, respect for the Constitution and fear of God. Of course, in discharging that duty, the judiciary will not be scared by some of the unfair attacks and criticism by partisan minds and some of their lawyers whose idea of justice is only when the judgment of the court is in their favour. But it is injustice when the judgment is against them. The judiciary must stand up to its duty and play its role in the reform of the election litigation process.