

# Courts' Involvement in the Electoral Process and Their Impact on Improving Election Quality in Nigeria

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## Abstract

This study provides evidence of the increasing cases of post-election petitions and substantial court determinations of election outcomes in the Federal Republic of Nigeria. Since 1999, Nigeria has organised four cycles of national elections. Each of the elections was contested either in or out of court (in the latter case, for example, in the form of election violence). The courts, for their part, have been required to decide some 2 596 post-election petitions, which have continued to increase in every election year. This raises an important question as to whether the frequent court involvement has had a significant impact on election quality: What is the implication of the increase in election contestations in court for the independence of the judiciary, given the allegations of judicial politicisation? The study concludes that the courts' involvement in electoral processes has not significantly influenced conformance with the electoral laws; instead, the judiciary has become politicised, while some court decisions have interfered with the powers of the electoral management bodies tasked with ensuring that the conducting of elections is free and fair.

**Keywords:** electoral process; court adjudication; election quality; electoral management bodies; post-election petitions; Nigeria

## Introduction

As the new democracies in Africa that made the transition from authoritarian rule in the 1990s have begun to emerge from their infancy, social science scholars have shifted their attention from enquiring about transitions from authoritarian regimes to investigating the problems related to the consolidation of democracy. Current academic enquiries dwell on the quality and long-term prospects of democracy in post-transition



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countries. In other words, they focus on whether such democracies are prone to surrendering to a new kind of authoritarian rule or whether they will prove to be stable or “consolidated.” One of the biggest challenges in recent African history has been organising elections with integrity, that is, elections that are based on the principles of universal suffrage, political equality, transparency, respect for the rules and accountability to the people. It is in these areas that politicians resort to the courts to reverse electoral malpractices. In Malawi and Uganda, the judiciary has exhibited higher levels of judicial assertiveness and independence than their counterpart in their more politically stable neighbour, Tanzania (Ellett 2008, 501). The judiciary in the Federal Republic of Nigeria (hereafter Nigeria) is encumbered by the process of moderating political struggles and is often called upon to act to protect incumbent-specific sectional and/or party interests (Omenma 2015). Hernández-Huerta (2015) argues that, in other countries, parties that lose elections do not challenge election results to protest against election fraud, as is the case in authoritarian regimes (Schedler 2002), but rather to strengthen their own capacity to negotiate with newly elected governments.

Elections in post-independence Nigeria have been characterised by fraud and the subversion of the sovereign will of the people. This, perhaps, has to do with the character of the state, or what most scholars describe as “the politics of primitive wealth accumulation” in Africa. Madunagu (2003, 63) comprehensively describes the salient features of Nigerian electoral democracy as follows:

My main finding is that every election in Nigeria, since independence, had tried to perfect the electoral malpractices, or forms of election rigging, employed in the preceding election, while introducing new ones. The list of the electoral malpractices given below is cumulative, that is, it is the sum of electoral practices since independence. They include: criminal or unlawful or immoral employment of state power or, in popular language, the power of the incumbency; employment of violence and intimidation; bribery and purchase of voter’s cards; disenfranchisement of voters; maximum voting; falsification of results; non-provision or inadequate provision of voting materials; declaration of result where no voting has taken place; etc. Some of these forms of rigging are clear, others not so clear.

A further insight into elections in Nigeria is given by the former Vice-President of Nigeria, Atiku Abubakar:

Most elections are rigged before they occur because candidates are eliminated through various methods. These include subverting party constitution and rules, the use of thugs, corrupting party officials to disqualify or annul the nomination of some candidates and other illegal methods of distorting the wishes of the electorate. (Abubakar 2006, 53)

The quality of elections is absolutely essential to deepening democracy, because there is a connection between elections and democratic stability. Elections are only a small fraction of democratic requirements. Democracy transcends notions of the frequency

and the number of elections. It involves open, competitive and meaningful electoral politics, which survives over a long period of time. Despite the Nigerian courts' frequent intervention in electoral matters, there appears to be no significant relationship between electoral justice and the reduction of election fraud. In other words, it seems that the more individuals resort to the courts, the more controversial pre- and post-election outcomes become in Nigeria.

To investigate the foregoing, the present study adopted a constitutional ethnographic approach. Scheppele (2004, 395) defines this approach as follows: "The study of the central legal elements of politics using methods that are capable of recovering the lived detail of the politico-legal environment." Finally, the increasing involvement of courts in the determination of election outcomes is commensurate with the increasing level of electoral malpractices (that is, low election quality), which is an indicator of the weakness of the electoral management body (EMB) in the face of a strong and manipulative political class.

## **Research Methodology**

The study adopted a survey design, and primary and secondary data were collected. The "population" of the study was 36 states in Nigeria and the country's four periods of election, namely in 1999, 2003, 2007 and 2011. This determined the choice of research respondents. Senior officials were purposively sampled, two each from among senior officials of the Independent National Electoral Commission (INEC), the National Human Rights Commission, politicians and party technocrats or officials, legal experts or retired judges, members of civil society organisations and academia. A total of 10 senior representatives from these groups were interviewed. A structured interview schedule was the main instrument used for gathering primary data. Three lecturers in the Department of Political Science, University of Nigeria, Nsukka, validated the interview guide. Measuring the internal consistency reliability using Cronbach's alpha, produced a value of 0.93. The oral interview materials helped to give meaning to the documented materials about the politicisation of the judiciary, weak intra-party democracy, the weakness of the EMB and the power distribution among social groupings in Nigeria.

The interviews were supplemented by observations of party meetings and events and several court cases. Secondary evidence was obtained from documents such as the European Union Election Observation reports, the International Institute for Democracy and Electoral Assistance reports, the International Republican Institute election reports, domestic election observation reports, publications of INEC, reports of the Electoral Reform Commission, and the National Judicial Council Fact Finding Committee on Judiciary Crisis. The researcher obtained the 2007 and 2011 general election results from the database of INEC. Quantitative data were analysed using simple descriptive

statistics, whereas logical arguments, inferences and content analysis were used for processing qualitative data.

## **Literature Review: Theoretical Arguments**

An election is a process that is central to states' emerging from transitional democracy and attempting to consolidate democracy. The nexus between electoral process and democratic consolidation indicates the extent to which the election process is free and fair (Huntington 1991). The measure of a free election is when the process is free of any form of inhibitions and contradictions. The role of the judiciary in the electoral process is generally acknowledged as being crucial, perhaps even more so when electoral petitions have to be considered.

Recently, judicial adjudication in the electoral processes has been at the centre of numerous debates in the United States (2000), Taiwan (2004), Congo (2006), Nigeria (2007 and 2011) and Kenya (2017) (Ginsburg 2003; Hirschl 2008; Popova 2008). A central theme emerging from the debates is how to guarantee "open political competition" (Freedom House 2010, 1). This has to do with managing matters relating to electoral flaws and fraud in electoral processes, which are the concern of the judiciary in the electoral matters that come before them.

One of the most important matters raised in the literature on the electoral process is voting rules (Barbera and Jackson 2004; Messner and Polborn 2004; Ticchi and Vindigni 2005). This body of literature on voting rules is probably the largest in the field of constitutional political economy (Robinson and Acemoglu 2006). The contributions of Acemoglu and Robinson (2000, 2001) and Robinson and Acemoglu (2006) are explicit in this regard: they point out that that "approach means not simply being interested in when universal adult suffrage was introduced, but in understanding all movements in the direction of increased democracy" (Robinson and Acemoglu 2006, 10). This is an important theoretical contribution to understanding democratisation as being more than a theory of electoral process.

Other scholars, such as Schedler (2002), Lehoucq (2003), Darnolf (2011) and Roussias (2013), have focused on the causes and consequences of misconduct connected to elections in order to understand the dynamics of the electoral process in any democracy. In an early investigation of the topic, Lehoucq (2003) paid more attention to methods of misconduct used on election day such as ballot rigging, faulty tabulations and ballot stuffing. However, subsequent studies have begun to pay attention to the tactics adopted by political actors during the electoral campaign, that is, pre-election irregularities (Donno and Roussias 2012, 90; Ruiz-Rufino 2012, cited in Donno and Roussias 2012). Ibrahim and Garuba (2008), in reflecting on the electoral process in Nigeria, agree that pre-election factors determine the extent of the inclusiveness, transparency, security and dispute resolution that accompany elections. Ibrahim and Garuba (2008, 53) state that:

Experience with the electoral process reveals that elections are won and lost at the pre-election stage. This is not hard to appreciate, given that much of what happens on election day only builds on pre-election arrangements. Among pre-election activities that are anchored on the regulatory framework, the conventions and practices on which INEC works around the clock to satisfy are: the registration of voters, candidates and political parties, the supervision of political parties, the exhibition and compilation of the voters' register, the printing of ballot papers, the appointment of electoral officers and recruitment of temporal staff, the announcement of the notice of polls, the storage and distribution of ballot papers, and other election materials.

It is on this basis that some international organisations, such as the International Foundation for Electoral Systems (IFES), the European Union (EU) and the Office for Democratic Institutions and Human Rights (ODIHR) (which is the principal institution of the Organization for Security and Cooperation in Europe (OSCE)), consider an election to be a continuous process and not an isolated event. A recent study by the International Peace Institute (IPI) (2011), suggesting ways to improve the quality of electoral processes in Africa, establishes a significant relationship between the concepts of "election" and "electoral process." The process includes not only the electoral campaign and election-day events, but also the post-electoral period and the responses to the announcement of the electoral results. Even though elections are a *sine qua non* of a democracy, an election itself is a product of a broader political process rather than a one-off event. Elections are therefore democratic processes comprising three stages: pre-voting, voting and post-voting; each phase is accompanied by several elements (IPI 2011, 2):

- Pre-voting: In this phase, electoral frameworks may be developed or refined. Boundaries are defined to ascertain voter eligibility, and voter and civic education, voter registration, party nominations and electoral campaigns also take place.
- Voting: In addition to the casting of votes, this phase includes vote counting and the verification of results.
- Post-voting: This period includes all of the activities that ideally occur between elections. Voter lists may be updated; post-election reviews may take place in which electoral laws and institutions are analysed to determine how they can be strengthened. Finally, procedures may then be put in place to strengthen those laws and institutions.

Even though free and fair elections conducted regularly are used to measure and define the quality of elections, they are but one component of an entire electoral process. The processes are encapsulated in the framework of election administration, voter registration, political party registration, nomination of candidates, electioneering, voting, and election petitions. Any serious academic enquiry into the electoral process must appreciate the nature of the interactions between political parties and electoral

processes on the one hand, and the interface between the judicial system and the electoral process on the other.

López-Pintor's study of the conceptual framework as it affects electoral rigging provides insight into electoral processes. He argues that widely accepted international democratic standards should be used to assess the effectiveness of the electoral process in each country. He maintains that:

[t]hese standards touch on every level of the democratic legal order, from constitutional considerations to ordinary legislation to rules and regulations promulgated by EMBs and other administrative bodies. More specifically, they affect the technical aspects of elections, from the conduct of voter registration at the beginning of the process all the way through to the final adjudication of election disputes. (López-Pintor 2010, 13–14)

The democratic standards deal with each stage of the electoral process, from designing the electoral process to finalising the electoral outcome. The democratic standards are principles enshrined in Article 25 of the International Covenant on Civil and Political Rights (ICCPR) of 1966: (1) periodic elections; (2) universal suffrage; (3) equal suffrage; (4) right to stand for public office; (5) right to vote; (6) secret ballot; (7) genuine elections; and (8) allowing for the free expression of the will of the people. Nigeria's 1999 Constitution and its various electoral acts validate ICCPR principles by providing for a secret ballot system, a four-year election period and adult suffrage of 18 years of age and older as the basis of eligibility to vote (Omenma 2015, 37).

López-Pintor reduces these eight principles to four categories, each representing various dimensions of the electoral sequence. The first category is what he identifies as the underlying political environment expected of any democratic country during periodic elections. The elements of the political environment are maintaining and ensuring a fairly secure environment for elections, establishing a neutral EMB and undertaking massive political communication, civic education and voter information. These political conditions are expected to result in "the free expression of the will of the people" (López-Pintor 2010, 15).

The second category refers to aspects of free and fair elections, which presuppose the sacred right of citizens to exercise their political franchise without an iota of inhibition. This category includes other subcategories such as voting and counting operations, the release of election results, electoral grievance adjudication and electoral observers. The basic provision of this category is its emphasis on the transparency, openness and integrity of elections.

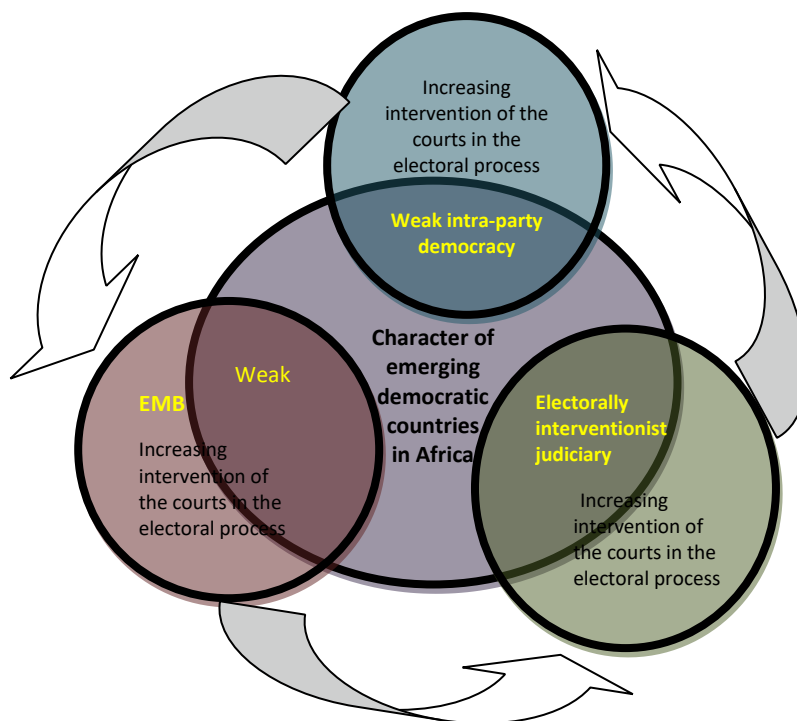
The third category dwells on the right to a franchise, that is, the political right of citizens enshrined in the right of universal and equal suffrage. This right includes political rights, electoral procedures, and gender and minority representation. This is necessary to avoid excluding any significant sector of the electorate or potential candidates and to prevent

tampering with electoral procedures. Moreover, the right to the franchise requires voter registration and voter list updates, which include a significant voting age population (normally citizens who are 18 years of age and older).

The fourth and final category is the right to participate in an election or to stand for election. This right includes belonging to a political party, campaigning for an elective position and having equal or free access to media (López-Pintor 2010, 15–17).

To evaluate the impact of the electoral process on the democratic process objectively, the significant role of the judiciary has become increasingly important. This raises important issues relating to transparent electoral processes and the relationship between EMBs, political class and the courts. The way in which the judiciary has an influence on the role of EMBs and a political class, as well as how the various stakeholders appropriate the courts' function in the polity to advance their political interests, determines the quality of elections.

Figure 1 shows three dependent variables that link the electoral interventionism of the courts and the democratic process in Nigeria, namely, the level of intra-party democracy, the quality of elections (determined by the degree of judicial intervention) and the EMB. These explanatory variables reinforce one another, as represented by the arrows in Figure 1.



**Figure 1:** Interactions between the explanatory variables

Source: Omenma (2015, 44)

First, the candidate selection process of political parties is consistent with declining intra-party democracy, which in turn is an indicator of a low level of democratic consolidation.

Second, the same factors or forces that weaken intra-party democracy also interfere with the activities of the EMB, particularly the level of its independence and its capacity to organise free and fair elections. If the EMB lacks independence, that will lead to deep-seated suspicion of the EMB’s competence and professionalism in conducting elections, especially in the context of incessant court injunctions over EMB election programmes and events, the resolution of election disputes, and the valid nomination of party candidates. The implication is that the courts may not only be politicised in the process but may usurp the powers of the EMB to declare election outcomes.

Third, given the context where money politics (that is, the use of money to influence voters) is dominant, the courts are likely to be the targets of the responses of “political investors” to market forces. This means that electoral justice effectively becomes auctionable. The importance of this is that the outcomes of adjudicatory processes



related to elections are largely arrived at in response to very narrow but powerful interests, that is, results that are in contradistinction to the actual votes cast. In the process, the judiciary becomes politicised and is either used to reinforce electoral fraud or, as is often the case, to act to protect specific sectional or party interests. As a result, this limits the opportunity to preserve electoral justice.

These debates have concrete implications particularly during the phase of democratic transition. Some scholars have concentrated on the preservation of judicial independence and the rule of law, others on the weaknesses in the system (Finkel 2003; Maravall and Przeworski 2003; Widner 2001); yet others concern themselves with the preservation of or weaknesses in legal tools, such as the Constitution (Federal Republic of Nigeria 1999) and the Electoral Act (Federal Republic of Nigeria 2006), which grant courts broad formal powers (Epp 1996; Ginsburg 2003, 2008; Hirschl 2004; Klug 2000). Other scholars have turned their analytical attention to the background of judicial involvement, seeking to explain when and why judges do or do not act to defend rights, to hold powerful actors accountable or otherwise to enter the political arena (Ginsburg 2003; Helmke 2005; Osiel 1995; Vanberg 2005; Woods 2005). More recently, scholars have also started to examine the extent of political compliance with judicial decisions (Kapiszewski 2007; Staton 2004; Vanberg 2005), with special reference to the electoral process. This is particularly important in the Nigerian political context, given the manner in which judicial decisions are flouted at the executive levels of government—federal, state and local—as well as by government institutions such as the EMB, the law-enforcement agencies and even political parties.

Related to this is the abuse of judicial powers by the judiciary itself in the process of electoral adjudications. First, it is asserted that the judiciary has allowed itself to be used by hegemonic sociopolitical forces to preserve their hegemony and secure their policy preferences (Hirschl 2000). Ugochukwu (2011, 58) argues that “although there might be justification for judicial intervention in the countries of Africa, the prevalence of corruption in the judiciaries makes such intervention a double-edged sword.” When judicial intervention in the electoral process is viewed from these perspectives, the need arises to understand the role of the judiciary in pursuing electoral justice as opposed to supporting the consolidation of democracy.

## **Presentation of Results**

Since 1999, the number of post-election petitions has been increasing and many such cases have occupied INEC’s attention deep into the next election year. Table 1 summarises the post-election petitions for each successive election year in Nigeria, whereas Table 2 breaks down the number of petitions filed by type of election.

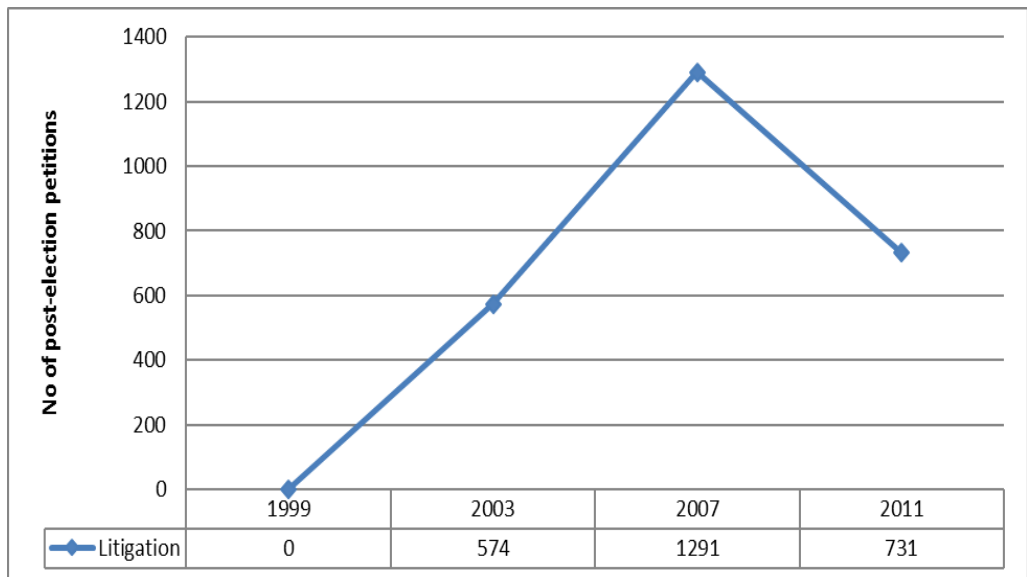
**Table 1:** Summary of post-election petitions filed in 1999, 2003, 2007 and 2011

<b>Years</b>	<b>No. of constituencies</b>	<b>No. of petitions</b>
<b>1999</b>	1 497	N/A*
<b>2003</b>	1 497	574
<b>2007</b>	1 496**	1 291
<b>2011</b>	1 487***	731
<b>Total</b>		2 596

Note: \* Not available; \*\* The governorship election was not conducted in Anambra State on April 14, 2007; \*\*\* Governorship elections were not conducted in 10 states on April 26, 2011.

Sources: Electoral Reform Committee (2008, 123); INEC (2011, 38); Omenma (2015).

Table 1 shows the number of constituencies in Nigeria and the number of election-related petitions for each election cycle. There are a total of 1 497 election constituencies (Omenma 2015) and for the three election years (2003, 2007, 2011) a total of 2 596 post-election cases were registered and contested in various election petition tribunals across the Federation (i.e. Nigeria), including in Nigeria's Federal Capital Territory (FCT). There were no statistics on the number of post-election petitions after the 1999 general election. Figure 2 illustrates the increase in the number of post-election petitions in each election year in Nigeria.



**Figure 2:** Litigation trend from 1999 to 2011 elections

Source: Omenma (2015, 133)

Figure 2 shows that for the 2003 general election, 574 petitions were filed with the various election tribunals in the Federation, including that of the FCT. This number increased to 1 291 in 2007 and declined to 731 in 2011. Although the number of the petitions declined after 2011, against 1 291 after the 2007 elections, the post-election petitions after 2011 were substantially higher than the 574 cases recorded after the 2003 general election. Statistically, therefore, post-election petitions increased during each successive election cycle in relation to those of the 2003 elections.

Table 2 presents the breakdown of election petitions for the presidential, gubernatorial, senatorial, House of Representatives and State Houses of Assembly candidates, including those of the FCT.

**Table 2:** Summary and breakdown of post-election petitions filed in 1999, 2003, 2007 and 2011

	Presidential	Gubernatorial	Senatorial	House of Representatives	State Houses of Assembly	Total
<b>1999</b>	N/A*	N/A	N/A	N/A	N/A	N/A
<b>2003</b>	N/A	N/A	N/A	N/A	N/A	574
<b>2007</b>	8	107**	137	299	738	1 291
<b>2011</b>	2	53***	90	208	378	731
	<b>Grand Total</b>					<b>2 596</b>

Note: N/A\* not available; \*\* there were 35 constituencies in this year; \*\*\* there were 26 constituencies in this year

Sources: Electoral Reform Committee (2008, 123); INEC (2011, 38); Omenma (2015).

In the 1999 and 2003 general elections (see Table 2), no records were kept showing the breakdown of post-election petitions filed at the constituency level (ERC 2008; Omenma 2015). However, following the 2007 general election, eight petitions were filed against the winner of the presidential election, with the entire country as its constituency, whereas only two petitions were filed after the 2011 general election. After the 2007 general election, there were 35 constituencies for the gubernatorial elections and 107 petitions were filed in respect of the 2007 gubernatorial elections. This means that there was an average of 3.1 petitions per state, that is, on average, three petitioners contested the results of the gubernatorial elections in each of the 35 states.

For the 2011 general election, there were 26 state constituencies and 53 petitions were filed, showing an average of two petitions per state. In each of the 2007 and 2011 electoral cycles there was an average of two post-election petitions challenging the election results for each state governor (Omenma 2015).

The post-election trend shows a tendency of challenges dragging on for too long, even after the declared winners had been sworn in as president, governor or legislator. In the case of the presidential and the gubernatorial elections, post-election litigation typically goes on appeal for a final determination, that is, proceeding from the Court of Appeal to the Supreme Court for presidential elections and from the gubernatorial election tribunal to the Court of Appeal for the gubernatorial elections as at the 2011 general election. The adjudicatory process typically takes an average of two years to conclude.

In some of the cases, it took up to three years, as in the case of *Buhari v Obasanjo*<sup>1</sup> over the 2003 presidential election, which lasted 35 months (Jinadu 2010, 142). In the case of the gubernatorial election tribunals in Ekiti State and Osun State, the cases were not concluded until a few months (fewer than six months) before the 2011 general election (Jinadu 2010, 142). The same was true of Delta State, where the Court of Appeal, in November 2010, nullified the election of Emmanuel Uduaghan and ordered INEC to conduct fresh elections within 90 days. This was fewer than five months before the next general election of April 26, 2011.

Given the nature and significant number of pre-election and post-election petitions and the fact that INEC is usually a party (as defendant or complainant) to many of these cases, judicial decisions arising from such cases naturally had an impact on INEC's discharge of duties.

In the next section, I shift the focus of analysis from explaining the sheer number of pre- and post-election petitions to understanding and analysing the effect of the intervention of the judiciary on the independence and capacity of INEC to perform its electoral duties and on the quality of elections.

## Discussion

Electoral tribunals are specialised courts established specifically to deal with election petitions; their powers are limited by the relevant enabling laws. In Nigeria, the electoral tribunals are mandated under section 285 of the 1999 Constitution and Part VIII of the 2010 Electoral Act (as amended), which provide for procedures for the determination of electoral complaints. This Act states that election petitions arising from the conduct of a presidential election are to be heard by the Court of Appeal and that any other election petitions are heard by the Election Petition Tribunal (EPT). The Court of Appeal and the Supreme Court can also have appellate jurisdiction.

Between three cycles of elections (see Figure 2), a total of 2 596 post-election petitions were heard by the courts, which is an indication of a high rate of occurrence of electoral fraud. How the courts respond to the complaints often poses overwhelming problems for the electoral commission. Lady Justice Wood has noted that an effective resolution of complaints is integral to guaranteeing the integrity and legitimacy of an electoral system (Vickery 2011, 11). In Nigeria, electoral adjudication takes undue time owing to delays in rulings that affect subsequent election cycles. These delays affect the distribution of election materials, the optimal use and pooling of resources, and the outcome (results) of the elections.

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<sup>1</sup> *Muhammadu Buhari, All Nigeria Peoples Party (ANPP) v. Chief Olusegun A. Obasanjo & 264 ORS*, Supreme Court, SC. 3/2005, Friday, July 1, 2005.

## Distribution of Election Materials

Timing is of the essence in electoral administration. The public, candidates and staff of EMBs should have sufficient time to familiarise themselves with the election materials and locations before an election takes place. The 2007 general election in Nigeria provided an example of the importance of timing in the management of elections. The celebrated case of Atiku Abubakar (*INEC v Action Congress*<sup>2</sup>) and the case of Rotimi Amaechi's substitution by the People's Democratic Party (PDP) with the name of Celestine were both pre-election matters, but the politics both inside and outside the court leading to the final rulings on both cases had a negative impact on the powers of INEC.

Atiku Abubakar's legal battle over the 2007 presidential election started in the Federal High Court, Abuja, when the Action Congress requested to know whether INEC had the power to verify the credentials or papers of candidates and/or screen and/or disqualify candidates in the elections, including Alhaji Atiku Abubakar, the Vice-President of Nigeria and the presidential candidate of the Action Congress (Transition Monitoring Group (TMG) 2007, 41). The Federal High Court and the Court of Appeal took divergent decisions. The High Court decision held that INEC had the power to verify candidates' claims of credentials or papers, but the *power to disqualify any candidate sponsored by any political party, including Atiku Abubakar, was vested in the Courts* (TMG 2007, 41). However, the Court of Appeal ruled otherwise, namely, that INEC had the power and authority to screen candidates sent to it by political parties and *to remove the name of any candidate who failed to meet the criteria set out by the Constitution without having to go to court*. On appeal to the Supreme Court, and after detailed deliberations, the lead Justice of the Supreme Court delivered his judgment thus:

Having carefully considered the submissions of counsel to the parties, I have no difficulty in coming to the conclusion *that the respondent (INEC) has no power whatsoever to disqualify any candidate from the general elections*. I hold so. This appeal has merit and therefore succeeds. (Mohammed 2007, 1–2, 4)

Beyond the restoration of Atiku Abubakar's right of participation, the critical issue is the divergent decisions of the Federal High Court and the Court of Appeal, which were laced with politics, from which the court should have insulated itself. This was the implication of the court rigmarole, and the politicking is the Supreme Court decision that was handed down three days before the presidential and gubernatorial elections in April 2007. The Supreme Court's decision required the inclusion of the name of Atiku Abubakar on the ballot paper, but while its decision had restored Atiku's political rights,

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<sup>2</sup> *Action Congress v. INEC* (2007) 12 Nigeria Weekly Law Report (NWLR) (Pt.1048)220 S.C.

it became a herculean task for INEC to plan and execute its electoral duty at such short notice.

In the first instance, INEC had to reprint 65 million presidential election ballot papers (without serial numbers or the photographs of the contestants) within three days and to distribute the same number across the almost 120 000 polling stations in Nigeria. There are 119 973 polling units (PUs) and 8 809 registration areas (RAs) (INEC 2011, 3) in Nigeria. To distribute election materials to these PUs and RAs on the election day is always a herculean task, considering that most of the PUs and RAs are located in remote and rural areas with almost inaccessible roads and difficult water terrains in riverine areas. The distribution of election materials is usually delayed by one or two hours, depending on the location. In some cases, polling stations did not open before the afternoon or did not open at all. This led to a sudden change (on the eve of April 21) to the start of election-day time, from 08:00 to 10:00, and to the closure of polling from 15:00 to 17:00. As a result of the sudden shift, many polling stations in most states, such as Abia, Imo, Kaduna, Ebonyi and Bauchi, did not open until late afternoon. International election observers reported that the election was marred by various kinds of shortcoming. The European Union Election Observation Mission (EU EOM) (2007, 35) pointed out that:

A total of 75 per cent of polling stations did not receive the correct number and type of ballot papers. The newly printed presidential ballot papers were without serial numbers and insufficient quantities were delivered in many parts of the country. In Ebonyi and Abia States, presiding officers only received 46 per cent of the required number, and that in Borno State only 36 per cent of the presidential ballots needed were distributed. Once again no elections took place in many areas of the states such as Benue, Kaduna, Anambra, Borno, Nasarawa, Ondo, Edo, Gombe and Cross River.

Prolonged court cases, such as that of Atiku Abubakar, affected logistics and also had the effect of confusing the electorate about the appropriate choice of candidates. The electorate did not know in good time whom they were casting their vote for or whether, after having cast their votes, the court might transfer such votes to another person.

This was also the case with Rotimi Amaechi's substitution by the PDP with the name of Celestine. There, the latter contested and won the gubernatorial elections but the Supreme Court nullified the party substitution and ordered the swearing-in of Rotimi Amaechi, who had not contested the governorship election of Rivers State. Such delays in adjudicating complaints can affect public confidence and delegitimise elections. The case of Amaechi (*Amaechi v INEC*<sup>3</sup>) painted the court as the usurper of INEC power by declaring an election winner—which the court does not have the power to do—while

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<sup>3</sup> *Amaechi v. I.N.E.C. (No.2)* (2007) 18 NWLR (Pt.1065) 98.

Atiku's complex judicial battle resulted in a delay in the distribution of election materials and the conducting of the elections.

### **Optimal Use and Pooling of Resources**

INEC depends on the services of ad hoc staff to operate the 119 973 polling units (PUs) and 8 809 registration areas (RAs) across the Federation's states. These ad hoc staff are usually trained in handling election materials ranging from non-sensitive to sensitive materials, conducting actual voting, and counting the ballots. But given the court decisions that disrupted the distribution of election materials, as was the case with the presidential and gubernatorial elections of 2007, the ad hoc staff were subjected to difficult situations beyond their capacity. Instead of their engaging in the behind-the-scenes arrangements of their respective PUs, they spent their time and energy chasing after election materials. The EU EOM (2007, 32) assessment of the ad hoc staff in the 42 per cent of polling stations visited showed that:

[t]he overall conduct of polling was rated as poor or very poor ... observers witnessed disorder in 22 per cent of polling stations visited. In the majority of polling stations observed, breaches of the secrecy of the vote occurred. In many polling stations observed it was common practice for voters to mark their ballots in the open, surrounded by polling agents .... Disorder inside polling stations was observed in 15 per cent of polling stations visited during closing and counting. (EU EOM 2007, 32)

Given the disorderly conducting of elections by INEC's ad hoc staff, the elections invariably fell short of the minimum standard for free and fair elections. The available data show that most of the election-day shortages were caused by INEC's ad hoc staff. Omenma, Ibeanu, and Onyishi (2017, 40, 41) note that "INEC violations of electoral law were 33.33% in the 2003 election, increasing to 66.67% in 2007, and finally to 92.31% in the 2011 election." The mean values for the four types of fraud over the three elections showed INEC ad hoc staff issues at 64.10; state or party official interference at 59.89; election violence at 55.34; and multiple or underage voting at 52.14. The mean and standard deviation values of the INEC violations were 64.10 and 29.57, respectively. This shows that, although there are significant differences between the different election years, the mean value of INEC's violation is very high.

### **Election Outcome**

The cumulative effect of the delay in the distribution of election materials and of the deficiencies of INEC's ad hoc staff indicates that the election results were not actual reflections of the choices of the electorates. When the courts deliver a midnight judgment that interferes with election timetables and causes delays in or shifts of election programmes, this usually leads to electoral apathy. Electoral apathy is a good incentive for politicians to inflate and falsify election results. This is supported by the revelations of the former governor of Cross River, Donald Duke, that in any election where there is a very high turnout the results are usually genuine, but in elections that



witness a low turnout, the results are likely to be manipulated to the advantage of the hegemonic power group.

An election petition is time bound, which is why election tribunals are established to disengage election petitions from the intricacies surrounding the normal court system. This most often accounted for a delay in hearing and determining electoral disputes. Such intricacies lead to unnecessary adjournments, a reliance on legal technicalities, frequent use of *ex parte* orders, the placement of injunctions, delays in the commencement of proceedings and other legal niceties that could have a negative impact on the dispensing of justice in the normal courts. However, these legal technicalities have found their ways into the proceedings of election tribunals, because the beneficiaries of electoral fraud depend on legal technicalities to frustrate the judicial process.

The beneficiaries of election fraud hire the best brains among election petition lawyers, who use all the legal technicalities to delay court processes, while most of them use state resources to fund their litigation. Some of the delaying tactics include filing frivolous interlocutory applications, *ex parte* motions, lining up hundreds of witnesses and delaying the constitution of election tribunals. This has a negative impact on INEC's preparations for and its conducting of the elections. INEC's Acting Legal Director, Bawa, argues that this resorting to legal technicalities frustrates INEC's functioning. He states that:

the judiciary sometimes seems to be oblivious of the realities of life, *ex parte* orders, mostly *ex parte* orders are churned out in Anambra, from all parts of the federation. So, as you are saying you are dealing with this person, this person comes with an order saying it's me, another one comes with an order and says it's me .... And when a court gives an order affecting a candidate, that will also have a bearing on the conduct of an election. In fact, the outcome of an election itself. A situation where a court gives an order restraining the commission from accepting a particular candidate for instance, even though the Act says no court has power to restrain the conduct of an election or the conduct of a primary, but there are situations where the court makes an order at very late hours saying the person who a political party submitted should not have been the candidate for the election, so he should not be there. (Bawa, Interview, 2013)

INEC has been experiencing difficulties in enforcing and following electoral guidelines as a result of incessant *ex parte* orders, injunctions and delays in ruling on matters of electoral urgency. Citing the case of several court decisions of the PDP in Anambra State, Bawa (Interview, 2013) noted:

A court in Awka directed that INEC should not accept any list from the PDP in Anambra except from a particular group, so INEC was bound by that and acted on that. But the matter went on and got to the Supreme Court and the Supreme Court said no, that INEC ought not to have accepted the list from that group, but because it was one case that went

to the Supreme Court that has been sorted out, the other are still there in the Court, so the judicial process is now trying to take care of the other cases that were not collectively carried along with the other case. So these are some situations that we have judicial interventions.

So the judicial process has ways of affecting the conduct of an election. It has adverse implications for conducting credible elections because over-reliance on legal technicalities not only thwarts electoral justice but has also led to delays. It defeats the rationale for setting up a special court, because INEC should not be consumed with pre- and post-election petitions when it ought to be preparing for the next election.

Much as the judiciary is central to supporting democracy, particularly in cultivating legitimacy for democratic orders (Diamond 1999, 47; Domingo 1999, 153), when the same judiciary is seen “as a safe sanctuary for election riggers” (Harunna 2008, 2), it affects INEC’s discharge of its powers and functions as contained in Part 1 of the Third Schedule of the Constitution (Federal Republic of Nigeria 1999) with respect to organising, undertaking and supervising all elections.

This article has provided different kinds of data to show that the interventions of the judiciary in the electoral processes between 1999 and 2011 increased substantially during each election cycle in Nigeria. Table 1 indicates the official number of post-election matters being heard by various tribunals as 2 596. Cumulatively, both the pre- and the post-election matters heard during the period of the study are estimated to have been well over 18 000. The increasing intervention of the judiciary equally resulted in the lowering of the quality of the elections. The illustrative cases of the five state governors (Adamawa, Bayelsa, Cross River, Kogi and Sokoto) on tenure prolongation and *Amaechi v INEC*,<sup>4</sup> among others, demonstrated a correlation between the increasing intervention of the highest court and the poor quality of elections during the election cycles. The majority of the decisions that flow from that court have a negative impact on the election quality; for instance, the Supreme Court judgment on Atiku Abubakar’s candidacy three days before the election day substantially affected the outcome of the presidential and governorship elections on April 21, 2007. As the delivery of 75 per cent of the election materials was delayed on election day, voting started very late in most of the polling states, several thousand voters were disenfranchised, the results declared contradicted actual voter turnout, and so on.

### **The Judiciary and the Undermining of Elections**

The total of 2 596 post-election petitions adjudicated by the courts over the four election cycles is an indication that the Nigerian judiciary takes the view that it is its electoral duty to ensure that INEC does not preside over its own cases. The judiciary does indeed have a central role to play in electoral dispute resolution: it provides an avenue for

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<sup>4</sup> (No. 2) (2007) 18 NWLR (Pt 1065) 98.

electoral grievances to be resolved. In this respect, the judiciary has helped to sustain the political rights of the electorate in Nigeria. The alternative to this is to resort to self-help, with consequential anarchy. Also, judicial involvement in election matters provides avenues for legal reforms such as the time limitation on post-election petitions, which invariably helps to improve the electoral system. The reduction in post-election petitions from 1 291 after the 2007 elections to 731 in 2011 shows that the judicial resolution of election disputes has contributed to improving the credibility of the 2011 general election in Nigeria. And court interventions do help to guide the electoral process in line with international best principles of conducting elections.

But, it has to be said, the interventions of the courts, particularly with the interpretation of the relevant laws guiding the conducting of elections, has created undue delays in election-day activities and has led to problems with INEC's enforcing electoral guidelines and regulations. This has in turn reduced the level of public confidence in INEC. This also interfered with the procurement of election materials and their timeous and efficient distribution for elections, which caused shifts in the election timetable and staggered elections in some states, and also created an atmosphere of uncertainty in the electoral process.

Several factors account for the courts' poor role in the electoral adjudications in Nigeria. Davies (2003) argues that in the process of the judiciary's fulfilling its electoral roles in Nigeria, it suffers from serious limitations, the most chronic of which is corruption. Evidence of this is that many election-related petitions have been compromised because they have been based on financial or material gain and/or non-material gain aimed at undermining the impartiality of the court process. For instance, cases of corruption against the judges handling election cases have been divulged. In 2003, at the Akwa Ibom State Gubernatorial and Legislative Houses Election Tribunal, four out of the five tribunal members were found guilty of having accepted financial inducement, while the Akwa Ibom Chief Judge, Justice Effiong David Udo, acted as the middleman between members of the tribunal and their alleged benefactor, Governor Victor Attah (Ugochukwu 2004, 69; 2011, 77; Fawehinmi 2007; Otteh 2004, 19). The four tribunal members received bribes and subsequently upheld the election of the then incumbent governor, Victor Atta. This was notwithstanding the avalanche of irregularities and instances of fraud established during the voting and counting process.

In another related event, the Nigeria Judicial Council (NJC) established that Justice Okwuchukwu Opene had received 15 million naira (US\$100 000) in bribes, and Justice David Adeniji had accepted 12 million naira (US\$80 000), whereas Justice Kumai Bayang Akaahs had declined to be bribed. The justices who received bribes handed down judgment in favour of Dr Ugochukwu Uba, whereas Justice Akaahs, who rejected the bribe, delivered a dissenting judgment (Fawehinmi 2007; Ugochukwu 2011). Also, Justice Egbo-Egbo's *ex parte* judgment handed down an order for sacking the Anambra State governor, whereas Justice Nnaji of Enugu State High Court issued counter-orders

to an existing court order. This is supported by the revelation of retired Supreme Court Justice O. Adekeye:

Election years are most challenging periods for Nigerian Judges, desperate politicians, in a bid to win at all cost, even attempt reaching out to judges through their relations, friends and close associates with mouth-watering bribes in order to win election petition cases in courts. The truth is that no judge will go to any politician to seek for a bribe. (Nnochiri November 2012)

Corruption undermines the independence of arbiters and judges, the legitimacy of electoral law and the right to an effective remedy. It represents a major threat to democracy, human rights and the rule of law and it endangers the stability of democratic institutions. It is from the same perspective that Puddington (2010, 3) describes Nigeria's judiciary as "weak, unable to act independently or apply the law equally to all members of society." Bawa (Interview 2013) noted that the judicial process had certain ways of affecting the conduct of elections, ways that had adverse implications for the conduct of credible elections because over-reliance on legal technicalities not only thwarted electoral justice but also led to delays. This defeats the rationale for setting up special courts because the Electoral Commission does not need to be consumed by pre- and post-election petitions when it ought to be preparing for subsequent elections.

## Conclusion

The judiciary is central to supporting democracy, particularly in cultivating legitimacy for democratic orders (Diamond 1999, 47; Domingo 1999, 153). But the same judiciary is also seen "as a safe sanctuary for election riggers" (Harunna 2008). If this is the case, it adversely affects INEC's discharge of its powers and functions as contained in Part 1 of the Third Schedule of Nigeria's Constitution with respect to organising, undertaking and supervising all elections. What has been revealed is that the electoral justice system has become a matter of promoting the preferences of dominant "interest groups" or political "Big Men" rather than promoting democratic consolidation. This is the syndrome of "Big Man politics", "money politics" or the "politicisation of the judiciary" in Africa (Joseph 1991; Kew and Lewis 2010; Kramer 2004; Lewis 2008). This syndrome appears to be the main determinant of the electoral justice system in Africa (Omenma, Ibeanu, and Onyishi 2017, 47). This is precisely why an independent, incorruptible and fearless judiciary alert to its responsibility is a *sine qua non* of positive electoral justice and true democratic norms.

If the state or a dominant power bloc interferes with the operation of an independent court or INEC, that will decrease the independence and undermine the impartiality of the body and increase the likelihood that the adjudication of election complaints will be biased. In other words, these are the outcomes of deliberate executive encroachment upon the appointment and discipline of the judges. The available evidence indicates that since the return of democracy in 1999 in Nigeria, the executive branch of government

has been devouring the available space and interfering in the judicial functions of government in order to pursue and fulfil political ambitions. Examples of this are the promotion of Justice George Oguntade to the Supreme Court after delivering the “required judgment” on the 2003 presidential election; similarly, there was the president’s appointment of Justice James Ogebe (the Chairman of the tribunal that determined the 2007 presidential election petition) to the Supreme Court in 2007, just days before the tribunal he chaired was due to deliver its judgment (Ugochukwu 2011). These are examples of the indirect or direct ways in which the executive branch of government coerces the judiciary to compromise on its independence while handling significant election petition matters.

A theoretical counter-argument is that because the courts have been unduly involved in election matters, they have become the targets of “political investors.” This means that electoral justice becomes available to the highest bidder. The importance of this is that some outcomes of election adjudicatory processes are produced in response to very narrow but powerful interests. Because of the value generally placed on material well-being and state power (government), ruling elites are often keen to use the state powers in a manner that will maximise their stay in government rather than advance the course of democratic consolidation. The result is that the very institution that ought to protect democracy becomes a threat to it, because the human factor is permitted to override institutional roles. This contradicts the opinions of Dahl (1957) and Przeworski (2005) that the role of the judiciary in a democratic system is to ensure that the processes and results of electoral competitions are upheld with all sanctity.

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