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**BACK TO THE FUTURE: A JURISPRUDENCE FOR RESTORING ELECTION PETITIONS\*\*\*****Abstract**

*By constitutional and statutory prescription, the functions of Nigeria's Independent National Electoral Commission (INEC) encompass inter alia, promoting knowledge of sound democratic election processes; and conducting all elections to the offices of the President and Vice-President, the Governor and Deputy Governor of a State, and to the membership of the Senate, the House of Representatives and the House of Assembly of each State of the Federation. An election petition is aimed at questioning the election return and declaration of a candidate in an election. The adjudicating body that has sole jurisdiction to decide such petition is the Election Tribunal. The jurisdiction of an election petition tribunal to decide an election petition is invoked when a person has been elected and there are questions raised such as are provided in the Electoral Act, 2022. Statutorily, INEC has a duty of providing compulsory discovery of documents and materials used in an election to a person desirous of challenging the returns of the election. Procedurally, INEC is required to be joined as a defendant to any election petition. Requiring INEC to providing materials to assist a petitioner in a proceeding where INEC is a respondent creates a tension between INEC's constitutional function as an umpire and its procedural role as a respondent. This tension as resolved by INEC entails obstructing compulsory discovery and disobeying court orders for discovery. This puts paid to any pretension of neutrality by INEC in election petition proceedings. This paper aims at suggesting a framework for re-establishing INEC's impartiality in election petitions. The paper found that the procedural requirement of making INEC a respondent to election petitions unnecessarily converts INEC's role from that of umpire to that of adversary. The paper concluded that in order to restore INEC to its unmitigated role as umpire, there should be a recalibration of electoral adjudication procedure to eliminate INEC's status as compulsory co-respondent. The paper then suggested and itemised extant procedural machinery that could be deployed in election petition adjudication that obviates a necessity of making INEC a compulsory co-respondent.*

**Keywords:** elections; election petitions; INEC; neutrality; impartiality; electoral jurisprudence

**1. Introduction**

Nigeria's last election cycle (2023) and the judicial challenges to the conduct and results of the elections disclosed deep contradictions in the expected impartiality of Nigeria's election umpire. In the judicial challenges to the elections, INEC exchanged its role from that of an impartial election umpire to that of a deeply biased and highly interested party in the election petitions. It adopted several methods to deliberately and egregiously frustrate the election petitions and discourage and intimidate litigants. INEC constantly and consistently refused to obey court orders requiring it to perform its statutory duty of availing litigants with necessary materials for evaluation of the integrity of the election.

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INEC deliberately furnished mutilated, useless and unreadable materials that were calculated to afford no probative value to the pending proceedings. INEC's deliberate obfuscation, stonewalling and befuddling in deliberate violation of its statutory duties made it impossible for most litigants who needed access to material in INECs custody to establish their cases before the courts. While much could be said about the self-imposed helplessness of the courts when confronted with INEC's in-your-face brand of intransigence and obduracy, it is impossible to say enough about INEC's deliberate sabotage and incapacitation of Nigeria's democratic election and the election jurisprudence springing from it. This paper attributes INECs wilful damage, disruption and destruction of the verity and integrity of Nigeria's electoral jurisprudence to rules of practice and procedure that require that INEC be made a party to every election petition. This has the effect of transmuting the psychology of INEC from presenting an unbiased account of their conduct of the election, to defending at every cost, the conduct of the election. This '*defending at every cost syndrome*' ultimately translates to defending at all costs inclusive of falsehood, perjury, document forgery, evidence suppression and destruction, and every other form of unconscionable practice calculated to defeat the case of the litigant who had the temerity and effrontery to challenge INECs conduct of the election. This paper argues that in order to recalibrate INECs mind-set to that of an impartial umpire, a jurisprudence must be created that would isolate INEC from post-election litigation. The paper then does ahead to suggest possible ways of achieving this objective.

## **2. The Role, Duties and Responsibilities of INEC in the Election Schematic**

Nigeria's Independent National Electoral Commission (INEC) is established by s. 153(1)(f) of Nigeria's 1999 Constitution (CFRN). Its constitutional and statutory responsibilities and powers include to organise, undertake and supervise all elections to the offices of the President and Vice-President, the Governor and Deputy Governor of a State, and to the membership of the Senate, the House of Representatives and the House of Assembly of each state of the federation; register political parties in accordance with the provisions of the Constitution and Act of the National Assembly; monitor the organisation and operation of the political parties, including their finances; conventions, congresses, and party primaries; arrange for the annual examination and auditing of the funds and accounts of political parties, and publish a report on such examination and audit for public information; arrange and conduct the registration of persons qualified to vote and prepare, maintain and revise the register of voters for the purpose of any election under the constitution; monitor political campaigns and provide rules and regulations which shall govern the political parties;<sup>1</sup> and to conduct voter and civic education; promote knowledge of sound democratic election processes; and, conduct any referendum required to be conducted pursuant to the provision of the 1999 Constitution or any other law or Act of the National Assembly.<sup>2</sup> Statutorily, the function of announcement and declaration of election results is the function of INEC. In this respect, the results of all elections are required to be announced by the Presiding officer at the polling unit; Ward Collation Officer at the Registration Area or Ward Collation Centre; Local Government or Area Council Collation Officer at the Local Government or Area Council Collation Centre; and State Collation Officer at the State Collation Centre.<sup>3</sup> The returning officer is required to announce the result and declare the winner of the election at Registration Area or Ward Collation Centre in the case of Councillorship election in the FCT; Area Council Collation Centre in the case of Chairmanship and Vice Chairmanship election in the FCT; State Constituency Collation Centre

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<sup>1</sup> s. 15, Part 1 of the 3<sup>rd</sup> Schedule of CFRN 1999

<sup>2</sup> s. 2 of Electoral Act 2022

<sup>3</sup> s. 25 (1) (ibid)

in the case of State House of Assembly election; Federal Constituency Collation Centre in the case of election to the House of Representatives; Senatorial District Collation Centre in the case of election to the Senate; State Collation Centre in the case of election of a Governor of a State; State Collation Centre in the case of a Presidential election; and National Collation Centre in the case of election of the President.<sup>4</sup> The decision of the returning officer is final on any question arising from or relating to unmarked ballot paper; rejected ballot paper; and declaration of scores of candidates and the return of a candidate.<sup>5</sup> INEC possesses tremendous powers. Its powers in the performance of its constitutional and statutory functions are subject only to judicial control. Abuse of these powers and error in the use of these powers are not only possible, they are regular actual occurrences. A typical election petition calls to the question, INEC's conduct of an election. Ordinarily, INEC's role is that of an umpire, and this role continues even after the conduct of an election. However, experience indicates, that INEC's pretension at neutrality comes to an end upon the challenge of an election result. At this point, the Commission reverts to aggressive combat mode and goes all out to frustrate the petitioner. The standard weapon deployed by INEC in accomplishing this is refusing the petitioner access to electoral materials, even when the court has ordered it to. Consequently, a good number of election petitions are lost, not due to an absence of merit in the petition, but solely due to INEC's deliberate stonewalling, obstructionism, impedance and obfuscation. This represents an unacceptable subversion of our electoral law jurisprudence. This paper proposes a new model of election petition procedure that eliminates the necessity of joining INEC as co-respondent, thus ameliorating or eliminating its adversarial opposition to the petitioner.

### 3. The Role and Duties of Umpires

Within the context of Nigerian jurisprudence, an umpire is an impartial arbiter. His function is to moderate the contests between two or more competitors as a referee. He is required to be dispassionate in determination of matters confided to his authority. He is precluded from descending into the arena, which term connotes conducting himself in such a manner that indicates a personal stake in the subject-matter of the proceeding<sup>6</sup>. INEC, established by s. 153(1)(f) of CFRN has powers and duties that include to - monitor the organization and operation of the political parties, including their finances; arrange for the annual examination and auditing of the funds and accounts of political parties, and publish a report on such examination and audit for public information; monitor political campaigns and provide rules and regulations which shall govern the political parties; and, carry out such other functions as may be conferred upon it by an Act of the National Assembly.<sup>7</sup> INEC is an agency of the federal government<sup>8</sup> designed to be and given powers to ensure its independence and neutrality as the country's electoral umpire. Conceptually, the function of INEC by statutory provision is one of umpire in the conduct of elections in Nigeria. Consequently, it is required, not to ever put itself in a position where imputations may be made that

<sup>4</sup> s. 25 (2) (ibid)

<sup>5</sup> s. 65 (1) (ibid); under s. 65 (2) (ibid), a decision of the returning officer under subsection (1) may only be reviewed by an election tribunal or court of competent jurisdiction in election petition proceedings under the Act.

<sup>6</sup> *Coomassie v. Tell Communications Ltd.* [2003] 1 NWLR Part 802, 551; *Ajileye v. Fakayode* [1990] 5 NWLR Part 148, 92 [In acting as a referee, an umpire is required to give each of the disputants equal and fair opportunity in the contest.]

<sup>7</sup> s. 15 Part 1 of 3<sup>rd</sup> Schedule to CFRN 1999

<sup>8</sup> *Obasanya v. Obafemi*, [2000] 15 NWLR Part 689, 1

it supports one party or the other in an election.<sup>9</sup> Flowing from its role as an electoral umpire, INEC in discharge of its functions as an umpire is required, before the conduct of elections, during the conduct of elections, and even after the conduct of elections, to sustain, preserve and retain its position of neutrality as an umpire.<sup>10</sup>

Independence of an umpire connotes much more than independence from executive or legislative control and domination. It entails and includes independence from political influence, whether exerted by the political organs of government or by the public. In a two or multiparty system, nothing is more calculated to undermine the image of an impartial arbiter than an open identification with the interest of one of the groups engaged in the contest for power.<sup>11</sup> In order to give the strength and visible expression to the requirement for INEC's neutrality, all staff, electoral officers, presiding officers, returning officers and security officials taking part in the conduct of an election are required to affirm or swear to an oath of loyalty and neutrality, indicating that they will not accept bribe or gratification from any person, and shall perform their functions and discharge their duties impartially and in the interest of the country without fear or favour.<sup>12</sup> The Electoral Act contains further provisions purposed to ensure that INEC's neutrality is not compromised, and, also that public perception of its neutrality is not questioned. Consequently, both for the purpose of registration of voters, and conduct of elections, INEC is required to ensure that its designated officials are neither members of a political party nor have openly expressed support for any candidate.<sup>13</sup> Furthermore, no person holding an elective office to which the Electoral Act, 2022 relates or a registered member of a political party shall be eligible for or be appointed to carry out the duties of a returning officer, an electoral officer, presiding officer or a poll clerk, and any officer appointed to carry out any of those duties shall be ineligible for nomination as a candidate for election while he or she continues to hold such appointment.<sup>14</sup> Yet again, in order to ensure that INEC is not beholden to any party or personage for favours had and received, the Commission for purpose of securing the votes cast in an election is solely responsible for requesting deployment of security personnel for registration of voters or elections, and is required to utilise only the Nigerian Armed Forces for distribution and delivery of election materials and protection of election officials.<sup>15</sup> A credible electoral process would be impossible without an impartial, neutral, unprejudiced electoral umpire. Statutory provisions securing the independence of INEC are purposed to insulate the electoral umpire from the influence and control of self-interested contestants in the electoral process. To the extent that neutrality of the electoral umpire is dependent on the existence of a statutory framework, the foregoing statutory provisions create and elucidate sufficient legal structure to ensure the impartiality and objectivity of INEC.

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<sup>9</sup> *Haruna v. Modibo*, [2004] 16 NWLR 487

<sup>10</sup> *INEC v. Oshiomole*, [2008] 3 LRECN 649

<sup>11</sup> Ben. O. Nwabueze, *Judicialism in Commonwealth West Africa*, (Hurst/Nwamife, 1976) 280

<sup>12</sup> s. 26 (1) (n 2); under s. 26 (2) (ibid), any person who violates the provisions of s. 26(1) commits an offence.

<sup>13</sup> s. 27 (1) (ibid); under s. 27 (2) (ibid), the officers shall perform such functions and discharge such duties specified by the Commission, in accordance with provisions of the Act, and shall not be subject to the direction or control of any person or authority other than the Commission in the performance of their functions and discharge of their duties.

<sup>14</sup> s. 142 (ibid)

<sup>15</sup> s. 27 (3) (ibid)

#### 4. The Formal Orthodoxy of Parties and Non-Parties in Cases and Actions

In instituting any action, whether commenced by writ of summons, originating summons, petition, or originating motion, the originating process must state the name of a pursuer with legal capacity to bring the action. It must also contain the name of a defendant with legal capacity to defend the action and the claim against the defendant. In other words, the originating process must state briefly and clearly, the parties to the action, the subject matter of the claim and the relief sought. There must be a dispute between the pursuer and the defendant.<sup>16</sup> A party to an action is a person whose name is designated on record as plaintiff or defendant. The term ‘party’ refers a person or persons by or against whom a legal suit is brought, whether a natural or legal person. All other persons who may be affected by the suit indirectly or consequently are persons interested and not parties<sup>17</sup>. For the purpose of an action, parties are classified as *proper parties*, *desirable parties*, or *necessary parties*.<sup>18</sup> Proper parties are those, who though, not interested in the plaintiff’s claim, are made parties for some good reasons, e.g., where an action is brought to rescind a contract, any person is a proper party to it who was active or concurring in the matters which gave the plaintiff the right to rescind. Desirable parties are those who have an interest or who may be affected by the result. Necessary parties are those who are not only interested in the result, but also, who in their absence, the proceedings could not be fairly dealt with. In other words, the question to be settled in the action between the existing parties must be a question which cannot be properly settled unless they are parties to the action instituted by the plaintiff.<sup>19</sup> It is a cardinal principle of Nigerian jurisprudence that - a court shall not make an order against a person who is not a party to the suit; a court shall not make an award to a party of what the said party has not claimed; an order or award cannot be made against a party without giving him an opportunity of being heard, and, an order or an award should not be made against a person who has done no wrong.<sup>20</sup> It is also a fundamental principle of law that all parties who will be affected one way or the other in litigation must be made parties. They are entitled to be heard and must be heard before judgment should be given by the court. This is because it is against all known principles of fair hearing for a party to be condemned in a judgment in which he is not given an opportunity to lead evidence either in support or in defence of his right. A plaintiff has a legal duty to bring to court all persons who may be affected by the decision in the case so that the matter in dispute could be resolved once and for all, but while a plaintiff cannot bring to court a party as a defendant against his will, he must, in order to succeed

<sup>16</sup> *Ayorinde v. Oni*, [2000] 3 NWLR Part 649, 348; in *Ejezie v. Anuwu*, [2008] 12 NWLR Part 1101, 446, it was stated that a plaintiff is a person who initiates an action. He is the party who complains or sues in a civil action and is so named on the record. A plaintiff is also a person who seeks remedial relief for an injury to rights. In other words, a plaintiff is the party who commences an action in a court of law, and should be a person who has a right of action, that is, the person who has been wronged. A plaintiff is also known in some jurisdictions as the complainant, demandant, objectant or pursuer. No person can in the same suit be both the plaintiff and the defendant, even in different capacities. All persons who join as plaintiffs in the same suit cannot set up conflicting claims between themselves. In other words, plaintiffs in a suit must act together. They must present a common cause of action with a common set of reliefs.

<sup>17</sup> *Bello v. INEC*, [2010] 8 NWLR Part 1196, 342

<sup>18</sup> *Ebongo v. Uwemedimo* [1995] 8 NWLR Part 411, 22

<sup>19</sup> *Ogbonda v. Nkanginieme*, [2010] All FWLR Part 502, 1034

<sup>20</sup> *Onyekwulunne v. Ndulue* [1997] 7 NWLR Part 512, 250; in *Jabre v. Jabre* [1999] 3 NWLR Part 596, 606, it was held that it is an infraction of the fair hearing provisions of the constitution and the common law to make an order of court on a person who is not a party to the proceedings in court. A right to be heard in a case, before a tribunal can make an order on him, is one which all Nigerians have. Where this principle of law is not obeyed, the proceedings and order made against such a person is a nullity.

in the action, bring to court a party whose presence is crucial to the resolution of the conflict<sup>21</sup>. An interested person within the contemplation of the law includes a person affected or likely to be affected or aggrieved or likely to be aggrieved<sup>22</sup>. In this regard, the general principle of practice is that a court of law is entitled to make any order on any matter of which the court is seized provided that while making the order, the court is satisfied that it has full jurisdiction over the persons and subject matter involved in the litigation process before it. Once that has been complied with, a court's order must be obeyed by all persons irrespective of their personal feeling about the order. Even where the trial court wrongfully assumes jurisdiction, the order it made should not be disobeyed or disregarded. An order made by a court against a person not a party before it and or without giving the person a hearing is an order made in breach of the constitutional provision on fair hearing<sup>23</sup>.

The question that now arises is whether INEC possesses any interest in the results of any election petition, sufficiently compelling to make its joinder as a party to the petition inevitable? Legally, a person for a person to be joined as a party to an action, he must have a direct or legal interest in the results of the action.<sup>24</sup> In this regard, the interest required to be disclosed is legal interest which affects its civil rights and obligations, or that it has suffered or is suffering an injury or threatened injury which entitles it to a remedy. It means a person who has suffered a legal grievance, a person against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or whose title to something has been wrongfully affected.<sup>25</sup> Clearly, INEC as an institution, has its statutory and constitutional functions clearly delineated and specified. These functions are not subject to either accretion or diminution by the election petition tribunals or in fact any other body or authority. A decision whether the election conducted by INEC was won by either the petitioner or respondent does not deprive INEC of anything and does not affect its rights and obligations. An order requiring INEC to issue a certificate of return to a particular candidate does not affect any of the rights and obligations of INEC. An order annulling an election conducted by INEC and requiring it to conduct a re-run, does not affect its rights as a statutory body. In other words, the greatest effect and consequence an order of an election petition tribunal could have on INEC is to require it to perform its statutory responsibility. Consequently, the decision of an election petition tribunal, whichever way it goes is incapable of depriving INEC of anything; it is incapable of amounting to a legal grievance to INEC. It is for that reason clear that INEC as an institution does not possess any personal interests in the results of an election petition necessarily persuasive to make its joinder as a party to the petition inexorable.

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<sup>21</sup> *Onabanjo v. Ewetuga* [1993] 4 NWLR Part 288, 445

<sup>22</sup> *Ojomo v. Governor of Ondo State; in Re Ogunmowola* [1996] 2 NWLR Part 428, 90

<sup>23</sup> *Pan African Bank Ltd. v. State* [1997] 4 NWLR Part 499, 296

<sup>24</sup> *CMI Trading Services Ltd. v. Panchenko Yuriy*, [1998] 11 NWLR Part 573, 284, it is in the interest of justice that a person whose legal right might be affected in a proceeding should be allowed to join in the suit as a party so as to watch and safeguard his interest. A refusal would result in a denial of the fundamental right to fair hearing. Where there is a genuine grievance, the law should provide a venue for dealing with it. It will therefore be strange if there is any area of law in which an interested party can be legitimately deprived of a hearing.

<sup>25</sup> *NBC Plc v. Osofisan*, [2000] 10 NWLR Part 675, 370; in *Okonkwo v. Mode Nigeria Ltd.* [2002] 14 NWLR Part 788, 588, it was held that for an applicant to be entitled to appeal as a person having an interest, he needs to show that the order made affects his interest prejudicially. See also *Ugwu v. Alaebo*, [2006] All FWLR Part 309, 1474. In *CAC v. Registered Trustees, CCC*, [2010] All FWLR Part 509, 423, it was held that grievance *per se* is not what qualifies a person as having interest in a matter, what qualifies a person as a person having interest is legal grievance.

Ordinarily, for parties to be joined in a suit as either co-plaintiffs or co-defendants, they must have the same or common interest, to the extent that they have a common mission or cause to pursue. Where the interests are separate, distinct or irreconcilable, joining them as parties is equivalent to the court forcing persons with un-identical or unrelated causes of action in the litigation<sup>26</sup>. The question now is whether INEC shares any identity of interests with any of the parties to an election of petition to make its joinder as a co-party with that party inexorable? The Electoral Act makes it clear that the only grounds upon which an election may be questioned are that - a person whose election is questioned was, at the time of the election, not qualified to contest the election; or, the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act; or the respondent was not duly elected by majority of lawful votes cast at the election.<sup>27</sup> In this regard, while ostensibly, INEC's performance and conduct of the election might come under scrutiny if an election is questioned, clearly, whether or not the person whose election is questioned was at the time of the election qualified to contest the election is not an interest jointly shared with INEC as to require INEC to become co-party with him. Furthermore, whether the election was invalid by reason of corrupt practices or non-compliance with the provisions of the Act by any of the parties; or whether the respondent was duly elected by majority of lawful votes cast at the election is not an interest jointly shared with INEC to require INEC being made a co-party with the party. For purposes of insulating INEC from the legal contestation of the parties, the Electoral Act provides that the fact that an act or omission is contrary to an instruction or directive of the Commission or of an officer appointed for the purpose of the election, if not contrary to the provisions of the Act shall not of itself be a ground for questioning the election.<sup>28</sup> INEC's institutional interest in the peaceful and successful conduct of elections differs profusely from the personal interests of election contestants in the results of the election. In the light of the fact that INEC does not share a congruency of interests with parties to election petitions, an argument for its inevitable joinder as a co-party to election petitions is unsustainable. Consequently, elections petitions could and should proceed to their successful determination without a necessity of joining INEC as a co-party to the proceedings.

Generally, for purposes of joinder of a party as co-party to a proceeding, a necessary party to a proceeding is one whose presence is essential for effectual and complete determination of the claim before the court. It is a party in the absence of whom the claim cannot be effectually and completely determined. A key test is whether he will be directly affected by the judgment of the Court in the suit by curtailing or interfering with the enjoyment of his legal rights. This is because the only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action.<sup>29</sup> The test to apply is whether the person sought to be joined will have his interest irreparably prejudiced if he is not joined in the action. In other words, the test is whether the order sought in the action might directly affect the person by curtailing the enjoyment of his legal rights. It is not enough that the person has relevant evidence to adduce as that will only make him a necessary witness, nor that he merely has an interest in the correct solution of some questions involved and has thought of some relevant arguments to advance and is afraid that the existing parties may not advance them adequately. Rather, the only reason which makes it necessary to

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<sup>26</sup> *Co-operative and Commerce Bank (Nig.) Plc. v. Madam Amadi Rose* [1998] 4 NWLR Part 544, 37

<sup>27</sup> s. 134(1) (n 2)

<sup>28</sup> s. 134(2) (ibid)

<sup>29</sup> *Ige v. Farinde* [1994] 7 NWLR Part 354, 42

make a person a party to an action is that he should be bound by the result of the action.<sup>30</sup> Upon the declaration of an election return, the rights of several institutions are altered. Legislators are sworn in and resume sitting while their election petitions are running. If their elections are annulled, they vacate their legislative offices. It is never required that the legislative houses in which they sit be made parties to the pending electoral disputes. This is because, while the setting aside of an election of a legislator might affect the individual rights of the legislator, it does not in any manner affect the statutory rights, duties or obligations of the legislative house in which he was sitting. By that same analogy, the voiding of an election return does not deprive INEC of any right so as to make it necessary for INEC to be a party to the electoral dispute concerning the particular election return. It is clear that the fact that INEC conducted the election and has in its custody all the materials relating to the conduct of the election only makes it a necessary witness and not a necessary party. Furthermore, undoubtedly, the setting aside of an election return by the court or tribunal does not in any manner affect INEC by curtailing or interfering with the enjoyment of its legal rights. There is thus no principle of law that requires that INEC must without fail, be made a party to an electoral dispute.

### **5. Basis of Procedural Requirement of Joining INEC as Party in Election Disputes**

Under the Electoral Act, an election petition may be presented by a candidate in an election; or a political party which participated in the election.<sup>31</sup> In an election petition, a person whose election is complained of is the respondent.<sup>32</sup> If the petitioner complains of the conduct of an electoral officer, a presiding or returning officer, it would not be necessary to join such officers or persons notwithstanding the nature of the complaint. In this instance, INEC shall be made a respondent; and be deemed to be defending the petition for itself and on behalf of its officers or such other persons.<sup>33</sup> An election shall not be liable to be invalidated by reason of non-compliance with the provisions of the Electoral Act if it appears to the Election Tribunal or Court that the election was conducted substantially in accordance with the Act and that the non-compliance did not affect substantially the result of the election.<sup>34</sup> In an Election Petition, if the Tribunal or the Court as the case may be, finds that a candidate who was returned as elected was not validly elected on any ground, the Tribunal or Court shall nullify the election. If a Tribunal or Court nullifies an election on the ground that the person who obtained the highest votes at the election was not qualified to contest the election, the Tribunal or Court shall declare the person with the second highest number of valid votes cast at the election who satisfies the requirements of the Constitution and the Electoral Act as duly elected. If the Tribunal or the Court finds that a candidate who was returned as elected was not validly elected on the ground that he did not score the majority of valid votes cast at the election, the Tribunal or the Court, as the case may be, shall declare as elected the candidate who scored the highest number of valid votes cast at the election and satisfied the requirements of the Constitution and this Act.<sup>35</sup> Ordinarily, the grounds for questioning an election encompass that a person whose election is questioned was, at the time of the election, not qualified to contest the election; the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act; or the respondent was not duly elected by majority of lawful votes

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<sup>30</sup> *CMI Trading Services Ltd. v. Panchenko Yuriy* (n 24)

<sup>31</sup> s. 133(1) (n 2)

<sup>32</sup> s. 133 (2) (ibid)

<sup>33</sup> s. 133(3) (n 2)

<sup>34</sup> s. 135 (ibid)

<sup>35</sup> s. 136 (1)-(3) (ibid)



cast at the election.<sup>36</sup> Largely, it is impossible most times to prove any of the grounds for questioning an election without asserting a complaint regarding the conduct of an electoral officer, a presiding or returning officer, it then becomes inevitable that INEC shall be made a respondent so as to defend the petition for itself and on behalf of its officers or such other persons. This requirement of procedure has come with a steep price to the perception of INEC as an impartial arbiter of the strongholds of democracy. The effect of making INEC a party is to immediately transform it from a disinterested observer to a highly biased and partisan participant in the litigation process.

## **6. Tension between INEC's Role as Umpire and its Status as Co-defendant in Election Disputes**

Under Nigeria's current electoral laws, in respect of any issues arising from or relating to unmarked ballot paper; rejected ballot paper; and declaration of scores of candidates and the return of a candidate, the decision of the returning officer is final. However, this decision of the returning officer may be reviewed by a tribunal or court in an election petition proceeding under the Act.<sup>37</sup> For the purposes of securing and preserving the integrity of materials used in the election cycle, and upon which the decision of the returning officer was premised, the process of post-election procedure and collation of election results, requires that after the recording and announcement of the result, the presiding officer shall deliver same along with election materials under security and accompanied by the candidates or their polling agents, where available, to such person as may be prescribed by the Commission.<sup>38</sup> Furthermore, the Chief Electoral Commissioner or any officer authorised by him or her shall keep official custody of all the documents, including statement of results and ballot papers relating to the election, which are returned to the Commission by the returning officers.<sup>39</sup> After the recording and announcement of the result, where a person or party desires to challenge the declared returns, the stipulated method for contesting an election is by an election petition presented to the competent tribunal or court in accordance with provisions of the Constitution or of the Act complaining of an undue election or undue return. The person elected or returned is required to be joined as a party to the election petition.<sup>40</sup>

An election petition may be presented by a candidate in an election; or a political party which participated in the election. If the petitioner complains of the conduct of an electoral officer, a presiding or returning officer, it would not be necessary to join such officers or persons. The Commission shall, in that instance, be made a respondent; and be deemed to be defending the petition for itself and on behalf of its officers or such other persons.<sup>41</sup> On the presentation of an election petition, the Resident Electoral Commissioner in a state where an election is conducted is

<sup>36</sup> s. 134(1) (ibid)

<sup>37</sup> s. 65 (ibid)

<sup>38</sup> s. 62(1) (ibid), the Commission shall compile, maintain and update, on a continuous basis, a register of election results to be known as the National Electronic Register of Election Results which shall be a database of all polling units, including collated election results, of each election conducted by the Commission in the Federation. The Register shall be kept in electronic format by the Commission at its national headquarters. Any person or political party may obtain from the Commission, on payment of such fees as may be determined by the Commission, a certified true copy of any election result kept in the Register of Election Results for a State, Local Government, Area Council, Registration Area or Electoral Ward or Polling Unit, as the case may be, and the certified true copy may be in printed or electronic format

<sup>39</sup> s. 69 (ibid)

<sup>40</sup> s. 130(1) (ibid)

<sup>41</sup> s. 133 (ibid)

required, within 14 days after an application is made to him by any of the parties to an election petition, to cause a certified true copy of such document to be issued to the said party.<sup>42</sup> In addition, an Election Tribunal or a Court may make an order for inspection of a polling document or any other document or packet in the custody of the Chief National Electoral Commissioner or any other officer of the Commission if it is satisfied that the order is required for the purpose of instituting, maintaining or defending an election petition. A document other than the document aforementioned relating to an election and which is retained by the Chief National Electoral Commissioner or any other officer of the Commission shall be open for inspection on an order made by the Election Tribunal or the Court in exercise of its powers to compel the production of documents in legal proceedings.<sup>43</sup> Due to these provisions of the Electoral Act, 2022 entitling persons and political parties to inspection and certified true copies of election documents, it is not necessary for a party who alleges non-compliance with the provisions of the Act for the conduct of elections to call oral evidence if originals or certified true copies manifestly disclose the non-compliance alleged.<sup>44</sup> The essence of these provisions is to assist the trier of facts come to the truth of how the elections were conducted. In this regard, it is realised that all the documents, processes and protocols created, deployed and used for the election at all times remained in the custody of INEC and its officials. Consequently, in the absence of a liberal discovery regime, it is practically impossible for the trier of facts or the parties to obtain access to records of the conduct of the elections. In creating this liberal discovery regime, the law proceeds on the basis that the electoral umpire does not have any particular institutional or individual interest in the outcome of the elections and ensuing petitions, but instead, would show great accommodation to the needs of the electoral contestants in proving their cases in court. Unfortunately, this has not been so. Instances abound where staff of the Commission through overt acts, by failing to produce documents in their custody contrary to the orders of court, frustrated the ability of some contestants to elections to challenge the election results before the election tribunals or courts.<sup>45</sup> Ordinarily, an election is not required to be invalidated by reason of non-compliance with the provisions of the Electoral Act if it appears to the Election Tribunal or Court that the conduct of the election was in substantial conformity with the Act and that the non-compliance did not significantly affect the result of the election.<sup>46</sup> Consequently, the measured refusal of INEC to comply with either discovery requests by parties or discovery orders by courts may not be attributable to any institutional loss of privilege likely to be suffered by the electoral umpire on proof that it conducted a shoddy election. One of the sensible explanations that could be given to INEC's system of stonewalling and frustration of discovery regimes is that it is predicated upon staff of the electoral umpire acquiring personal and fiduciary interests in the outcome of the election petitions. If this is so, the ability to tackle the such an entrenched institutional corruption using the rubric of the law is slender. However, another sensible Explanation for INEC's opposition to discovery regimes is that upon being made a respondent to the election petition, INEC exchanges its status of umpire for the status of litigant. At this point, winning the judicial contest becomes the only issue that is important to INEC, thus justifying (in its own eyes) a victory-at-all-costs mind-set.

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<sup>42</sup> s. 74 (ibid), any Resident Electoral Commissioner who wilfully fails to comply with this provision commits an offence and is liable on conviction to a maximum fine of N2,000,000 or imprisonment for a term of 12 months or both.

<sup>43</sup> s. 147 (ibid)

<sup>44</sup> s. 137 (ibid)

<sup>45</sup> *Buhari v. Obasanjo*, (2003) 1 LRECN 1(CA); *Buhari v. Obasanjo*, (2005) 1 LRECN 235 (SC); see also Izinyon & Charles, 'Electoral Law Practice and Procedure,' vol. 1, (Acavi:2018) 46

<sup>46</sup> s. 135(1) (n 2)

## 7. Rethinking the Formal Orthodoxy of Parties to Actions and Restoring INEC's Neutrality

### 7.1 Making INEC a Co-respondent is Unnecessary since all Presumptions Inure to its Favour

Generally, an election shall not be liable to be invalidated by reason of non-compliance with the provisions of the Electoral Act if it appears to the Election Tribunal or Court that the election was conducted substantially in accordance with the Act and that the non-compliance did not affect substantially the result of the election.<sup>47</sup> This is because, the burden of proof rests on a petitioner who alleges particular or specific non-compliance with a requirement of the Electoral Act, to further prove, not just that it was substantial, but also that it substantially affected the result of the election. This in effect means that the onus lies on the petitioner to establish both substantial non-compliance, and that the substantial non-compliance affected or could have affected the result of the election.<sup>48</sup> Whether or not the onus shifts to the respondent to prove that the non-compliance did not substantially affect the election and result depends on the court's perception of the effect of the non-compliance. Where the court is of the opinion that the non-compliance did not and could not have had any impact whatsoever on the election, then, the petitioner has failed to shift the onus of proof and the petition fails. However, where in the opinion of the court, the effect of the non-compliance is fundamental, and creates in the mind of the court, a doubt on the regularity of the election and authenticity of the ensuing result then the onus shifts to the respondent. In such situation, unless the respondent leads evidence to establish that the non-compliance did not affect the result, the petition succeeds.<sup>49</sup> In accordance with the totality of the case on the effect of non-compliance on an election, it is clear that the success or failure of an election petition founded on the non-compliance principle is determined by the total effect of the alleged or proven non-compliance on the election. Irrespective of the scale of the proven non-compliance, the petitioner is required to correlate it to the result of the election. Failure of the petitioner to establish the effect the proven non-compliance has on the results of the election is fatal to the petition.<sup>50</sup> From this perspective, it is clear that the burden of proof in election petitions is weighted in INEC's favour to such an extent that even if INEC is not a party to the petition, statutory presumptions subsists to its favour and advantage. It is therefore unnecessary to make INEC a party to election petitions seeing that all available presumptions enure to its favour without any need of calling evidence on its part.

<sup>47</sup> s. 135 (ibid)

<sup>48</sup> *Buhari v. Obasanjo*, [2005] All FWLR Part 273, 1; *Chime v. Onyia*, [2009] All FWLR Part 480, 673; *Abubakar v. Yar'adua*, [2008] 19 NWLR Part 1120, 1; *CPC v. INEC*, [2011] 18 NWLR Part 1279, 493; *Okechukwu v. INEC*, [2014] 17 NWLR Part 1436, 255

<sup>49</sup> *Abubakar v. Yar'adua*, [2009] All FWLR Part 457, 1; *INEC v. Oshiomole*, (n 10)

<sup>50</sup> *Izinyon & Charles, 'Electoral Law Practice and Procedure'*, (n 46) 320; in *Buhari v. Obasanjo*, [2005] 2 NWLR Part 910, 241, INEC declared 1<sup>st</sup> respondent winner of 2003 presidential elections. Upon appellant's petition, the result of the presidential election for Ogun State was nullified. Despite the nullification, the Court upheld 1<sup>st</sup> respondent's victory, since nullification of the Ogun State result did not affect the overall result of the entire country. It was also found that failure of two officials of INEC to take the prescribed oath, contrary to the Electoral Act, should not on its own lead to nullification of the election. It was yet again held that non-certification of voting materials contrary to s. 45 of Electoral Act, 2006, was insufficient, standing alone, to lead to nullification of the election, unless shown to have substantially affected the election. In *Opia v. Ibru*, [1992] 3 NWLR Part 231, 658, failure to hold elections in a single local government area council was held insufficient to void governorship elections for the entire Delta State, unless it could be shown that it substantially affected the result of the election for the entire state. In *Lanto v. Wiwo*, [1999] 7 NWLR Part 630, 227, it was found that by human error, appellant was deprived of two votes. The court found that even after adding the two votes to appellant's total number of votes, it would not change the result of the election. The court however emphasized that if the two votes could have changed the result of the election, then, the election could have been vitiated on that score.

## **7.2 INEC even as a Non-party is Bound under the Consequential Orders Rule**

The courts, in the exercise of the jurisdiction vested on them by the law in every cause or matter have the power to grant, either absolutely or on such terms and conditions as the court thinks just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters avoided<sup>51</sup>. Sometimes, orders made in a final judgment may require the intervention of the same court by further orders to ensure the convenient implementation of the order made in the judgment. A court of law must ensure, within its powers and jurisdiction, that there is no failure of justice or that it does not give its order in vain. When a court intervenes for this purpose, the court exercises not just its express jurisdiction, but also its inherent jurisdiction<sup>52</sup>. These provisions of the law enable and entitle the courts to grant the requisite consequential orders for purposes of finally determining the matters in controversy<sup>53</sup>. In its ordinary dictionary meaning, the word ‘consequential’ means ‘following as a result, or inference; following or resulting indirectly’. By the very nature of the term ‘consequential’, any consequential order must be one giving effect to the judgment.<sup>54</sup> A consequential order is one which flows directly and naturally from the decision or order of court made on the issues in litigation and inevitably consequent upon it<sup>55</sup>. A consequential order is not one merely incidental to a decision, but one necessarily flowing directly and naturally from and inevitably consequent upon it. It must be giving effect to the judgment already given not by granting a fresh and unclaimed or unproven relief. A proper consequential order need not be claimed but a substantive order must be claimed and sustained from the facts before the court. Before a consequential order can be granted, it must be closely related to the substantive relief claimed<sup>56</sup>. The inherent jurisdiction to make consequential orders is the most effective weapon in the judicial and juridical armoury of the courts. It permits the courts to directly or indirectly, ensure proper administration of justice<sup>57</sup>.

Upon the conclusion of the trial of an election petition, if the Tribunal or the Court as the case may be, determines that a candidate who was returned as elected was not validly elected on any ground, the Tribunal or Court shall nullify the election. Where an Election Tribunal or Court nullifies an election on the ground that the person who obtained the highest votes at the election was not qualified to contest the election, the Election Tribunal or Court shall declare the person with the second highest number of valid votes cast at the election who satisfies the requirements of the

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<sup>51</sup> s. 11 Federal High Court Act, 1973; s. 27 of High Court Act (establishing High Court of FCT, Abuja); s. 14 of High Court Law (Lagos State). o. 3 r. 23(1) of Court of Appeal Rules provides that the Court shall have the power to give any judgment or make any order that ought to have been made and to make such further or other orders as the case may require including any order as to costs

<sup>52</sup> *Adekanye v. Comptroller, Nigeria Prisons Service*, [1999] 14 NWLR Part 637, 115

<sup>53</sup> *Sadiq v. Bundi* [1991] 8 NWLR Part 210, 443

<sup>54</sup> *Obayagbona v. Obazee* (1972) 5 SC, 247 quoted in *Apostolic Church v. Olowoleni* [1990] 6 NWLR Part 158, 154; *Maduabu v. Ray* [2006] All FWLR Part 300, 1671; *Ray v. Maduabu* [2006] All FWLR Part 310, 1637

<sup>55</sup> *Akapo v. Hakeem-Habeeb* [1992] 6 NWLR Part 247, 266; *Gbadamosi v. Alete* [1993] 2 NWLR Part 273, 113; *Royal Petroleum Co. Ltd. v. First Bank of Nigeria Ltd.* [1997] 6 NWLR Part 510, 584

<sup>56</sup> *Idrisu COP.*, [2009] All FWLR Part 450, 720; in *Oduwole v. Aina*, [2001] 17 NWLR Part 741, 1, it was held that the High Court has inherent powers to make orders even if they are not sought by the parties where such orders are ‘incidental’ to the prayers sought. However, a consequential order must flow directly and naturally from the decision or order of court made on the issues in litigation and invariably consequent upon it.

<sup>57</sup> *Erisi v. Idika* [1987] 4 NWLR Part 66, 503

Constitution and this Act as duly elected. If the Tribunal or the Court determines that a candidate who was returned as elected was not validly elected on the ground that he did not score the majority of valid votes cast at the election, the Election Tribunal or the Court, as the case may be, shall declare as elected the candidate who scored the highest number of valid votes cast at the election and satisfied the requirements of the Constitution and the Act.<sup>58</sup> A key difference between s. 136(1) of Electoral Act, 2022 and s. 136(3) of Electoral Act, 2022 is that under s. 136(1) of Electoral Act, 2022, the tribunal or court is given power to nullify an election if it determines that the person returned or elected was not validly elected on any one or more of the grounds set out in s. 134(1) of Electoral Act 2022. If an election is nullified, there would no longer be any results to be declared and returned for any or all the candidates that contested the election. Nullification of the election denotes nullification of all the results in respect of all the candidates that contested the election. Thus, the consequential order to follow such nullification would be one for fresh election since the effect of nullification is that legally, no valid and lawful election was conducted. However, if the basis for the nullification of the election by the Election Tribunal or Court is the ground that the person who obtained the highest votes at the election was not qualified to contest the election, the Election Tribunal or Court shall under s. 136(2) of Electoral Act, 2022, declare the person with the second highest number of valid votes cast at the election who satisfies the requirements of the Constitution and the Electoral Act, as duly elected<sup>59</sup>. An election tribunal has no authority or power ordinarily to appoint the time an election will be held after annulling the election and ordering fresh elections. The power is vested in the body charged with responsibility for conducting elections<sup>60</sup>. In the entire process consequent upon the presentation of an election petition, and the orders made pursuant thereto, INEC has no role to play. The nullification of and the consequent declaration of the person with the second highest number of valid votes cast at the election as duly elected contain no roles for INEC. Nullification of all the results in respect of all the candidates that contested an election would be followed by a consequential order for fresh elections since the effect of nullification is that legally, no valid and lawful election was conducted. Since INEC is Nigeria's sole electoral umpire, its presence as a party to the petition is not necessary for it perform its constitutional and statutory role of conducting fresh elections in lieu of the nullified one. INEC, even without being a party to an election dispute is bound by the consequential orders made by the Court or Tribunal, its presence as a party is thus unnecessary since the only function it serves is to aggravate INEC and transmute it from an impartial umpire to an incensed and aggravated party to a litigation.

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<sup>58</sup> s. 136 (n 2)

<sup>59</sup> The proviso to the rule however requires that for the person with the second highest number of valid votes cast at the election to accede to the right of being declared the winner of the election, he must have remained a member of the political party on which's platform he contested the election otherwise, the candidate with the next highest number of votes in the election and who satisfies the same conditions shall be declared the winner of the election.

<sup>60</sup> *INEC v. AC*, [2009] All FWLR Part 480, 732; under s. 136(1) (n 2), if the Tribunal or the Court determines that a candidate who was returned as elected was not validly elected, and nullifies the election, it has power to order the Commission to conduct a fresh election not later than 90 days after the decision, if an appeal is not filed against the decision; or nullification of the election by the court having final appellate jurisdiction in respect of the election. The jurisdiction of the Tribunal or Court is limited to making an order for the Commission to conduct a fresh election within 90 days. The Tribunal or Court does not have powers to fix a date within the statutory period of 90 for the Commission to hold the fresh election.

### **7.3 Applying the Rule *in Rem* Principle to Bind Non-Parties also Binds INEC**

A judgment or decision is *in rem* when and where it is a solemn pronouncement upon the status of a particular subject matter by a tribunal having the jurisdiction and the competence to pronounce on that status. A judgment or decision *in rem* operates as estoppel *per rem judicatam* not only as between the parties and their privies but also against non-parties, whether or not it is used as a foundation for an action or is relied upon as a bar.<sup>61</sup> The ability of a judgment *in rem* to affect the status of a person or thing, or the disposition of a thing is contradistinguished from affecting a particular interest in it of a party to the litigation. Apart from the application of the term to persons, it must affect the res by way of condemnation, forfeiture, declaration, status or title, or order for sale or transfer. Examples of judgments *in rem* are a judgment of a probate court establishing a will or creating the status of administration; judgment of a divorce court of competent jurisdiction dissolving or establishing a marriage, or declaring the nullity of a marriage or affirming its existence; and a judgment of a parliamentary election petition.<sup>62</sup> Such a judgment is usually and invariably founded on proceedings instituted against or on something or subject matter whose status or condition is to be determined. It is thus a solemn declaration on the status of some persons or things. It is therefore binding on all persons in so far as their interests in the status of the property or person are concerned. That is why a judgment *in rem* is a judgment *contra mundum*-binding on the whole world – parties as well as non-parties<sup>63</sup>. A judgment *in rem* is an adjudication that has pronounced upon the status of a particular subject matter by a tribunal having competent authority for that purpose. It is founded upon proceedings instituted to determine that status of a particular subject matter.<sup>64</sup> Basically, the entire subject matter of an election petition is the entitlement to occupy elective office. On conclusion of the hearing, the verdict of the Court or Tribunal is a determination of which of the two persons who contested the election is entitled to occupy the elective office.<sup>65</sup> It is a determination of status. In this regard, it is a judgment *in rem*. As pointed

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<sup>61</sup> *Oke v. Atoloye* [1986] 1 NWLR Part 15, 241; *Sosan v. Ademuyiwa* [1986] 3 NWLR Part 27, 241, in *Hill v. Clifford, Clifford v. Timms, Clifford v. Phillips*, [1907] 2 Ch. 236, Cozens-Hardy, M. R. stated as follows: “It is by no means easy to find a satisfactory definition of a judgment *in rem*. In *Smith’s Leading Cases* it is defined as ‘an adjudication pronounced, as its name indeed denotes, upon the status of some particular subject matter by a tribunal having competent authority for that purpose.’ There are, however, two classes of judgments *in rem*, one of which is conclusive against all the world, and the other of which is not conclusive, though admissible, in any other proceedings. Instances of the former class are adjudications by a competent court as to the existence of a marriage, or a condemnation of a prize in the Admiralty Court. A familiar instance of the second is an inquisition in lunacy, which has always been allowed to be read in a subsequent suit between third parties as evidence of the lunacy, though it is not conclusive and may be traversed.”

<sup>62</sup> *Ogboru v. Ibori*, [No.1] [2005] 13 NWLR Part 942, 319

<sup>63</sup> *Dike v. Nzeka* [1986] 4 NWLR Part 34, 144; *Akinkunmi v. Sadiq* [1997] 8 NWLR Part 516, 277; *Abia v. Cross River State Property and Investment Ltd.* [2006] All FWLR Part 339, 955, in *Castrique v. Imrie*, 30 E & E D, 152, Blackburn, J. stated as follows, “We think that some points are clear. When a tribunal, no matter whether in England or a foreign country, has to determine between two parties and between them only, the decision of that tribunal, though in general binding between the parties and privies, does not affect the rights of third parties, and if in execution of the judgment of such a tribunal process issues against the property of one of the litigants, and some particular thing is sold as being his property, there is nothing to prevent any third person setting up his claim to that thing, for the tribunal neither has jurisdiction to determine, nor did determine, anything more than that the litigant’s property should be sold, and did not do more than sell the litigant’s interest, if any, in the thing. .... But when the tribunal has jurisdiction to determine not merely on the rights of the parties, but also on the disposition of the thing, and does in the exercise of that jurisdiction direct that the thing, and not merely the interest of any particular person in it be sold or transferred, the case is very different.”

<sup>64</sup> *Oke v. Atoloye* (n 61), examples of judgments *in rem* are a decree as to nationality is a judgment *in rem*; so also a decree of divorce or a decree of legitimacy. These decrees as to status are binding on the entire world, parties as well as non-parties. It is the contention of the writer that a decree as to whether one is lawfully elected to an office is a judgment *in rem* in respect of the status of the person relative to that office.

<sup>65</sup> ss. 133-136 of Electoral Act, 2022

out earlier, a judgment *in rem* binds all persons, whether a party to the proceedings or not. It stops anyone from raising the issue of the status of persons or things, or the rights or title to property litigated before a competent court. In other words, all persons, whether or not party to the proceedings are estopped from averring that the status of persons or things, or the right or title to the property is other than the court has by such a judgment declared or made it to be.<sup>66</sup> The question then is whether INEC needs to be a party to the proceedings in order to be bound by the judgment of the Court or tribunal? Not just INEC, does a legislative house need to be a party to the proceeding in order to be bound by the declaration of whichever of the litigants is adjudged properly elected? The answer to these questions lies in the holding of law that the effect and difference of proceedings *in rem* as distinguished from proceedings *in personam* is that the proceedings *in rem* binds everybody, binds third persons, even though they were not parties to the proceedings<sup>67</sup>. Consequently, since the declaration of status of either of the contestants as duly elected or not, binds the entire world, including INEC, there is no necessity for INEC to be made a party to an election petition.

## 8. Conclusion

In addition to INEC's role of promoting knowledge of sound democratic election processes, it is also charged with the duty of conducting elections to stated offices. Post-election, it has the duty of giving litigants access to materials used in the elections. The tension created in performing this latter function requires a recalibration of electoral jurisprudence to eliminate INEC's compulsory role as co-respondent. In this regard, it is clear that making INEC a party to election petitions is neither inevitable nor beneficial. The question is why does INEC compel its continuance? The answer to the question has nothing to do with the administration of electoral justice. The answer is found in basic economics. Provision of legal services to INEC comprises the most lucrative sub-sector in the litigation industry. Eliminating INEC from participating in electoral litigation would eradicate legal fees and financial takings that outpace and outstrip a Sultan's dream of tolls and taxes. This however comes at a steep price. Cardinal to the credible performance of its constitutional and statutory functions is a perception of INEC's neutrality. INEC's refusal to accede to compulsory statutory discovery and its deliberate refusal to obey court-ordered discovery has created an INEC which in the public eye is perceived to be a malleable instrument for the allotment of selective and variable institutional favours premised on opaque considerations. This paper theorises that eliminating INEC from participating in post-electoral litigation would refocus it on the constitutional neutrality expected of it and eliminate the current public perception of INEC as just another tool for the subversion of electoral democracy.

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<sup>66</sup> *Ogboru v. Ibori*, [No. 1] (n 62)

<sup>67</sup> *Simpson v. Fogo*, 70 E R 644