

ELECTORAL REFORMS IN NIGERIA: REPLACING *AD HOC* TRIBUNALS WITH ELECTORAL AND CONSTITUTIONAL COURTS

Joseph Ekpe Edet, PhD

Formerly Head of Department of Private Law

Faculty of Law

University of Calabar, Nigeria

Abstract

This article reviewed the innovations and implication of the key provisions of the new Electoral Act. It recommended a further amendment of the Electoral Act to include the introduction of permanent electoral court or constitutional court in the judicial system to replace the *ad hoc* electoral tribunals. It is pertinent to recall that the Electoral Decree 1977 introduced the use of Election Petition Tribunals which replaced the use of regular courts which were hitherto vested with the powers to settle electoral disputes. It is trite that Nigeria has witnessed many elections since Independence in 1960. Even during the *interregna* by the military, elections were conducted with the aim of installing an ideal democratic governance. The various governments had experimented on different electoral system to the point of an experiment on diarchy by the administration of military President Ibrahim Babangida. The regime of General Sani Abacha even attempted a transmutation from military to civilian governance. The effort died with him. The various Electoral Acts provided the legal and institutional framework for the conduct of these electoral experiments and elections. The electoral process is an ideal and integral part of the democratic process, whether in developed climes or developing nations. A malfunctioning electoral system would certainly usher in undemocratic ideals which will inadvertently lead to maladministration and bad governance. Nigeria has made various changes to laws governing elections in the country with the Electoral Act amended severally to reflect the whims and wishes of the electorates and sometimes that of the establishment. The latest in line of such amendments is the Electoral Act 2022 signed into law by President Muhammadu Buhari. It was birthed under a somewhat controversial circumstance on the 25th of February, 2022.

Key Words: Reforms, Ad hoc, Tribunals.

KEY PROVISIONS INTRODUCED IN THE ELECTORAL ACT 2022

Financial Independence of INEC and Early Release of Election Funds to INEC

The Electoral Act 2022 introduced the Independent National Electoral Commission Fund. The Act has created room for the Commission to have financial autonomy by receiving funds for the conduct of elections directly from the Revenue Mobilization Allocation and Fiscal Commission, an agency of the Federal Republic of Nigeria that oversees the revenues accruing to and disbursement of such funds from the Federal Account. The Body also ensures that there is conformity and equity in the nation's revenue allocation formulae. Thus, the erstwhile arrangement of getting funds subsequent to vetting by the Ministry of Finance has been jettisoned. Additionally, Section 3(3) of the Electoral Act 2022 provides that funds for general elections must be released timeously at least one year before the election. The section provides thus: "The election funds due to the Commission for any general election are to be released to the Commission not later than One Year before the next election".

Early Conduct of Primaries and Submission of Candidates List

The Electoral Act stipulates and makes it mandatory for political parties to hold a primary and subsequently submit the list of candidates not later than 180 days before the date appointed for a general election. This new development in the timeframe for submission of the names of party candidates from 60 days to 180 days makes it a mandatory requirement for parties to conduct primaries early enough. Indeed, time is of essence.

Aspirants Have Power to Institute Action for False Information

The Electoral Act 2022 (Section 29(5)) provides that only aspirants who took part in a primary election can challenge candidates who submit false information to the INEC. This therefore repeals the provision in the former Act where any member of the public could challenge a candidate with false information. The Act has reserved that only to those who participated in the primaries wherein the candidate with false information emerged. It frowns against being a meddlesome interloper.

Legal Backing of Electronic Voting and Transmission of Result

Section 47 and 50(2) (Electoral Act 2022) gives legal backing for the use of smart card readers, electronic accreditation of voters and any other voter accreditation technology that INEC deploys. Where the card deployed by the Electoral Commission (INEC) fails to function and a fresh card reader or technological device is not deployed, the election shall be cancelled and another election scheduled within 24 hours.

Timeframe for Publication of Election Notice Extended

The Commission has been given more time to publish the date of the election and the place at which nomination papers are to be delivered. Section 28 and 30 of the Act stipulates that the Commission shall, not later than 360 days before the day appointed for holding of an election under this Act, publish a notice in each State of the Federation and the Federal Capital Territory.

Political Appointee Not Eligible as a Voting Delegate or Aspirant

Section 84 of the Electoral Act 2022 makes provision for the nomination of Candidates by political parties. One of its provisions is the exclusion of Political Appointee from acting as a Voting Delegate. Subsection 12 provides that no political appointee at any level shall be a voting delegate or be voted for at the convention or congress of any political party.

Virtually Impaired, Special Need and Vulnerable Voters

People living with disability are recognized in the Act. The Commission shall take reasonable steps to ensure that persons with disabilities, special needs and vulnerable persons are assisted at the polling units by the provision of suitable means of communication, such as braille, large embossed print, electronic devices, sign language interpretation, or off-site voting in appropriate cases.

Provision for Central Electronic Voters Database

The Commission will keep the Register of Voters at its National Headquarters and other locations. Section 9(2) of the Act provides that the Register shall be kept in electronic format in addition to being kept in manual, printed, paper-based or hardcopy format.

Redefinition of Over-Voting

Section 51(2) of the Act 2022 provides that where the number of votes cast at an election in any polling unit exceeds the number of accredited voters, the Presiding officer shall cancel the result of the election in that polling unit. This is an improvement on the repealed electoral law which provided that the number of registered voters, as opposed to accredited voters, shall be the factor in determining over-voting at election tribunals and only the commission can declare the election at the polling unit as null and void.

The Commission's Power to Review Involuntarily Declared Result

Under the Electoral Act 2022, INEC now has the power to review, within Seven (7) days, the declaration and return where the Commission determines that the said declaration and return was not made voluntarily or was made contrary to the provisions of the law, regulations and guidelines, and manual for the election.

Early Commencement and Longer Period of Campaign

Section 94 of the Electoral Act 2022 provides that the period of campaigning in public by every political party shall commence 150 days before polling day and end 24 hours prior to that day. This affords political parties and their candidates ample time to market their party and candidates to the populace.

Death of Candidate Before or During Election

The new Act has put the controversy usually generated by the death of a Candidate before or during election to rest, as the death of a candidate in elections had generated lots of conflicts among political parties and political actors in the past. The new Act provides that where before the commencement of polls a candidate dies, the election shall be postponed and The Commission shall appoint some other convenient date within 14 days. Section 34 of the new Act in its proviso states that in case of presidential or gubernatorial or Federal Capital Territory area council election, the running mate shall continue with the election and nominate a new running mate. If after the commencement of polls and before announcement of final winner/ announcement of

final result and declaration of a winner, a candidate dies, the election will be suspended for not more than 21 days.

The Implication and Developmental Trend of Electoral Act 2022

Lawmaking is one of the developmental process of any state. When new laws are made, it brings or introduces new regulation of conduct and this is applicable to the new Act which has the tendency, if properly applied or implemented, to revolutionize our electoral system. One of the major development that the new Act brought is that it has queued into the digital or computer age by creating an electronic database and also electronic transmission of result. This will reduce rigging or manipulation of election process and ensures eligible voters are not disenfranchised based on disability amongst many other innovations.

INTRODUCTION OF ELECTORAL COURT OR CONSTITUTIONAL COURT

The function of hearing and authoritatively determining disputed claims to legal rights or obligations constitutionally belongs to the Judiciary. This is referred to as Judicial power. Judicial power is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties that bring a case before it for decision (*Muskrat v United States America* 219 US 346 e 361(1911)). In the *United States of America v Arrendondo* (31US)691(1832) judicial power was defined as the “right to determine actual controversies arising between diverse litigants duly instituted in courts of proper jurisdiction. In *Abraham Adesanya v President of the Federation of Nigeria* (1981) I A11 N.L.R (pt.1) 1 at 40. Idigbe JSC held that the phrase ‘judicial Power’ denotes the power of the court to decide and pronounce a judgment and carry it into effect. The Black’s Law Dictionary (Bryan A. Garner (ed) Thomson West Publishing Co.2004,8thEdition) defines judicial power as the authority vested in courts and judges to hear and decide a case and to make binding judgments on them; the power to construe and apply the law when controversies arise over what has been done or not done under it. In Nigeria, judicial power is captured and defined in the Constitution of the Federal Republic of Nigeria, 1999 thus:

6 – (1): The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation.

Section 6(6)(b) states as follows that judicial powers vested in accordance with the foregoing provisions of this section- shall extend to all matters between persons or between government or authority and to any person 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. Thus, whereas, access to the courts is usually free to all manner of people who have some legal rights or claims to enforce as stated above, administrative justice is available strictly only to those specifically and expressly authorized to apply for it. Election Tribunals were set up for aggrieved parties to ventilate their grievances instead of resorting to the regular court system. The word ‘tribunal’ applies to any court, judicial body, or board with quasi-judicial functions. It is an administrative body that adjudicates disputes arising out of claim of rights or administrative procedures. In Roman Law, the term tribunal applied to an elevated seat occupied by the Chief Judicial Magistrate (West’s Encyclopedia of American Law, the Gale Group Inc., 2nd ed., copyright (2008)). Like other tribunals, Election Tribunals are judicial or quasi-judicial set up on an ad-hoc basis to settle electoral disputes arising from the conduct of elections. Among the numerous disputes meant to be settled by election tribunals are:

1. Challenging the results of an election (ie the return of a candidate other than the petitioner as the winner).
2. Allegation of improprieties and fraud on the part of the candidate.
3. Allegation of non qualification to contest an election on the part of a candidate to an election made by a petitioner.
4. Challenging the presentation of a candidate other than the petitioner by a political party.

There is really no qualms with tribunals, my qualms is with the ad hoc nature of a serious matter. The *raison d’etre* for setting up special bodies to handle

election petitions has been criticized. Indeed, opinions are divided as to the necessity where there exist competent courts of record to settle such issues. It is viewed from some quarters as a distraction, unnecessary duplication and above all entronement of huge expenditures on the already impoverished polity (O. Agbakoba, H.Ogbonna, C. Ogham-Emeka; Manual on Election Petitions in Nigeria (The Human Rights Law Service (HURILAWS) 2007). Reasons, however, abound on why Election Tribunals are established.

Firstly, Election Tribunals are strictly courts, except in nomenclature. Like regular courts they form part of the machinery of adjudication available in the country for resolving electoral disputes. Indeed, many tribunals have all the trappings and characteristics of regular courts, including relatively permanent and independent existence, fairness and openness of proceedings, and the power to issue binding orders and decisions (Ibid).

Secondly, the urgency and speed required in the settlement and determination of electoral issues necessitates the establishment of special courts to promptly dispose such petitions. The legal maxim ‘justice delayed is justice denied’ appropriately supports this point. This principle is the basis for the right to a speedy trial and has become a rallying cry for legal reformers who view regular courts as acting too slowly in resolving legal issues because the regular court system is too complex and overburdened. Delays associated with judicial proceedings are well documented.

Thirdly, electoral cases are said to be ‘*sui generis*’, lawyer’s language and Latin for “its own kind or class; unique or peculiar in its ways, form and manner”. Accordingly, the rules that govern them are most of the time different from the rules that govern other civil actions. This point was well made in *CheNwole v Amah Iwuagwu*, (16 NWLR Pt 895,61,87; *Samano v Anka* (2000) NWLR(P1640)28) where the Court of Appeal held that; ‘Election petitions are by their very nature peculiar from other proceedings and are very important from the point of view

of public policy. It is the duty of the courts therefore to hear them without technicalities to unduly fetter their jurisdiction'. In the words of Uwaifo JSC in *General Buhari v AlhajiDikko Yusuf*¹, ((2003)14NWLR Pt. 541,446, p.498.) "An election petition is heard and determined by an appropriate Election Tribunal as usually provided by the constitution. In the1999 constitution, such provision is made under section 285 and the sixth schedule to the constitution. The procedure is largely governed by a law made specifically to regulate the proceedings. The jurisdiction of an Election Tribunal to deal with election petitions is of a very special nature different from that in an ordinary civil case. It is plain that the proceedings are special for which special provisions are made under the constitution. Election petitions are distinct from the ordinary civil proceedings. It is such that in certain circumstances the slightest default in complying with a procedural step which otherwise could be cured or waived in ordinary civil proceedings could result in fatal consequences to the petition".

It should be noted that Election Tribunals are preferred to regular courts in the determination of election disputes because electoral cases are '*sui generis*'. The uniqueness or peculiar nature is in relation to the procedure in its trial and determination (Onamade, 2007:8). The courts have equally conferred and confirmed this status (*Onitiri v Benson* (1960) SCNLR 314,317; *Oyekan v Akinjide* (1965)NMLR381,383; *Obih v Mbakwe* (1984) 1SCNLR 192,p.285-286.). Indeed, the legislation dealing with electoral matters are also governed by the doctrine. Oguntade JCA (as he then was) confirmed this in *Abdullahi v Elayoand others* ((1993) NWLR Pt.268,171,197-198) thus: "A legislation dealing with election is often a special one with special rights and duties. It is *sui generis* with its peculiarities which a court must recognize and take into account".

Election legislation also creates a special jurisdiction and the ordinary rules of procedure in civil cases do not always serve to effectuate its purpose. Thus paragraph 45 (1) of Decree No. 18 of 1992 provides:

Subject to the express provision of this Decree, the practice and procedure of the Tribunal in relation to an election petition shall be assimilated as nearly

as may be to the practice and procedure of the High Court in the exercise of its civil jurisdiction and the High Court Civil Procedure rules or Civil procedure Code shall apply with such modifications as may be necessary to render them conveniently applicable as if the petitioner and the respondent were respectively the plaintiff and the defendant in a civil action.

It follows therefore that when applying the ordinary rules of procedure of the High Court in civil matters to election matters governed by legislation, the express provisions of the relevant

legislation must be held inviolate. The doctrine of *sui generis* is made applicable to election petitions because as a matter of deliberate policy, election petitions are expected to be devoid of procedural court that cause delay and the disposition of substantive disputes, hence the relevant rules are issued in mandatory forms (Uwais JSC in *Nwankwo v Attah* (1999) 5 NWLR(Pt.601)134)

Nevertheless, the doctrine is not cast on stones as it can in appropriate cases or circumstances be applied liberally in the interest of Justice. The Supreme Court had approved some relaxation of the strict application. The liberal application of the doctrine strengthens the courts jettisoning of technical rules. The Court had stated that ‘petition must be weighed against the wider need not only to do justice but also to be seen to be doing it (*Buhari v Yusuf* (2003)14NWLR p.841). In *Egolum v Obasanjo* ((1999)7NWLR(Pt.611), 355,413) ,Achike JSC stated that ‘The heydays of technicality are now over. This much was emphasized by Holden J in *Dogari v Gwarzo and ors* ((1965) NNLR 9@10) that allegation in electoral matters must be pronounced upon judicially and no technicalities can be allowed to stand in the way of that inquiry. Equally in *Nwobodo v Onoh*, ((1984)1SCNLR 1@92;(1984) NSCC 1) Uwaifo JSC stated that ‘it is the duty of the courts therefore to endeavor to hear petition without allowing technicalities to unduly fetter their jurisdiction’.

Electoral Tribunals are known for their flexibility. Cases are often decided upon their own facts and merits, and not on any principle of precedents already established by it or other tribunal. In other words, general principles of law applicable in other civil matters are not primarily applicable per se to election petitions. The argument equating ‘cause of action’ in civil cases to ‘cause of action’ in election petition was roundly rejected (*Ezeobi v Nzeke* (1989)1 NWLR(Pt.98) p.478) Thus an election matter is not

the same as ordinary civil proceedings. Above all, time is of essence in the determination of election petitions. It must always be born in mind that in the determination of election petition matters, public policy and the constitutional right to fair hearing within a reasonable time dictate that time is a rare commodity. In *Ambassador Akpang Obi-Odu v Donald Etim Duke*, ((2005)10 NWLR Part 932,105@pp144-145), Dongban-Mensem (JCA) stated clearly that as a matter of expediency and in the expected and established spirit of election petitions, time is of essence. Reason being that, it is the right of the electorate to know within a reasonable time frame who of the contending parties is their elected representative but this knowledge becomes merely academic at the expiration of the term for which the election was held². (*Mohammed H Rimi v INEC and anor* (2004)IJNWLR pt.895).

It is hereby suggested that the *sui generis* status of the electoral processes and procedures should be elevated to the establishment of electoral or constitutional courts dedicated purely and only to electoral matters and other constitutional matters. Consequently, all pre electoral matters, electoral matters and matters arising from elections on the whole should be handled by the Electoral Courts. Indeed, matters that bothered on constitutional interpretations should be handled by this special court. There should also be special judges and judicial officers trained specially for electoral cases and other constitutional matters. After more than twenty years of uninterrupted and unbridled democracy, our democracy has lost the flavour of 'nascence' and has come to stay thus the need to have permanent structures put in place instead of the *ad hoc* approach we've adopted and operated so far. It's really a distraction to co-opt regular judicial officers or to transform existing courts to tribunals as other civil and criminal cases are usually left unattended to. Nigeria has a rich reservoir of experience and qualified judicial personnel who are on standby to fill in vacant positions were created. Nigeria has overtime contributed so many judicial officers to other African countries. It is time to tend to our own domestic needs, in the way and manner the former President of the United States of America, Donald Trump, whose catch phrase was "America First". Indeed, a separate set of judicial officers should be appointed up to the apex Court to handle electoral and constitutional matters. The distractions on the existing court system are huge and monumental especially as they are made to compete with

other equally important litigations that are made to wait during the pendency of electoral tribunals.

In actual fact, similar courts exist in South Africa, United Kingdom, the Oriental Republic of Uruguay and elsewhere. We only need to redesign ours to suit our peculiarities.

The electoral court in South Africa oversees the electoral commission established by the Electoral Commission Act, 1996 to replace Special Electoral Court which oversees the 1994 elections and her status similar to that of the high court. The implication being that even the Electoral Commission may be granted such independence expected of it to the point that it may not really be under the presidency.

In Uruguay, Article 278 of the 1934 Constitution assigns electoral court the competencies to exercise overall responsibilities for electoral acts and procedures and to decide appeals and complains and undertake the functions of a supreme electoral court of justice. Thus, the court does not only hear and review electoral disputes and complains, it is also the highest court on all election related matters. A more compelling need for the establishment of electoral courts independent of regular courts would be the need for expeditious determination of cases. There have been some very protracted election cases in the past that dragged on incessantly and endlessly. Delay in the dispensation of justice also remains a challenge, which may create room for unnecessary dispute. It is trite fact that justice delayed is justice denied. The delay creates animosity, anxiety, doubt and disbelief among the electorates in the activities of the judiciary making them restless and agitated while waiting endlessly for electoral results to be announced. This is particularly worrisome despite the status of electoral tribunals as *sui generis*. Article 25 of the First Schedule to the Electoral Act 2022 clearly prohibits undue postponement and adjournments. It states:

No formal adjournment of the tribunal or court for the hearing of an election petition shall be necessary, but the hearing shall be deemed adjourned and may be continued from day to day until the hearing is concluded unless the tribunal or court otherwise directs as the circumstances may dictate.

Notable cases that suffer inordinate delays due to unnecessary proliferation of witness and endless adjournment include that of *Buhari v Obasanjo* ((2005) 5 NWLR

(pt.910) 241.) in which about two hundred and sixty seven (267) other respondents most of whom were INEC officers and a total of four hundred and seventy one (471) witnesses, about three hundred and eleven (311) exhibits were tendered and admitted, about two hundred and ninety-four (294) photographs exhibited by the petitioners and three hundred and seventy-seven (377) photographs exhibited by the respondents. The case of *Ngige and Peter Obi* ((2009) 14 NWLR (pt.999) 1 at 95) was also one of the most protracted election cases, which spanned a period of three years with a total number of four hundred and eighty two (482) witnesses testifying. The petitioner called forty-five (45) witnesses, the first respondent called four hundred and twenty-five (425) witnesses while the 2nd respondent called eleven (12) witnesses. The judgment of the tribunal was about seven hundred (700) pages. These scenarios were repeated in *ANPP v Boni Haruna and ors* ((2003) 15 NWLR (pt.541) 546) in respect of Adamawa State governorship election petition which involved two thousand one hundred and eighty eight (2188) respondents. The case of *Akpang Obi Odu v Donald Duke* ((2005) 10NWLR (pt. 990) 65.) in respect of Cross River State governorship election involved about two thousand three hundred and forty (2340) respondents. The implication of these long delays can only be imagined especially in the face of the fact that most of these parties to the dispute were already holding and enjoying the offices. A special court system will regulate all of these.

Another factor that precipitates electoral dispute and a need for an Electoral/Constitutional court is endless litigation by Nigerian politicians. Nigerians are deeply litigious and the concept of magnanimous in victory seems not applicable in our climes. Not long ago, the Supreme Court rejected attempt by a former Governor of Rivers State, Chief Celestine Omehia to join in a suit filed by Cyprian Chukwu seeking to determine and possibly abridge the tenure of office of the then Governor of Rivers State, Rotimi Amaechi. The Supreme Court stated that Omehia had failed to show what special interest he had in the matter to justify the Appeal court entering a decision to join him in the matter. He was shut out for lacking the *locus standi* in an action challenging when Amaechi's tenure of office would expire. (Guardian Newspapers Limited, Lagos Saturday, Feb 8, 2014, p.1). Clearly even the Supreme Court is tired, as there must be an end to litigation.

Conclusion

Endless and unending litigation is a recipe for electoral tension and dispute. Establishment of Electoral Courts may reduce endless litigation as some of the so-called aggrieved litigants just take advantage of technicalities and loopholes in regular courtrooms to find their way to political offices. Nigeria's political system should not be seen as democracy decreed by the courts but that which takes into cognizance the will and wishes of the people. There is serious crisis of confidence in the judiciary with regular courts sitting as electoral tribunals. Thus a very high need to separate them, make them permanent and raise to the fore the *sui generis* status of electoral courts.

References

Agbakoba, O., Ogbonna, H., Ogham-Emeka, C (2007). *Manual on Election Petitions in Nigeria*. Lagos: The Human Rights Law Service.

Buhari v Yusuf (2003) 14 Nigeria Weekly Law Report p.841

Electoral Act of the Federal Republic of Nigeria 2022

Ezeobi v Nzeke (1989)1 Nigeria Weekly Law Report (Pt.98)p.478

Garner, B.A. (ed)., (2004). *Black's Law Dictionary*. 8th Edition. Minnesota: Thomson West Publishing Co.

Guardian Newspapers Limited, Lagos Saturday, Feb 8, 2014, p.1

Mohammed H Rimi v INEC and anor (2004) IJ Nigeria Weekly Law Report pt.895

Muskrat v United States America 219 US 346 e 361(1911)
(31US) 691(1832)

Obih v Mbakwe (1984) Supreme Court of Nigeria Law Report 192,p.285-286

Onamade, P. A., (2007). *Advocacy in Election Petitions*, Lagos: Philade Co. Ltd.

Onitiri v Benson (1960) Supreme Court of Nigeria Law Report 314,317

Oyekan v Akinjide (1965)NMLR381,383

Samano v Anka (2000) Nigeria Weekly Law Report (Pl640)28

Uwais JSC in *Nwankwo v Attah* (1999)5 Nigeria Weekly Law Report (Pt.601)134

West's Encyclopedia of American Law. (2008). 2nd Edition. The Gale Group Inc.

(1981) I All Nigeria Law Report (pt.1) 1 at 40

16 Nigerian Weekly Law Report, Pt 895,61,87

(2003)14 Nigeria Weekly Law Report Pt. 541,446, p.498

(1993) Nigeria Weekly Law Report Pt.268,171,197-198

(1999)7 Nigeria Weekly Law Report (Pt.611), 355,413

(1965) Northern Nigeria Law Report 9@10

(1984)1 Supreme Court of Nigeria Law Report 1@92;(1984) NSCC 1.

(2005)10 Nigeria Weekly Law Report Part 932,105@pp144-145

(2005) 5 Nigeria Weekly Law Report (pt.910) 241

(2009) 14 Nigeria Weekly Law Report (pt.999) 1 at 95

(2003) 15 Nigeria Weekly Law Report (pt.541) 546

(2005) 10 Nigeria Weekly Law Report (pt. 990) 65