

Accountability Brief

The Judiciary: Upcoming 2023 Elections In Nigeria
Pathway To Credibility

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EXECUTIVE SUMMARY

The role of the judiciary in deciding cases on electoral disputes is not one that is lightly made. It involves several factors and wisdom which leads to favourable and unfavourable outcomes. When a decision is made in a dispute there will always be a victorious party and an aggrieved party and therefore such decisions must be seen to be made equitably. It must be clear to those not involved in the dispute that based on all the facts and evidence pleaded, there was no other decision that could be reached other than the one reached. There should be no room for doubt or misconception of the outcome of the matter and should be simplified in a way that the parties can understand it and the arbitrator can defend it. Such is the position the courts find themselves in when resolving disputes in accordance with the Laws and though not always understood by the populace it should be clear and transparent to ensure that the rule of law remains supreme.



BACKGROUND

The judiciary being the third organ of government plays a significant role in the adjudicating of disputes between parties. Recognition of the power of the judiciary is contained in the section 6 of the 1999 Constitution of the Federal republic of Nigeria (as amended) which also classifies the various courts in Nigeria.

Section 285 (1) of the 1999 Constitution as amended provides that "There shall be established for the Federation one or more election tribunals to be known as the National Assembly Election Tribunals which shall, to the exclusion of any or tribunal, have original jurisdiction to hear and determine petitions as to whether - a) any person has been validly elected as a member of the National Assembly; (b) the term of office of any person under this Constitution has ceased; (c) the seat of a member of the Senate or a member of the House of Representatives has vacant and; (d) a question or petition brought before the election tribunal has been properly or improperly brought."

This provision therefore empowers only the judiciary to decide on issues that arise during the electoral process. The judiciary makes pronouncements on the validity of the electoral process as well as who has emerged as a candidate for a political party during pre-election disputes and who has emerged as the chosen candidate after the electoral process.

This decision is not only time bound but is essential to resolve any lingering issues raised by aggrieved candidates prior to, during and after the electoral process. Although the judiciary has been said to pick the winner of an election, this has been argued to diminish the wishes of the electorate. Former President Goodluck Johnathan said "Ballot papers should be the basis of selecting political officeholders. If it is the judiciary that should select them then we are not yet there." [1]

Whilst emphasis has been made on the power of the judiciary to determine elections one way or the other, limited discussions are held on the plight of the judiciary and the common man regarding access to justice during the period when judges are seconded to hear the election disputes and the cases before their courts are adjourned for long period of times.

The Electoral Act 2022 was enacted to address challenges and gaps discovered in the 2010 Act and has incorporated innovations that seek to improve the electoral process in Nigeria, some of the provisions have however been said to be contrary to the provisions of the Constitution and it is trite Law that any provision in Law contrary to the provisions of the Constitution will be held to be null and void to the extent of its inconsistency.

One of such provisions is section 29(5) and 84(14) which provides that the Federal High Court has exclusive jurisdiction to determine pre-election matters.

This is contrary to section 285 of the Constitution which states that the composition of election tribunals is as contained in the sixth schedule of the Constitution where the members of the tribunal emanate from the courts established by the Constitution. When this issue is raised before the supreme court, a decision on its constitutionality will emerge.

The judiciary in determining election petitions face various obstacles ranging from lack of manpower, lack of funding to time limitations.

Election petitions being 'sui generis' and time bound are to be determined within 180 days as provided for in section 285 (10) of the Constitution "a court in every pre-election matter shall deliver its judgment in writing within 180 days from the date of filing the suit".

A reading of this provision alongside sections 29(5) and 84(14) of the Electoral Act 2022 shows the amount of responsibility the Federal High Court is saddled with. According to Justice Tsoho, a total of 1,838 pre-election cases were filed in the court, out of which 1,285 cases have been disposed of, leaving a total of 556 cases pending [2].

A court with a total number of 76 judges in all jurisdiction's nationwide has been given the exclusive mandate to hear 1,838 cases all time bound with judgments delivered in writing has no other resolve than to suspend/adjourn the cases being heard until the cases are decided. This drastically affects the common man as he will not have his day in court and as the legal maxim states, justice delayed is justice denied. This concern was raised by the President of the Nigerian Bar Association (NBA), Yakubu Maikyau, SAN who stated that "the suspension of the hearing of all regular cases before the judges who constitute the task force was of serious concern to the Bar." [3]

Further challenges include the fact that no increase in manpower was envisioned by the Act and no financial support was accorded to the court in the carrying out of this task. For the task to be achieved, an emergency relief fund was approved by the Chief Judge of Nigeria (CJN), Hon. Justice Olukayode Ariwoola to remedy it, and the Chief Judge of the Federal High Court had to issue a practice direction on pre-election matters to "provide for a fair, impartial and expeditious determination of pre-election cases" [4].

Some of the provisions in the practice directions include the commencement of matters by originating summons, the filing of affidavits by litigant lawyers stating if there is no multiplicity of action on the same

[1] <https://punchng.com/ballot-not-courts-should-decide-election-winners-jonathan/>

[2] <https://www.vanguardngr.com/2023/01/electoral-act-2022-the-big-hurdle-before-federal-high-court-judges/>

[3] <https://www.vanguardngr.com/2023/01/electoral-act-2022-the-big-hurdle-before-federal-high-court-judges/>

[4] <https://guardian.ng/news/federal-high-court-issues-new-practice-direction-on-pre-election-matters/>

subject matter, use of electronic means to inform counsel of urgent court events and the prioritization of pre-election matters by the court. The Act should have taken into account good practices that have evolved in the courts and infrastructural support available to the courts.

The intendment of the provision on exclusivity is warranted given the large number of inconsistent decisions given by courts based on the previous Act. Residing the jurisdiction solely on the Federal High Court will limit or eliminate inconsistent decisions, however, the importance of adequate infrastructure and funding to be made available to the court to achieve its mandate and the desired outcome.

A significant challenge faced by the judiciary prior to the 2022 Act is the issue of multiplicity of court decisions on the same subject matter leading to conflicting judgments and in my view room for assumptions of judicial corruption by the public. This is because of the doctrine of judicial precedents and the fact that courts of coordinate jurisdiction should consider their judgments as persuasive.

Releasing conflicting judgments, resulting from multiplicity of actions instituted by lawyers should be frowned upon as it does not only lead to confusion but allows for opinions to be made about the judiciary.

The National Judicial Council in a bid to prevent such situations issued a directive to the heads of court to "embrace prudential limitations on their powers with a view to curtailing the incidences of unscrupulous forum shopping disrupting the administration of justice and the democratic process."^[5]

This has been argued to be an abuse of power as decisions on whether or not an action is meritorious will lie solely with the heads of court and result to lack of fair hearing for the litigants. A better approach seems to be the one adopted in the practice directions issued by the Chief Judge of the Federal High Court where counsel in pre-election matters are mandated to depose to affidavits stating that there is non-multiplicity of actions.

This eradicates the issuance of conflicting judgments and an abuse of court processes.

POSITIVE TRENDS FROM THE JUDICIARY

The contribution of the judiciary in positively shaping the credibility of the electoral process is seen in the adoption of some of the decisions of the courts being codified into law in the Amended Electoral Act, for example:

a) Exclusion of Political Appointees from Acting as Voting Delegates or Aspirants - Section 84 (12) of the Electoral Act 2022 has also provided 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 for the purpose of the nomination of candidates for any election. This provision is positive because it will bar political appointees from using their influence in contesting for elections and prevent them from remaining in the helm of power for longer than they are supposed to.

This in turn leaves room for fresh candidates with no prior political appointments to take up appointments, instead of recycling the same old candidates. This provision has, however, proved very controversial, and has been the subject of criticism and denunciation. It is however expected to improve the electioneering process in Nigeria.

The Court in the case of **PDP V. Deed & Anor (2022) LPELR-57480(CA)** laid a clear difference between a political appointee, Public Servant, and Civil servant. "a political appointee or political office holder is a person who is engaged by a politician who has been elected or appointed to serve in a public office.

His appointment is at the pleasure of the person who appointed him and does not have any statutory flavour. He has no security of tenure... he is not a public officer or a person employed by the civil service or judicial service of the State."

^[5]<https://dailytrust.com/njcs-new-policy-direction-on-elections-stirs-controversy/>

This judgement overturned the judgement of the lower court which had earlier declared S84(12) of the 2022 Electoral Act ‘unconstitutional’

b) Death of Electoral Candidates - The new Act has also provided that where before the commencement of polls a candidate dies, the election shall be postponed and shall commence within 14 days of the candidate's death. Section 34(1), Electoral Act, 2022. Where a candidate dies after polls, but before the announcement of the final winner/ announcement of the final result; the implication is that the election will be suspended for not more than 21 days. Section 34(3) (a), Electoral Act, 2022.

Where the election is for a legislative house position, the election shall start afresh and the political party whose candidate died may if it intends to continue to participate in the election, conduct a fresh primary within 14 days of the death of its candidate and submit the name of a new candidate to the Commission to replace the dead candidate. For gubernatorial, presidential and FCT area council elections, the running mate shall continue with the election (as the new candidate) and nominate a new running mate. This provision now takes into consideration that death may occur and allows the party to field fill a candidate and not be completely shut out from having its fair share of the elections.

This provision bridge the gap which was discovered in the 2015 gubernatorial elections in Kogi state, where the Candidate of the APC, Abubakar Audu died before the results of the elections were declared, the court was left with the difficult task of filling in this gap; the court in determining this conflict held that “... there is no provision of the law specifically on the replacement of a candidate who dies before the election is concluded” see **WADA & ORS V BELLO & ORS (2016) LPELR-41263 (CA)**. This section of law has bridged this enormous gap in Nigeria’s electoral space.

OTHER WAYS THE DECISIONS OF THE COURTS HAVE SHAPED THE ELECTORAL AND GOVERNANCE SPACE IN NIGERIA

The impact of court decisions on electoral cases cannot be overemphasised as they possess the power to confirm or deny the emergence of a candidate after elections. This can be seen through a plethora of cases one of which is the decision of the supreme court to overturn the emergence of a gubernatorial candidate in a state and substitute it with a candidate who was said to have polled fourth in the elections.

The court based its decision on the results of the election stating that the candidate who emerged did not win the majority lawful votes in the state and ought not to have been sworn in. The decision of the court was met with uproar by the citizens of the state and party members who stated that a candidate had been imposed on them. They felt that they were disenfranchised and that there was a miscarriage of justice. The tenure of the incumbent Governor has been met with several backlashes including insecurity and lack of trust in the state.

The impact of decisions of the judiciary in the 2022/2023 electoral process has begun to manifest from the recent decisions of the Supreme Court in pre-election matters where a candidate of the ruling party, All Progressive Congress (APC) who did not participate in the primaries for the senate was held to be the party’s candidate. This decision has been faulted on the basis that the decision of the court was based on technicalities and not substance thereby going against the rule of law and judicial precedents which provide that where a suit is technically flawed then substantial justice will prevail.

The decision has increased the lack of trust in the justice process with citizens left aggrieved and confused whilst some politicians will be relying on this outcome to institute actions should they not emerge as the elected candidates after the elections. Citizens are now confronted with asking questions regarding the validity of their votes or the imposition of candidates by the courts who they feel are not their choice candidates.

The supremacy of the rule of law cannot be contested and the courts base their decisions upon evidence brought before it. However, for the populace, it is important that the courts in their wisdom make decisions that are clear, transparent, and equitable so that even to the common man on the streets, there will be no doubt that a just decision was reached based on the facts of the case supported by irrefutable evidence.

In another decision, the electoral tribunal overturned the victory of a gubernatorial candidate in a state, substituting it with the name of another candidate. The decision was based on overvoting with the court relying on the Bimodal Voter Accreditation System (BVAS) in reaching its decision.

BVAS is an innovation of the Electoral Act 2022 developed in accordance sections 47 and 50(2) of the Act, which provide for the use of electronic devices such as smart card readers, electronic voting machines and other technological devices in the accreditation process for voters and the general conduct of elections. Furthermore, the new Act provides for the electronic transmission of election results in accordance with the procedure determined by the Commission.

The essence of this provision is to defeat the allegations raised by the manual accreditation process which was argued to be flawed and gave room for overvoting, rigging of elections and malpractice. The introduction of the electronic register and transmission will increase transparency and improve access to information for the public and create confidence in the electoral process.

From the above decisions it can be posited that the judicial interpretation of the provisions of the Electoral Act 2022 will significantly affect the outcome of the electoral process as in some cases it will validate the process and in other cases, it overturns the candidate returned with alternative candidates becoming the flagbearers of their party.

Notwithstanding the above, it is important for all factors contributing to the judicial process to be understood for any opinion to be made or for there to be any constructive criticism.

The role the judiciary plays in the electoral process is not in silos with the roles of the other organs of government and institutions. For there to be a coherent process, it is important for all parties to be at breast with the roles and responsibilities in order to ensure that the electoral process is fair, transparent, and credible.

The following factors are crucial as we move forward to the conduct of the 2023 elections:

1. There is a need for political will to be exhibited at various levels of leadership and influence; and by all stakeholders. The exhibition of political will includes ensuring mechanisms of addressing peaceful resolutions of conflicts by embracing dialogues, tolerance, transparency and accountability ethos.
2. Discouragement of frivolous applications that would unduly make the system unnecessarily cumbersome and wieldy. There is ongoing advocacy for the Nigeria Bar Association to award stiff penalties to lawyers who get involved in filing frivolous applications in order to stifle the wheel of justice so as to deter such acts.
3. It is essential to be mindful that the judiciary continues to struggle with infrastructural and efficient manpower challenges. The technological framework to support an effective system that would allow a quick turnaround time for the judiciary to handle electoral matters is lacking. Skilled effective and efficient manpower; and financial resources are limited.
4. There is need for engagement between the judiciary, prosecutors and the electoral management body on proper understanding of the evidence needed to prove the validity of an election to be tendered in the courts to ensure the credibility of the electoral process and the confirmation of a candidate issued a certificate of return.

RECOMMENDATIONS

1. For the electoral process to be said to be successful, it will require the collective effort of all organs and institutions of government. Each organ developing strategies without consultation with other organs of government might lead to confusion and misunderstandings. It is important for all heads of the organs of the government to hold meetings where collective strategies will be discussed and developed to ensure a credible outcome to the elections.
2. It is important for the lawyers representing electoral management body to understand the evidence needed to prove or disprove allegations of aggrieved candidates in the courts. The weight of evidence tendered is instrumental in the decision taken by the courts and seasoned professionals should be engaged in defending matters that arise.
3. It is important for the judiciary to conduct awareness exercises on their roles and responsibilities and the reasons for its decisions. It is not enough that only lawyers reading the judgments of the courts interpret same to members of the public as views on the same judgment can be interpreted differently by lawyers based on their thoughts. It is essential for the judiciary to begin to speak for itself and enlighten members of the public on the reasons for its decisions so as to make it more accountable and to show that it is an unbiased umpire.

CONCLUSION

It is imperative for a wholistic approach to be adopted for improved electioneering. All relevant stakeholders must be seen to obey and protect the rule of rule whilst safeguarding the rights of citizens to exercise their franchise.

The innovations sought by the 2022 Act can only be manifested if all stakeholders jointly implement its provisions in consideration of other applicable Laws.

The role of the judiciary in the upcoming 2023 general elections cannot be overemphasised and all tools needed to support it in the discharge of its role must be provided to ensure a free, fair, and credible election.