

**ELECTION PETITION AS A SPECIE OF PUBLIC INTEREST LITIGATION:  
MAKING A CASE FOR THE REMOVAL OF SOME OF THE ODDS AGAINST  
PETITIONERS IN ELECTION PETITION PROCEEDINGS IN NIGERIA**

**Abstract**

*Economic and social development, political stability and other kindred concepts have their bearing on peace and good governance which twin concepts in turn are engendered by free and fair elections. The problem of governance in the Nigerian state is multifaceted but above all, flawed electoral process is most prominent. Because of the inter-relationship between a flawed election and bad governance, instability and underdevelopment, it becomes of public interest that elections are conducted in strict compliance with the relevant laws, rules and guidelines or manuals made for such purposes. Where the citizen that participates in an election has cause to challenge the conduct or outcome of such election as flawed, he should be given adequate facility to ventilate his claims so that the court or tribunal would determine in fairness whether there is merit in his claim, bearing in mind that the petitioner is not the only one that would be affected by the outcome of the adjudication of his petition. This paper examined the public interest nature of election petition proceedings in Nigeria, the several odds stacked against petitioners in election petition proceedings in Nigeria and ended up in making a case for the removal of many of such odds to make proof of election petitions possible in the spirit of the public interest nature of election disputes.*

**Keywords:** Public Interest Litigation, Democracy, Flawed Election, Election Petition

**Introduction**

The problems of governance in the Nigerian state is a multi-faceted one. However, of all the problems, flawed electoral process is the most prominent.<sup>1</sup> By virtue of the principles of separation of powers, an adjudicatory powers in the country has been vested on the Judiciary. By the institution of checks and balances among the three organs of government, the judiciary has been vested with powers to review the actions of both the executive and the legislature. In Nigeria, the judiciary has always intervened in the electoral process through its adjudication of election petitions and proceedings arising from nomination of candidates for election by political parties. The most significant objective of the principles of separation of powers enshrined in the Nigerian constitution is to promote good governance, political stability and greater public good.

Unfortunately, however, Nigeria, a country richly endowed with huge human and material resources has lamentably failed to make significant advancement in terms of not only economic and social development but also in the cultivation of the tenets of democracy and strengthening the institutions that sustain democracy as seen in other nations.<sup>2</sup>The right of an individual to participate in the governance of his country is a fundamental tenet of

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<sup>1</sup> S.C Unachukwu, *Judicialisation of Politics as a Threat to Political Sovereignty: The Nigerian Experience*. International Journal of Comparative Law and Legal Philosophy, vol. 1, Issue I, 2020.

<sup>2</sup>S.A. Joshua: *The Relevance of Public Interest Litigation to Democracy and Good Governance in Nigeria*, Journal of Law, Policy and Globalization [www.iiste.org](http://www.iiste.org) ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) Vol.71, 2018, 63, visited on 29/4/2022 at 3pm.

constitutional democracy<sup>3</sup>. This idea is recognized in the 1999 Constitution of the Federal Republic of Nigeria (as amended). In its modern sense, democracy has not had a flowery history, particularly in Nigeria. In the course of the nineteenth century, democracy has become a system of representative government in which the representatives are chosen by free competitive elections.<sup>4</sup> Therefore, participation in governance by an individual is actualized by choice of persons to govern his country through popular election. Popular elections afford the individual a measure of control over the government. However, the individual's political right does not stop with his right to cast his ballot for a candidate of his choice in a free and fair election. The individual has got the right to stand and contest election into any political office he aspires to. Where he chooses to contest election into any political office, it is the duty of the state to ensure that the election is conducted, using all available machineries to ensure that the election is free and fair and that facilities are available to the individual to ventilate his grievances by way of election petition against the conduct of the election where he feels aggrieved.

Challenges to the outcome of elections in the country are on the increase, due largely to the tendency on the part of those entrusted with the conduct of elections in the country to mismanage the process and leave the citizenry to feel used, cheated and shortchanged. Slightly fewer than 1000 cases were filed by politicians disputing election results in 2003 general elections, for example.<sup>5</sup> By 2007 those figures had increased to around 1, 273.<sup>6</sup> These were not cases canvassing marginal questions regarding electoral management or procedure. In all of them, the litigants demanded a reversal of the declared results in their favor or that new voting be conducted. They often alleged fraud of unimaginable proportions. Unfortunately, election proceedings in Nigeria have over the years acquired the burdensome character of technicality. What ought to have been an inquiry as to whether the election in dispute was conducted in compliance with the legal framework for doing so has always degenerated into a maze of confusion where the litigants and their counsel pick their ways through a thick cloud of technicalities. In the election proceedings that follow successive general elections, a greater percentage of the election petitions are determined mainly on technical grounds more often than not, based on the form of the election petition to the utter disadvantage of the country, its citizenry and the course of progress and economic development of the country.

## **Conceptual Clarifications**

### **Democracy**

Democracy, according to Read could mean:

1. A theory of government which in its purest form, holds that the state should be controlled by all the people, each sharing equally in privileges, duties and responsibilities and each participating in person in the government, as in the city-states of ancient Greece. In practice, control is vested in elected officers as representatives who may be upheld or removed by the people.

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<sup>3</sup> A.O. Popoola (2011) The bench, the bar and the challenges of democratic consolidation in Nigeria: *Issues and prospects*, Commemorative Lecture on the 20th Anniversary of Chief Wole Olanipekun (SAN)'s call to the Inner Bar cited in S.A. Joshua, note 2.

<sup>4</sup> See S.C Unachukwu cited in footnote 1.

<sup>5</sup> B. Ugochukwu, Nigeria: *Tribunals and the 2003 Elections* (Lagos: Legal Defence Centre, 2004).

<sup>6</sup> B. Ugochukwu, *cited at* note 5 at p. 201.

2. Political, legal or social equality.<sup>7</sup>

According to A.B Garner, democracy is government by the people, either directly or through representatives elected by the people.<sup>8</sup> H.J Laski, sees democracy as one of the cardinal duties of government. Apart from the provision of order is the provision of the technique for peaceful change.<sup>9</sup> The peaceful change of government is only found in democracies as opposed to other forms of government. Further, democracy, according to Harold Laski,<sup>10</sup> is a government that allows the people to choose their leaders by way of election, or to reject such leaders and their programmes, when they are no longer serving the interests of the people. Democracy may be direct as was postulated by Plato,<sup>11</sup> or indirect as seen in practice today in many nations of the world where representative type of governance is the norm.

Eseoghana Malemi, discusses democracy in terms of indirect or representative democracy as democracy is commonly known today. This is the common form of democracy. With the growth of population and society, indirect or representative democracy has replaced direct democracy. Representative democracy is a government where all persons of voting age are allowed the right to vote to form the government by electing persons into government who will represent and act on their behalf, especially in the executive and legislative arms of government, which elected persons are expected to properly constitute all the other organs and agencies of government, and generally manage the affairs of government for the welfare of the people.<sup>12</sup>

Some of the attributes of democracy or some of the necessary conditions for the existence and growth of democracy includes the following: Democracy means the existence of a constitution, usually a written constitution which is based on the rule of law, and is the foundation of the rule of civil law. Democracy means the observance of rule of law by all persons and authorities in a country. The holding of regular and periodic free and fair elections. The existence of a party system in the country, usually in the form of a two party system, or a multi-party system. The existence of organized opposition to the government mainly in the form of opposition political parties, civil rights groups, non-governmental organisations, labour unions, students union groups and pressure groups.<sup>13</sup> The equal right of all eligible persons to vote and be voted for is another hallmark of democracy.

### Good Governance

In a United Nations Development Program (UNDP) Policy paper,<sup>14</sup> the term *good governance* was defined as “the exercise of economic, political and administrative authority to manage a country’s affairs at all levels. It comprises of mechanisms, processes and

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<sup>7</sup>A.W. Read et. al (ed.), ‘The New International Webster’s’, *Comprehensive Dictionary of the English Language*, Encyclopedic Edition, (2010), p.406.

<sup>8</sup>*Blacks Law Dictionary*, 9<sup>th</sup> edition, p.345.

<sup>9</sup>H.J Laski, *A Grammar of Politics* (George Allen and Umwin) 5<sup>th</sup> edition, 6<sup>th</sup> Impression, 1980 P.111.

<sup>10</sup>*Ibid.*

<sup>11</sup>*The Republic*, Jowett Translation, Aimont Publishing Co. (1968), New York.

<sup>12</sup>E.O. Malemi: *The Nigerian Constitutional Law*, (2006), Princeton Publishing Co. Ik.,

<sup>13</sup>*Ibid.* generally, S.C Unachukwu, *The Provisions for Consensus Candidate in Section 84 of the Nigerian Electoral Act, 2022: A Set Back for Democracy*. Interdisciplinary Journal of African and Asian Studies (IJAAS), Vol. 8, number 1, 2022.

<sup>14</sup>Cited in S.A. Joshua: *The Relevance of Public Interest Litigation to Democracy and Good Governance in Nigeria*, Journal of Law, Policy and Globalization [www.iiste.org](http://www.iiste.org) ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) Vol.71, 2018, 63 visited on 29/4/2022 by 3pm.

constitutions, through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences”. The Report acknowledges the following as core characteristics of good governance: (i) Participation (ii) Rule of Law (iii) Transparency (iv) Responsiveness (v) Consensus Orientation (vi) Equity (vii) Effectiveness and Efficiency (viii) Accountability; and (ix) Strategic Vision.

Within the context of Nigeria, the term *good governance* means governance according to law, the standard of fairness, equity and good conscience. It has come to be known by the acronym “*democracy dividends*”; this has assumed greater relevance and currency in the present democratic dispensation<sup>15</sup>.

### ***Locus Standi***

*Locus standi* simply means standing to sue. It is the basis available to an aggrieved litigant to stand and approach a court of law for redress over an injury done to him. The first Nigerian case that tested the public interest litigation of a plaintiff and clearly highlighted the attitude of courts to the issue of locus standi is the case of *Olawoyin v. Attorney-General of Northern Region*<sup>16</sup>. In that case, the applicant challenged the constitutionality of the provisions of the Children and Young Person’s Law, 1958 of the Northern Region of Nigeria, which prohibited political activities for juveniles and also spelt out penalties on juveniles and others who are parties to certain offences specified in the statute. The applicant contended that he wanted to give political education to his children but the enforcement of the provisions of the statute would abridge his rights and rights of other people with similar intention, regarding freedom of conscience and freedom of expression. In dismissing his action, it was held that it is only a person whose rights had been affected by a law that may sustain a claim for the violation of his rights and that the rights must have been threatened directly by the actions of the defendant.

In *Adesanya v President of the Federal Republic of Nigeria*<sup>17</sup>, the appellant filed an action challenging the constitutionality of the appointment of a serving judge as the substantive Head of the national electoral body (FEDECO) by the President of the Federation. Although the Supreme Court, in its decision, conceded the importance and desirability of encouraging individual citizen to challenge the constitutionality or otherwise of the action of government, the court still held that an individual plaintiff has no *locus standi* to maintain such an action, except he is personally and directly affected by the act complained of, or his personal rights had been violated. The courts have since departed from the pigeonholed position it started with on the issue of *locus standi*.<sup>18</sup> Instructively, locus standi has never been much of an issue in election proceedings in Nigeria. Initial attempts made by persons other than persons who contested an election to initiate election proceedings by way of election petitions were promptly truncated where the court described such persons as ‘busy bodies’ and ‘meddlesome interlopers’. The best of it is that today the Electoral Act has clarified persons who can bring an election petition<sup>19</sup> or challenge the outcome of a primary election.<sup>20</sup>

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<sup>15</sup> I.T. Akomolede and E.M. Akpambang (2010) *Good governance, rule of law and constitutionalism in Nigeria*, 3 UNAD L.J cited by S.A Joshua, footnote 14.

<sup>16</sup> (1961) All NLR 269.

<sup>17</sup> (1981) All NLR (pt. 1) 1.

<sup>18</sup> See *Fawehinmi v Akilu* (1987) 4 NWLR (pt. 67) 797.

<sup>19</sup> See Section 133 (1) of the Electoral Act, 2022; Even in respect primary elections of political parties, section 87(9) of the Electoral Act 2010 (as amended) had limited the right to challenge the outcome of a primary election to only persons who participated in the primary election. See also *PDP v Sylva* (2012) 13 NWLR (pt. 1316) 85.

## Election/ Free and Fair Election

A.B Garner,<sup>21</sup> defines election as “the process of selecting a person to occupy an office (usually a public office)”. Election denotes a process of accreditation, voting, collation of votes, recording on all relevant official electoral forms and declaration of results.<sup>22</sup> According to Read et. al<sup>23</sup>, election is the selecting of a person or persons for office, as by ballot; a popular vote on any question; a choice, as between alternatives, choice in general.<sup>24</sup> The necessity for election arose instead of direct democracy because of the sophistication and complexities that have attended the conduct of the affairs of modern states, where it is impossible for all the people to participate in deciding issues that pertains to them at all times. The people cannot govern themselves in the sense of acting continually as a unit; for the business of the modern state is far too complex to be conducted by perpetual referenda.<sup>25</sup>

Every government must from time to time subject itself to a popular election so as to test the judgment of those who feel the consequences of its acts for the simple reason that unconditional power has always proved disastrous, ultimately to those over whom it is exercised. Such periodic election is to renew the legitimacy of the authority of the government over the governed in a popular mandate freely exercised.

Accordingly, A Ikelegbe,<sup>26</sup> states that election is the process through which a particular group of people choose their rulers and assign them to positions of rulership. Through elections, people dissatisfied with the performance of their elected representatives can effect a change of such representatives. Elections help to gauge how peaceful and effective democratic transitional processes are, in addition to being a reflection of the level of political development and systemic stability.<sup>27</sup> Elections in Nigeria has been anything but peaceful, right from the election held as an aftermath of the elective principle provisions of the 1922 Clifford’s Constitution.<sup>28</sup> The contemporary story of elections in Nigeria especially since Nigeria transited from military to its peculiar clone of civilian rule in 1999 has been that of one fraudulent election after another.<sup>29</sup> Any election is a process, not an event. It is a process which can be divided into three major phases, namely pre-polling, polling and post-election.<sup>30</sup>

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<sup>20</sup> See Section 87(9) of the Electoral Act, 2010 (as amended) which has been re-enacted in section 84(14) of the Electoral Act, 2022.

<sup>21</sup> A.B Garner (ed.) *Blacks Law Dictionary*, (West Publishing Co. Dallas, USA (2009) 2th edn.) 595.

<sup>22</sup> *Balonwu v Ikpeazu* (2005) 13 NWLR (pt. 942)479; also *Obi v. INEC* (2007) 11 NWLR (pt. 1046) 582.

<sup>23</sup> A.W. Read et. al cited in footnote 7.

<sup>24</sup> The New International Webster’s, *Comprehensive Dictionary of the English Language*, Encyclopedic Edition, 2010, p.406.

<sup>25</sup> H.J Laski, ‘A Grammar of Politics’, cited in (n 78)p.132.

<sup>26</sup> A. Ikelegbe, *Issues and problems in Nigerian Politics*. (Benin-City, Nigeria: Imprint Services, 2004) p. 120.

<sup>27</sup> Ibid.

<sup>28</sup> That this election was for mere 4 elective seats in Nigerian Legislative Council, restricted to two cities only (Lagos-3 seats and Calabar 1 seat and limited to specified income levels, must have irked the majority that were disenfranchised and caused the electoral blood pressure to rise above tolerable level.

<sup>29</sup> J. Ohanele: *Fund Mobilization by political parties and electoral frauds in Nigeria*. Online: <http://community.eldis.org/index.html>. (Accessed 23<sup>rd</sup> June, 2011).

<sup>30</sup> Institute of Human Rights and Humanitarian Law, (IHRHL) “Nigeria: Report Exposes Electoral Fraud”. Online, Scoop World from, <http://www.scoop.co.nz/stories/woo704/soo445.htm>.(accessed, 7<sup>th</sup> July, 2011) cited by U.F. Masajuwa; ‘Political Parties, Interest Groups and Elections in Nigeria’ in A. Osuntokun et al, *Nigerian Government and Politics*. (Ibadan, Nigeria: Rex Charles Publishers Ltd, (2003), p. 189.

The frauds associated with the electoral process permeate each of the phases of the electoral activities earlier enumerated.<sup>31</sup>

It is trite law that the concept of “election” denotes a process constituting accreditation, voting, collation, recording on all relevant official electoral forms and declaration of results. The collation of all results of the polling units making up the ward or constituency and the declaration of results are the constituent elements of election known to law.<sup>32</sup> Election is the cornerstone of democracy and it is essentially a contest for the votes of adult members of the society by aspirants to political office.

But the origin of elections does not date back to the dark ages. In the long swing of history, elections with broad mass participation are rather new. Such elections originated with democratic government, which means that they came along at the end of the eighteenth century and the beginning of the nineteenth. Today elections are widespread around the world, even though a number of world’s states are not democracies.

For U.F Masajuwa, election is an all-encompassing concept that comprises of three phases namely the pre-polling, the polling and the post polling.<sup>33</sup> The pre-polling phase takes care of issues like voter registration, education and enlightenment. Voter registrations and civic education are key to any effective representative elections. The polling phase includes all the overt and covert activities that take place on the Election Day proper. Such includes accreditation, voting, collation, recording on all relevant official electoral forms and declaration of results. The collation of all results of the polling units making up the ward or constituency and the declaration of results. This view is in accord with popular concept of election to the effect that an election is a process, not an event. It is a process which can be divided into three major phases, namely pre-polling, polling and post-election.<sup>34</sup>

Ikelegbe maintains that election as the process through which a particular group of people choose their rulers and assign them to positions of rulership.<sup>35</sup> Through elections, people dissatisfied with the performance of their elected representatives can effect a change of such representatives. Elections help gauge how peaceful and effective democratic transitional processes are, in addition to being a reflection of the level of political development and systemic stability.<sup>36</sup> He posits that free and fair election is one of the cardinal pillars of democratic governance. Elections provide citizens with the opportunity of exercising their constitutionally imputed sovereignty over those responsible for the exercise of executive and legislative powers in the society.

Free and fair election is one of the cardinal pillars of democratic governance. Elections provide the citizens with the opportunity of exercising their constitutionally imputed sovereignty over those responsible for the exercise of executive and legislative powers in the society. Through free and fair elections, citizens in a democratic society are able to vote for

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<sup>31</sup> U.F Masajuwa, ‘Political Parties, Interest Groups and Elections in Nigeria’ in A. Osuntokun et al, *Nigerian Government and Politics*. (Ibadan, Nigeria: Rex Charles Publishers Ltd, (2003), p. 189.

<sup>32</sup>Per Ogunbiyi JCA in *Independent National Electoral Commission 7 Ors. v. Onyimbah Enekwechi C. Ray & anor* (2004) 14 NWLR (pt. 892) 92 (2005) All FWLR (pt. 265) 1047 at 1071-1072.

<sup>33</sup>Ohanele, cited in footnote 24.

<sup>34</sup> Institute of Human Rights and Humanitarian Law, (IHRHL), *Nigeria: Report Exposes Electoral Fraud* cited in U.F. Masajuwa, note 31.

<sup>35</sup> A. Ikelegbe, *Issues and problems in Nigerian Politics*. (Benin-City, Nigeria: Imprint Services, 2004) p. 120.

<sup>36</sup>Ibid.

the political party and politicians of their choice based on their coherently articulated policies.<sup>37</sup>

The equality of citizens in a democratic society is given concrete expression and political significance through free, fair and credible elections based on ‘one citizen (person), one vote’.

Through free and fair elections, citizens in a democratic society are able to vote for the political party and politicians of their choice based on their coherently articulated policies.<sup>38</sup> Free and fair election means an election conducted in conformity with the provisions of the constitution, the electoral Act and the guidelines and manuals designated for the conduct of the election.

On the term justice, very succinctly, Bryan A. Garner,<sup>39</sup> states that justice is the fair and proper administration of laws. Justice, simply and ordinarily, connotes ‘fairness; and or; ‘rightness’. It is usually implied when a thing or an act is fair and, or right to all concerned in a given circumstance. The ideals of fairness, freedom, equality and indeed unity in a state or society are rationally predicated on the justice delivery system of that state or society. The attainment of substantial justice is the goal and desire of every state or society. A just society is a fair and equitable society in which every member receives their due.

### **Public Interest Litigation**

Black’s Law Dictionary<sup>40</sup> defines *public interest* as “... the general welfare of the public that warrants recognition and protection (2) something in which the public as a whole has a stake; especially an interest that justifies governmental regulation, while litigation is defined as “the process of carrying on a law suit. The combination of the two definitions therefore approximates to “a law suit carried on to protect the general public welfare that justifies government regulation”. The term has also been defined as “cases which raise issues beyond any personal interest of the parties in the matter, affecting identifiable sectors of the public or vulnerable groups; seeking to clarify or challenge important questions of law, involving serious matters of public policy or general public concern and/or concerning systemic default or abuse by public body<sup>41</sup>. Public interest litigation presupposes placing of cases at judicial platform with a view to advancing a point of law of social utility or significance<sup>42</sup>.

One is constrained to ask whether an election petition initiated by a candidate in an election who is struggling to enter into a public office where he would be paid salaries and allowances is a public interest litigation in the sense of the definitions proffered above. The obvious answer to this important question is a qualified ‘NO’. to the extent that there will be some proprietary interest that would accrue to the individual candidate in the election now turned to petitioner from being elected, such proceedings is not altogether a public interest litigation.

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<sup>37</sup> E Alemika, *Post-Election Violence in Nigeria: ‘Emerging Trends and Lesson’* Huhuonline, online: [www.huhuonline.com](http://www.huhuonline.com) (accessed, 24<sup>th</sup> August, 2011), cited in U.F. Masajuwa, note 31 at p.186.

<sup>38</sup> E Alemika, *Post-Election Violence in Nigeria: ‘Emerging Trends and Lesson’* Huhuonline, online: [www.huhuonline.com](http://www.huhuonline.com) (accessed, 24<sup>th</sup> August, 2011), cited in U.F. Masajuwa, note 31 at p.186..

<sup>39</sup> B.A. Garner (ed.), *Black’s Law Dictionary*, Deluxe Ninth Ed., (St. Paul, MN, USA: Thomson Reuters, 2009), P. 942.

<sup>40</sup> A.B Garner (ed.) *Blacks Law Dictionary*, (West Publishing Co. Dallas, USA (2009) 2th edn.) 595

<sup>41</sup> Mel Cousins: [www.flac.ie/download/pdf/cousins\\_flac\\_061005.pdf](http://www.flac.ie/download/pdf/cousins_flac_061005.pdf) accessed on 03-11-2017 at 8.05pm cited in S.A. Joshua, footnote 2.

<sup>42</sup> H. Hershkoff and A. McCutcheon (2000): *Public interest litigation: An international perspective* cited in S.A. Joshua, *Ibid*.

However, let us give consideration to the fact that a flawed election is a breach of the provisions of the constitutional provisions for the conduct of such election, the provisions of the Electoral Act made pursuant to the constitution on the conduct of such election as well as a violation of the standard set by society already on the conduct of elections.

It would appear clearly then, that the person who has filed an election petition, praying the court or tribunal to nullify a flawed election and order the electoral commission to re-conduct such election in accordance with the laws governing such election is acting in the public interest. He is protecting the provisions of the constitution and other laws from being trampled upon. He is protecting the entire constituency from being governed or represented by a usurper who has stolen their mandate. It has been said time and again that election proceedings are *sui generis*. They are in a class of their own and do not belong to the class of either civil or criminal proceedings. The liberal application of the doctrine of *sui generis* when it is in the interest of justice to do so strengthens the court's jettisoning of technical rules in handling election petitions. This view is confirmed by the statement of Ikongbeh, JCA in *Princess Pat Ajudua & Anor. v Hon. Olaka Nwogu & Ors.*<sup>43</sup> when he stated that:

*I must repeat what I said in my contribution in Williams v. Tinubu & Ors<sup>44</sup> regarding the increasing incidence of over-dependence on technicality in election petitions that:*

*“Indubitably an election petition is a matter sui generis and needs to be disposed of as expeditiously as possible. That, with all due respect, is not an invitation to adopt the most cavalier method of dealing with it. The need for speedy disposal of the petition must be weighed against the wider need not only to do justice but also to be seen to be doing it, taking into consideration the nature of an election petition and what the entire process entails for the body polity. In this regard I would like to recall the words of wisdom and caution issued by Holden, J. in Dogarai v. Gwarzo & Ors<sup>45</sup> on this point that:*

*‘If this were an ordinary civil action I would have no hesitation in refusing the application. In civil action, if the parties or their counsel cannot take the trouble to get their application right, the court shows them no mercy, but in an election petition we are not concerned with the interests and claims of private individuals. It has been alleged that the election in this constituency was not properly conducted. That is a matter in which interest of the community is seriously concerned, and in which public interest completely overshadows the interests of the individuals involved. It is necessary that the allegations of impropriety in the conduct of the election be enquired into and pronounced upon judicially, and no technicalities can be allowed to stand in the way of the inquiry. Accordingly, I will overlook the fact that this application is in the wrong form and without notice ... and without any supporting affidavits or reasons of any sort, and I will do what I think best for the purpose of bringing this petition on for hearing, in spite of the mistakes of counsel for the petitioner.’*

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<sup>43</sup> (No.1) (2004)16 NWLR (pt 898) 56 at pp. 73-75.

<sup>44</sup> (Unreported No. EPT/CA/L/03/03 decided on 18/07/03).

<sup>45</sup> (1965) NNLR 9 at 10.



*That decision was given under a different electoral law, but the same principle that was embodied in it has run through all electoral laws that we have had since, including the present one. Unhappily one cannot pretend to be unaware of the growing tendency in recent times among Judges who are called upon to hear and determine election matters to shy away from this sacred duty by hiding behind technicalities. The Nigerian society is a very delicate and sensitive one. There is nobody who can honestly dispute this widespread discontent. In my view, the best panacea for creating a peaceful and conducive atmosphere is to keep all avenues of ventilating grievances as wide open as possible. While we must work according to and within the provisions of the law and the rules we must do all we can to avoid enthroning technicality above everything else, even, nay, especially, in election petition matters.*

### **The Odds against Petitioners in Election Proceedings**

As a matter of public policy, election petitions should be heard on their merit rather than allow them to be defeated on mere technicalities. In the long run, it is in the interest of the public that elections are conducted in compliance with the relevant laws. However, there is a presumption of regularity standing for the acts of public officers including the conduct of elections by INEC.<sup>46</sup> It becomes certain in view of the stand of the laws governing elections and evidence in Nigeria that the burden of proof of non-compliance with the requirements in respect of any election is on whoever that alleges such. It is therefore, the burden of the petitioner to prove all the ramifications of his petition and he would rely on all relevant documents including the result Forms usually produced by the electoral commission and domiciled with the commission. The excessive burden on the petitioner in respect of proof of his petition, including, many a time the burden to prove the negative has not been alleviated in the smallest degree by the operators of our electoral system and the adjudicators of our electoral disputes. Few examples shall suffice here.

1. The 1999 Constitution and the Electoral Act provides for 21 days for filing of election petition in respect of all the elections conducted under the Constitution and the Electoral Act.<sup>47</sup> The elections include; elections into the State Houses of Assembly, the House of Representatives, the Senate, Governorship of states and the President of the Federation. It is observed that while the 21 days limited for filing of petitions on elections into the State Houses of Assembly, the House of Representatives and the Senate may be sufficient, such 21 days are grossly insufficient for filing of petitions against Governorship and Presidential election returns.

If one considers the numbers of local governments, polling units and wards in states like Kano (44 local government areas), Lagos (about 8 million voters) one would appreciate the insufficiency of time to assemble the number of witnesses that would give evidence of flawed election to cover such a state.<sup>48</sup> This problem is more evident in respect of election

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<sup>46</sup> See Section 167 (c) of the Evidence Act, 2011, see also the provisions of Section 65 (1) and (2) of the Electoral Act, 2022 to the effect that the decision of returning officer on any issue relating to the election, particularly on declaration of scores of candidates and return shall be final and subject only to review by an election tribunal or court of competent jurisdiction in an election petition.

<sup>47</sup> See Section 185 of the 1999 Constitution (as amended).

<sup>48</sup> There should be witnesses enough to cover the parts of the entire state, particularly where the outcome of elections are being challenged to avoid the principle of hearsay evidence and dumping that have been used recently by our courts and tribunals to defeat credible election petitions.

petitions against Presidential election returns, where the petitioner is to engage witnesses to give evidence in respect of what transpired in all the states he is not satisfied with the conduct of the election in them. What applies to the 21 days limited for filing of petitions as discussed above also applies to the provisions of 180 days limited for the conclusion of hearing and determination of election petitions by the tribunals or Court of Appeal as the case may be. The times limited for these exercises as it concerns Governorship and Presidential elections disputes seems to be intended to defeat justice in such proceedings and Lawyers have always made effective use of the lacunae created in the said provisions.

2. Many a time, INEC deliberately inflicts more injuries on the interest of petitioners already constrained by the time provisions in our constitution for filing of their petition when INEC delays or refuses, tactically, to afford the petitioner the vital documents such as Forms EC8, EC25, EC40, etc., needed to make a success of his allegations at the election tribunal. There are situations where these documents are withheld by INEC even after a court or Tribunal has ordered INEC to supply the petitioner with the said documents. The proper thing for the court or tribunal to do in such circumstances would have been to treat such documents as evidence within the peculiar knowledge of the respondents and invoke the doctrine of withholding evidence that would assist the petitioner to succeed in his petition.<sup>49</sup> Section 167 of the Evidence Act, 2011 provides:

*The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relationship to the facts of the particular case, and in particular the court may presume that:*

- (a) ....
- (b) ...
- (c) ...
- (d) *Evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.*

The Tribunals or courts would have relied on these lofty provisions of the Evidence Act to declare that there was either no result for INEC to present or that the result would have weighed against the declaration made by the Commission, assuming the commission produced them. However, the practice till date is for the Tribunal or Court to declare that the petitioner has failed to prove his case due to his failure to produce the disputed result.

3. The fees demanded by INEC from petitioners for the issuance of election forms which are necessary part of a petition are usually outrageous and discourage prospective petitioners. Likewise, the money which the tribunals demand as deposit are equally outrageous. Everything about filing, certification, compilation of record etc. done in respect of

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<sup>49</sup> The Electoral Commission who ought to be an unbiased umpire in election matters jettisons its role to take the side of the candidate it returned and is seen many a time fighting very hard at the courts or tribunals to protect the integrity of the result of the election which it had declared, in violation of its status as an uninterested umpire. INEC always get to an extreme when it confiscates the Register of voters, ballot papers and other materials used for the election in spite of court orders to the contrary or make the conditions on which it will make them available to the petitioners to be too rigid. Where over-voting is alleged or it is alleged that election did not take place or that the result of the election being paraded did not emanate from lawful votes cast at the election, the position of the tribunal or court ought to be, that refusal of the Commission to produce the voters register or allow for inspection of ballot papers after it had been ordered to do so connotes an admission of the allegations made by the petitioner that the result of such election being paraded did not originate from lawful votes cast at the election.

election petition from the INEC to the last appellate court are so monetised and exorbitant as if they are meant to punish the petitioner. This is contrary to the public interest nature of an election petition.

4. There are no provisions allowing for tangible amendment of election petitions. It is of common knowledge that the speed at which election petitions are prepared is such that makes for mistakes and non-inclusion of vital evidence. Twenty one (21) days are provided for the filing of election petitions from the date of declaration of a winner in the said election. Much of the time limited by the Constitution and the Electoral Act are usually depleted by the electoral commission in its deliberate delays orchestrated to frustrate the petitioner into abandoning his plan to file a petition against the result declared by INEC. In the Governorship election conducted in 2021 in Anambra State, INEC declared a winner and person returned, calling imaginary figures as results polled by the candidates. The aggrieved candidate who lost the said election applied to have the result of the election in Forms EC8A, EC25, EC40, etc. INEC was never ready to issue the applicants with the certified true copies of the result forms until the expiration of the 21 days limited for the filing of election petition against the said declaration. The petitioners that filed election petitions against the said declaration did so without certified true copies of the said result forms. Even the respondents filed their reply to the said petition without the result forms.<sup>50</sup>

Further to the acts of INEC in trying to help respondents in election petitions by keeping away the result of the elections whenever petitions are filed, is also another objectionable action of the electoral commission in filing replies to election petition, taking sides with the other respondents. It is doubtful if INEC has got the right and moral standing to participate in the trials of election petitions and appeals as an interested party when the commission is established to maintain neutrality in matters concerning returns it has made in elections and has, pursuant to that, always made its staff to take oath of neutrality before the conduct of every election.<sup>51</sup> In the appeal following Peter Obi's case against INEC over the declaration of Chris Ngige as Governor in 2003 Gubernatorial election in Anambra State, INEC filed an appellate brief, urging the Court of Appeal, vehemently to void the return of Chris Ngige as Governor of Anambra State which was made by the same INEC.<sup>52</sup> The Court of Appeal did not find the action of the commission acceptable at all and voiced out its indignation against that.

### **Conclusion**

The issue of expeditious determination of election disputes has been settled in Section 285 (6), (7), (8) and (10) of the 1999 Constitution (as amended), it should however, be noted that election disputes demand finality as its goal, and finality is not simply a product of a rapid opening and shutting of a case. Finality rests upon justice being seen to be done, because without that there may be no acceptance of the ultimate fairness of the process or its outcome.

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<sup>50</sup> If not for the judgment of the Supreme Court to the effect that Senator Andy Uba of the A.P.C, the only petitioner challenging the declaration of result was not a candidate of that party, it would have been a beauty to see how our all-knowing tribunal would have resolved the imbroglio surrounding the nonproduction of the said result forms.

<sup>51</sup> See the case of Peter Obi v INEC (2007) 11 NWLR (pt. 1046) 582

<sup>52</sup> In its judgment, the Court of Appeal, Per Aderemi, JCA deprecated the appellate brief filed by INEC and the entire stand of INEC against the result it declared. In his words, INEC, an unbiased umpire ought not to support any side in an election petition as it would suffer no injury whatsoever even where the court orders INEC to repeat the election.

As a consequence, overly strict rules on matters such as filing times and amendability of processes filed in election disputes may bring the ideals of justice and the electoral system into disrepute if in a particular case it is perceived, especially by the electorates involved, that serious and substantiable allegations are not given their day in court'.

It would not do the system any harm to allow petitioners opportunity to amend their petitions even for once, after all in other jurisdictions such as Canada and the United States of America that have attained sophistication in handling of elections, some measures of amendments are allowed in the interest of justice where necessary to afford the petitioner good opportunity of proving his petition.

There seems to be a compelling need for legislative consideration of the shortness of time limited for filing and hearing of election petitions, particularly, as it concerns Presidential and Governorship elections. Consideration also ought to be given to the desirability of a slip rule for purposes of amendment in cases where evidence of electoral irregularities were not known or were omitted at the time of filing an election petition or where documents were not available or were not discovered before the petition was filed. The present law places more burden on litigants and their Lawyers who pursue their grievances against undue return under stringent conditions already prepared to weigh against them. Time limits for disputing returns are short, and prohibitions against amendment are rigid in many instances, given the difficulties petitioners and their legal advisers face in gathering evidence and particularising pleadings.

There should therefore, be liberal provisions for amendment of petitions to provide room for the inclusion of facts that were not within the reach of the petitioner at the time of filing his petition. This contrasts with the present position in Nigeria where it is forbidden for the petitioner to contemplate an amendment that would introduce substantial new issues into the petition or to introduce new facts that would alter the character of the petition. This is indeed one of the albatrosses of petitioners in the Nigerian election petition jurisprudence.<sup>53</sup>

Paragraph 14 of the First Schedule to the Electoral Act, 2022 provides that:

14(1) Subject to subparagraph (2), the provisions of the Civil Procedure Rules relating to amendment of pleadings shall apply in relation to an election petition or a reply to the election petition as if for the words “**any proceedings**” “in those provisions” there were substituted the words “**the election petition or reply**”.

(2) *After the expiration of the time limited by \_\_\_\_\_*

- (a) *Section 132 (7) of this Act for presenting the election petition, no amendment shall be made –*
- (i) *introducing any of the requirements of paragraph 4 (1) not contained in the original election petition filed, or*
- (ii) *effecting a substantial alteration of the ground for, or the prayer in, the election petition.*

By the intendment of the above provisions, amendment of election petition to introduce any substantial facts has been technically forbidden. If for any reason a petitioner fails to plead a material fact concerning the holding of the election the whole candidates that participated and the result polled by each and the declaration and return in respect of the election, he has

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<sup>53</sup>Para. 14 (2) (a) (i) and (ii) of the Electoral Act, 2010 as amended.

lost his petition except he discovers it when his 21 days to file his petition was still running, in which case he can still amend and include such.<sup>54</sup>

The issue of cost incurred in filing and prosecuting election petitions are outrageous. In a country where poverty is widespread, it would become the prerogative of charlatans and rogues as it is presently, to use their ill-gotten wealth to shortchange the electoral process to the disadvantage of patriots and genuine leaders who may not even have the resources to follow their stolen mandates to logical points where they may recover them.<sup>55</sup>

Further to that, it would be more beneficial to the country if the electoral laws would limit INEC to the role of witness only in election proceedings. INEC as a special witness could produce the documents used in elections and tender written statement of facts of how disputed elections were conducted. Thereafter, such witness would be cross-examined by both petitioners and respondents and allowed to depart while the petitioner and respondents remain to slug it out at the tribunal or court. On appeal, INEC should not be made a respondent neither would it file a brief of argument. The present situation where INEC colludes with respondents at election tribunals or courts affects substantial justice in those proceedings.

The burden of proof placed on petitioners in election proceedings should be reviewed and reduced. Election petition proceedings should be limited to an enquiry as to whether the election was conducted in compliance with the provisions of the relevant laws and practice. Where it is shown that there was malfeasance in the conduct of an election, that would be enough to invalidate the election. It should not be required of the petitioner to show that it was the respondent that commanded the malfeasance or that he benefited from it in terms of votes.

As a matter of policy, the judiciary should be made to approach election proceedings from the point of view of public and national interest instead of the present parochial approach that makes it to appear as a business arrangement where the adjudicators are available to be acquired by the highest bidder whose promptings they readily do upon being pummeled on the back with some inordinate gains. If we must get election proceedings right in Nigeria, there must be a way of making the judges involved in it to be more accountable than they are presently.

Most of the evils of corruption that has eaten up the fabric of judicial integrity in Nigeria stems from the involvement of judicial officers in election proceedings. Having mixed up so much with politicians, majority of the judges that hear election proceedings have come to discover the volume of money being looted by politicians from our national treasury and are willing to share in the loot. They insist on taking their own portion upfront at the time of

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<sup>54</sup> The present situation of non-amendability of petitions in Nigeria departs tremendously from the position in other jurisdiction, particularly Australia. The position even negatives the provisions paragraph 53 of the first schedule to the Electoral Act, 2022 provides that:

53(4) an election petition shall not be defeated by an objection as to form if it is possible at the time the objection is raised to remedy the defect either by way of amendment or as may be directed by the Tribunal or Court.

<sup>55</sup> Assuming Mr. Peter Obi, the former Governor of Anambra State had no resources to follow his stolen mandate up to the Court of Appeal, he would not have been able to recover it from whoever that stole it. Many have lost such genuine mandates given to them because they have no resources to meet up with the exorbitant demands of election petition and appeals.

determination of election proceedings. The end result of the said unholy romance is the objectionable judgments emanating from our tribunals and courts, some of which have no bearing on law and judicial precedents. The disgraceful prosecution, dismissal and sanctioning of judicial officers that has become rampant in Nigeria has its roots in judicial officers mingling with politicians.

Experience has shown that where one of the parties in election proceedings is occupying the disputed office, he tends to employ unending antics to delay proceedings in the matter. In that case, it will serve the interest of justice and public interest better if elections petition and appeals are concluded before winners of such elections are sworn into the disputed offices so that none of the parties would have interest in frustrating proceedings in court. An amendment of the Electoral Act to incorporate such clause will do our polity some good as the requirement of expeditious trial will be aided by both parties. All that the practice would require is to conduct elections in time enough to allow for the conclusion of election proceedings before the date a person is required to be sworn into that office.

### **Recommendations**

Immediate legislative action is required to take care of the shortness of time limited for filing and determination of election petitions, particularly, as it concerns Presidential and Governorship elections. Such amendment is also recommended to provide for a slip rule for purposes of amendment in cases where there is cogent need of amendment of election petition.

The burden of proof placed on petitioners in election proceedings should be reviewed and reduced. Election petition proceedings should be limited to an enquiry as to whether the election was conducted in compliance with the provisions of the relevant laws and practice. Where it is shown that there was malfeasance in the conduct of an election, that would be enough to invalidate the election. It should not be required of the petitioner to show that it was the respondent that commanded the malfeasance or that he benefited from it in terms of votes.

The judiciary should be made to approach election proceedings from the point of view of public and national interest instead of the present parochial approach that makes it to appear as a business arrangement where the adjudicators are available to be acquired by the highest bidder whose promptings they readily do upon being pummeled on the back with some inordinate gains.

The issue of cost incurred in filing and prosecuting election petitions are outrageous. In a country where poverty is widespread, it is recommended that since election is a specie of public interest litigation, fees to be paid by petitioners to INEC and election tribunals and courts should be reduced to the barest minimum so that it can be affordable to persons of modest means that really want to prosecute election proceedings.

Further to that, it would be more beneficial to the country if the electoral laws would limit INEC to the role of witness only in election proceedings. INEC as a special witness could produce the documents used in elections and tender written statement of facts of how disputed elections were conducted. Thereafter such witness would be cross-examined by both petitioners and respondents and allowed to depart while the petitioner and respondents remain to slug it out at the tribunal or court. On appeal, INEC should not be made a respondent neither would it file a brief of argument.

Finally, to enable all the parties to assist in a fair, expeditious and just disposal of election proceedings, none of the parties in the dispute should be sworn into office until the conclusion of the final appeal in respect of the disputed seat. An amendment of the Electoral Act to incorporate such clause will do our polity some good as the requirement of expeditious trial will be aided by both parties. All that the practice would require is to conduct elections in time enough to allow for the conclusion of election proceedings before the date a person is required to be sworn into that office.

It is believed that these and other measures, if incorporated into our relevant electoral laws would assist in securing fairness in determination of election disputes in Nigeria and ensure that appropriate person occupy public offices for the common good of the people.