

An Analysis of the Legal Regime of Election Administration in Nigeria

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Abstract

Credible elections are vital for economic, socio and political development of any nation practicing democracy. Prominent among requirement for a free, fair and credible elections is the legal framework which regulates generally administration of election including the establishment of an electoral management body. This paper identifies and elucidates the provisions of the 1999 Constitution, which is the grundnorm of all the laws in Nigeria, relating to electoral matters in Nigeria. It examines the Electoral Act 2010 as well as the Electoral Guidelines. It identifies some of the lapses in the legal frameworks as it is presently and recommends measures to addressing them.

Keywords: Constitution, credible election, election management body, legal framework,

1.1 Introduction

Legal framework for administration of election in Nigeria comprises the Constitution of the Federal Republic of Nigeria 1999 as amended; the Electoral Act 2010 as amended and other laws regulating the conduct of institutions and agencies involved in elections¹. Before the amendment of the 1999 Constitution and prior to the repeal of the Electoral Act 2006 by the Electoral Act 2010, there were clamours for a reform of the Nigerian electoral system and the need to address the shortcomings of the legal framework that was subsisting as at that time with a view to addressing the problem of delay which was bedeviling administration of justice in hearing of election petition. This led to setting up of the Uwais Electoral Reform Committee. The extant legal framework of administration of election in Nigeria was the product of legislative intervention pursuant to part of the recommendations of the Electoral Reform Committee.

2.1 Some International Instruments Creating Electoral Rights

There are established principles of political rights and freedoms relating to elections contained in declarations, conventions, protocols and other international instruments adopted by the United Nations, African Union, Economic Community of West African States and the Commonwealth. Some of these instruments shall be briefly considered.

2.1.1 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

All appropriate measures shall be taken to ensure to women on equal terms with men without any discrimination:

- (a) The right to vote in all elections and be eligible for election to all publicly elected bodies;
- (b) The right to vote in all public referenda;
- (c) The right to hold public office and to exercise all public functions. Such rights shall be guaranteed by legislation.²

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.³

¹Uwais Electoral Reform Committee Report, in *The Constitution* Vol. 9, No. 2, June 2009 pp. 99-100

² Art. 4, 'Convention on the Elimination of All Forms of Discrimination Against Women' available online at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx> accessed on 4 September, 2015.

³ Art. 7, *ibid*

2.1.2 The Universal Declaration of Human Rights

- (1) Everyone has the right to freedom of peaceful assembly and association.
- (2) No one may be compelled to belong to an association.¹

In addition to the above,

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right of equal access of public service in his country.
- (3) The will of the people shall be basis of the authority of government: this will shall be expressed in period and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.²

2.1.3 Convention on the Political Rights of Women.

Women shall be entitled to vote in all elections on equal terms with men, without any discrimination.³ Women shall be eligible for election to all publicly elected bodies, established by national law, on equal terms with men, without any discrimination.⁴ Women shall be entitled to hold public office and to exercise all public functions, established by national law, on equal terms with men, without any discrimination.⁵

2.1.4 African Commission on Human and Peoples' Rights

- (1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
- (2) Every citizen shall have the right of equal access to the public service of the country.
- (3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law.⁶

2.1.4 International Covenant on Civil and Political Rights

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interest of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.⁷

- (1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
- (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
- (3) Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.⁸

¹ Art.20 'The Universal Declaration of Human Rights' available online at <http://www.un.org/en/documents/udh> accessed on 4 September, 2015.

² See Art. 21, *ibid*

³ Art. 1 'Convention on the Political Rights of Women, 193 U.N.T.S. 135, entered into force July 7, 1954' available online at <http://www1.umn.edu/humanrts/instreet/e2cprw.htm> accessed on 4 September, 2015.

⁴ Art. 2, *ibid*

⁵ Art. 3, *ibid*

⁶ Art. 13 'African Commission on Human and Peoples' Rights' available online at <http://www.achpr.org/instruments/achpr/> accessed on 4 September, 2015.

⁷ Art. 21, 'International Covenant on Civil and Political Rights' available online at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> accessed on 4 September, 2015.

⁸ Art. 22, *ibid*

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

3.1 The 1999 Constitution(as amended)

Issues relating to electoral process such as the electoral body in charge of organizing elections and the courts and Tribunals to determine complaints arising from the conduct of elections have their foundations in the nation's Constitution.

The Constitution whether written or unwritten, rigid or flexible, unitary or federal, and so forth has two basic natures namely- It is an expression of the will or desires of the people who make up the state or country; and it is a social contract between the government as an entity and the people on the one hand. It is a contract between those who hold public offices and the people, and it is also a social contract between and among the various ethnic peoples who make up the state or country.¹

The Constitution is the supreme and most important law of the country. Section 1 (3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) makes it clear that if any other law is inconsistent with the provisions of the Constitution that other law shall be void to the extent of the inconsistency. The courts have upheld that section in countless decisions.² For this reason alone any law dealing with elections that contradicts the provision of the Constitution will be of no effect. The Constitution also says very clearly that the Government of Nigeria or any part thereof shall not be governed or controlled by any person or group of persons except in accordance with the provisions of the Constitution. In other words, no one can occupy elective offices at the local, state or federal level unless he or she has been elected in accordance with the provision of the Constitution or any law made in accordance with the Constitution.

The Constitution prescribes certain qualifications that persons vying for some offices recognized or created by the Constitution must meet before they can participate in elections in those offices. In a rather inelegant fashion, in my opinion, the Constitution lists in separate sections what it refers to as disqualifications and qualifications as the end result of the two types of provisions is to prescribe eligibility criteria.³

With respect to electoral matters, the relevant items of the Second Schedule dealing with legislative powers are items 22 of Part 1.⁴ Item 22 of the Exclusive Legislative List is 'election to the offices of President

¹Ese, Malemi (2006), *The Nigerian Constitutional Law*, Princeton Publishing Co, Lagos pp.12 & 15. In *I. G. P. v. A.N.P.P.* (2007) 18 NWLR (pt 1066) 457 at 495- 496, the Court of Appeal held as follows: "The Constitution of any country is the embodiment of what the people desire to be their guiding light in governance, their supreme law, the grundnorm of all their laws. All actions of the government in Nigeria are governed by the Constitution and it is the Constitution as the organic law of a country that declares in a formal, emphatic and binding principles the rights, liberties, powers and responsibilities of the people both the governed and the government." See *F.R.N. v Ifeogwu*(2003) 15 NWLR (pt 842) 113; *AG Abia State v. AG Federation* (2002) 6 NWLR (pt 763) 264; *Abacha v. Fawehinmi*(2000) 6 NWLR (pt 660) 228

²See *NPA v. Eyamba* (2005) 12 NWLR (Pt. 939) 409 at p. 443. In the case of *Merwa&Ors v. Nyako&Ors*SC. 141/2011, the Supreme Court held as follows: "The Supremacy of the Constitution of the Federal Republic of Nigeria 1999 is captioned by sections one and three, part 1 of chapter 1 under general provisions which state that – Section one of this Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria." Section 3 "if any other law is inconsistent with the provisions of this constitution this constitution shall prevail and that other law shall to the extent of the inconsistency be void." This court had given recognition to this supremacy and had expatiated on the Constitution through various judgements in its interpretative jurisdiction. The Constitution is described as the grundnorm and the fundamental law of the land. All other legislations in this country take their hierarchy from the provisions of the Constitution. It is not a mere common legal document. It is an organic instrument which confers powers and also creates rights and limitations. It regulates the affairs of the nation state and defines the powers of the different components of government as well as regulating the relationship between the citizens and the state. Once the powers, rights and limitations under the Constitution are identified as having been created, their existence cannot be disputed in a court of law. But the extent and implications may be sought to be interpreted and explained by the court. The provisions of the Constitution take precedence over any law enacted by the National Assembly even though the National Assembly has power to amend the Constitution itself. Per Adekeye J.S.C. pp 123-124, paras. E - G. See *A-G Ondo State v. A-G Federation* (2002) 1 NWLR (pt. 772) 222.

³See sections 106 & 107 for membership of House of Assembly; Sections 65 & 66 for membership of National Assembly; Sections 177 & 182 for qualifications and disqualifications for election to the office of Governor of a State and sections 131 and 137 for qualifications and disqualifications for election to the office of President of the Federation.

⁴Exclusive Legislative List and 11 & 12 of Part II Concurrent Legislative List

and Vice President or Governor and Deputy Governor and any other office to which a person may be elected under this Constitution, excluding election to a local government council or any office in such council'. Items 11 and 12 of the Concurrent List are respectively as follows:

'11. The National Assembly may make laws for the Federation with respect to the registration of voters and the procedure regulating elections to a local government council.

12. Nothing in paragraph 11 hereof shall preclude a House of Assembly from making laws with respect to election to a local government council in addition to but not inconsistent with any law made by the National Assembly.'

3.2 Electoral Act 2010 (as amended)

In line with its constitutional power to make laws for the peace, order and good government of the Federation or any part thereof with respect to item 22 under the Exclusive Legislative List,¹ the National Assembly enacted the Electoral Act 2010.²

The Electoral Act 2010 is not the first of its kind. It was built on the provisions of the Electoral Act 2006, which it repealed. Its provisions made some marginal improvements over and above the 2006 Act, but it was definitely not sufficient enough to bring about an overhaul of the electoral system in the terms recommended by the Uwais panel.³ This was not totally unexpected.

It is against this background that the Electoral Act 2010 (as amended), was passed by the National Assembly, after much deliberation and debate. The key provisions of the Act reflect government's attitude towards the recommendations of the Uwais Committee. Expectedly, the recommendations of the Uwais Committee that were not reflected by the government, including the one on independent candidacy, were not reflected in the Act. Also, some of the seemingly novel provisions of the Act, such as the one on continuous registration, the oath of neutrality by election officials, prohibition of double nomination, among others, were merely lifted from the 2006 Act; the provisions of which are same in many material respects as the new Act.

There are uniquely novel provisions however. Of note in this regard is the provision of the Electoral Act 2010 which prohibits substitution of candidates by political parties except in cases of death or self-withdrawal.⁴ The bulk of the provisions of the Electoral Act 2010 relates to procedural issues that were already covered by the Electoral Act 2006, which was repealed by the new Act. The current Act is arranged in nine parts, with 152 sections and three schedules. The Act repeals both the Electoral Act 2006 and the INEC Act. It re-establishes INEC, an INEC Fund, and guarantees its independence. The functions, powers, revenue base and other matters connected with INEC and its staff remain essentially the same as in the repealed 2006 Act. The provisions of the 2010 Act in respect of the registration of voters, the provisions of registration officials and the creation of offences were more or less repetitions of the 2006 Act with some juggling of figures.

As for the procedure for election, the only major change was the prescription of the order of the election in section 25(1) of the 2010 Act. This provision is not only self-seeking as it was designed to serve the interests of the serving members of the National Assembly, it robs INEC of the unfettered power which it had under section 26 of the Electoral Act 2006 to determine the dates of elections. The other novel provision, which is commendable, is the provision of section 33 which bars political parties from substituting candidates after submission. This is to prevent the kind of ugly incident which Alabi⁵ observes made it possible for voters not to know the candidates up to the point of voting.

Ironically, the procedure of voter accreditation before the actual voting commences, for which the INEC was commended in 2011, even though not a novelty in Nigeria's electoral history, is not officially provided for under the Act but was adopted, perhaps, in pursuance of the powers of the Commission⁶ to fix the day and hours of polls.

In flagrant disregard for the recommendations of the Uwais Committee, but in line with the provisions of the 1999 Constitution, the Electoral Act 2010 vests the power to register and regulate the activities of political parties in the electoral commission. This was a consequence of the inability of the government to demonstrate

¹Item 22 is on election to the offices of President and Vice-President or Governor and Deputy Governor and any other office to which a person may be elected under the 1999 Constitution (as amended), excluding election to a local government council or any office in such council. See Second Schedule, Part 1 of 1999 Constitution (as amended)

²Laws of Federation of Nigeria 2011

³Alabi, M. O. A & Omololu, O. T. (2012), 'Uwais Report, Electoral Act 2010, and the Future of Democratic Elections in Nigeria' in Layonu, A. I. & Adekunbi, A. A. O. (eds.) *Reflections on the Nigerian Electoral System* First Law Concept, Ibadan pp. 207-236

⁴See Section 33 which provides that a political party shall not be allowed to change or substitute its candidate whose name has been submitted pursuant to section 31 of this Act, except in the case of death or withdrawal by the candidate.

⁵*Op cit* n. 18 above

⁶See section 46

sufficient political will to implement those recommendations of the ERC report which it purported to accept as far back as 2009. The same could be said of the refusal to create an Electoral Offences Commission, notwithstanding the creation of several offences in relation to the registration of voters and their conduct of elections.¹ In essence, the Uwais Committee's recommendation for unbundling INEC, which the government accepted, was not implemented, years after the recommendation was made and accepted.

The 2010 Act like the repealed 2006 Act, stipulates a continuous voters' registration system. In section 10(2), an applicant for registration under the continuous registration system shall appear in person at the registration venue with proof of identity, age and nationality. Apart from preventing registration by proxy, the innovation helps to establish the true identity of voters and prevent voting by non-human objects as witnessed in the 2007 elections in Ondo State. Other adjustments to the contents of the repealed Act were designed to prevent frustration associated with litigations arising from the conduct of elections, as well as enforcement of internal democracy in selecting party candidates for election. Essentially, these changes were meant to ensure more credibility and reduce acrimonious intra-party crises often associated with the choice of party's flag bearers. Aside from this, the Act imposes stiffer punishments for culprits engaged in the buying and selling of voters' cards.

On the whole, while the Electoral Act 2010 contains a number of provisions that seek to enhance the conduct of free and fair elections, these provisions were mostly cosmetic and are not far-reaching enough to bring about the desired reform of the entire electoral system. The Act merely seeks to make some marginal changes within the limits permissible under the existing constitutional framework. Such changes in the texts of the Constitution that are necessary for tackling the ills of the electoral/political system were not made by the National Assembly. It is therefore not surprising that the maladies of the previous years, which had robbed Nigeria of the needed credibility for democratic consolidation, were repealed in various forms and different degree, before, during and after the April 2011 elections.

3.3 Case Law

Case law refers to that body of principles and rules of law which, over the years, have been formulated or pronounced upon by the courts as governing specific legal situations. This assertion seems to run contrary to the general impression that judges do not make laws but simply apply them as and when the need arises. The primary duty of making laws is that of the legislature and judges do not go about making laws in the same manner and with the same ease as legislators do. But they are not altogether detached from the law-making process. A judge that is confronted with a legal problem does not have to resign helplessly where the established laws are inadequate in resolving the problem. It is a cardinal maxim of our law that where there is a wrong there must be a remedy.² Judges are, therefore, encouraged to formulate fresh rules of law or to extend the existing ones to deal with novel cases.³ By so doing, they add to the corpus of existing laws through their judicial pronouncements. This law making function of the courts is sustained by the operation of the doctrine of judicial precedent.⁴

At present, the decisions of the Nigerian courts cannot but constitute the least creative source of law in the country. The reason why that should be so is that the enactments which create the courts and give them their powers restrict them to applying only two types of law apart from rules contained in local statutes.⁵ The first is the received law, which is expressly declared to be the law of England.⁶ That, of course, does not prevent a body of Nigerian case law growing up around this received law. This has indeed occurred, and Nigerian decisions upon the rules of English law are cited by the courts almost as frequently as those of the English judges. But it does prevent Nigerian common law and equity striking off on their own, and in places departing from the pattern of development in England.⁷

¹ See sections 117-132

² Asein, J. O. (1998), *Introduction to Nigerian Legal System*, Sam Bookman Publishers, Ibadan p. 67

³ See e.g. the strict liability principle developed in *Rylands v. Fletcher* (1886) L.R. 3. H.L. 330

⁴ The doctrine of judicial precedent (otherwise called *stare decisis*) requires all subordinate courts to follow decisions of superior courts even where these decisions are obviously wrong having been based upon a false premise. This is the foundation on which the consistency of our judicial decision is based: See *Ngwo v. Monye* (1970) 1 All NLR 91 at 100. It is however, the principle of law upon which a particular case is decided that is binding. Such a principle is called *ratio decidendi*. A statement made in passing by a judge which is not necessary to the determination of the case in hand is not a *ratio decidendi* of the case but an *obiter dictum* and it has no binding effect for the purpose of the doctrine of judicial precedent. See *Dalhatu v. Twiaki&Ors* (2003) LPELR 917. Also *N.A.B Ltd v. Barri Eng. (Nig) Ltd* (1995) 8 NWLR (pt 413) 257 pp. 289 -290.

⁵ Except where under the rules of Private International Law a foreign law is applicable

⁶ Except in the North, but the practice of the Northern courts is the same as if the words "of England" were included

⁷ Park, A.E.W. *The Sources of Nigerian Law* (Sweet & Maxwell 1963) 54

Constitutionally, the responsibility of the court is to interpret laws and apply them to facts of the case before the court. Decisions reached as a result of the interpretation by superior courts of records have the force of law and sanction like any other law made by legislature. For example, an interpretation on a point of law by the Supreme Court of this country is law. Such pronouncements of courts of records as contained in our various law reports are laws, which can be referred to and applied, in subsequent cases, if the facts and circumstances are impari-material. Under common law, the method of applying the ratio decidendi of previous cases to the case in hand is called stare decisis (let what was previously settled or decided not be disrupted or altered).

Case law is a very important source of electoral law. Nigeria now has a fairly developed electoral jurisprudence which has been well documented.¹

3.4 Electoral Guidelines

Section 153 of the Electoral Act, 2010 (as amended) gives power to Independent National Electoral Commission (INEC) to issue regulations, guidelines or manuals for the purpose of giving effect to the provisions of the Electoral Act and for its administration thereof.

Consequently, the Commission usually issues guidelines and regulations for general elections. An example of this is Guidelines and Regulations for the 2015 General Elections.² In the case of *Okechukwu v. Onyegbu*,³ the Court of Appeal talking about the purport of the Manual for Election Officials, 2007 made pursuant to section 161 of the Electoral Act, 2006 (now section 153 of the Electoral Act, 2010 as amended) said as follows:

The Manual for Election officials, 2007 (exhibit AK in the instant case) was published by INEC for the fundamental objective of giving effect to the provisions of the Electoral Act, 2006. The guidelines are undoubtedly meant to be strictly constructed and adhered to by the electoral officials concerned in the process and procedure for election.

3.5 Conclusion

An examination of the legal regime of election administration in Nigeria has revealed that the grundnorm for the conduct of elections in Nigeria consists of the Constitution of the Federal Republic of Nigeria 1999 (as amended), the Electoral Act 2010 (as amended), case law and guidelines regulating the conduct of institutions and agencies involved in elections. The National Assembly did a commendable job in 2010 in its amendment of the 1999 Constitution among which are: making the Independent National Electoral Commission (INEC) financially independent when it made its expenditure derivable directly from the Consolidated Revenue Fund;⁴ Inclusion of time limitation for the hearing of election petition in the constitution to address the problem of delay in the hearing of election petition⁵ to mention but a few. The Electoral Act 2010 also contains provisions to address delayed hearing of election petition unlike the position under the repealed Electoral Act 2006.⁶ However, there is the need to further amend the Constitution as well as the extant Electoral Act to further guarantee and strengthen the independence of INEC by making the Commission not subject to the direction and control of any person or authority in the exercise of all its operation.⁷ Additionally, the constitution as well as the Electoral Act should be further amended to accommodate other plausible recommendations of the Electoral Reform Committee such as independent candidacy, giving greater weight to the substance of the petition rather than mere technicalities among others. This is imperative to restore credibility in the electoral process in Nigeria and ensure the conduct of free, fair and credible elections in the country.

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Asein, J. O. (1998), *Introduction to Nigerian Legal System*, Sam Bookman Publishers, Ibadan

¹See Popoola, A.O. 'Election Petitions and the Challenge of Speedy Dispensation of Justice in Nigeria' being a paper commissioned for presentation at the Induction Course for newly appointed Judges and Kadis of the Sharia Court of Appeal by the National Judicial Institute, Abuja 4-15 June, 2007.

²Available online at www.inecnigeria.org/wp-content/uploads/2015/01/FINAL accessed on 10 February 2015

³(2010) All FWLR (pt. 524) p. 117 at 136-137.

⁴See section 84 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

⁵See section 285(5) and (6), *ibid*

⁶See section 134 (1) and (2) of the Electoral Act 2010 (as amended)

⁷Under section 158(1) of the Constitution, INEC shall not be subject to the direction or control of any other authority or person in exercising its power to make appointments or to exercise disciplinary control over persons.

Ese, Malemi (2006), *The Nigerian Constitutional Law*, Princeton Publishing Co, Lagos

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1999 Constitution of the Federal Republic of Nigeria (as amended)

The Electoral Act 2010 (as amended)