

**An appraisal of the Legal Framework for the Conduct of the 2015 General Elections:
Matters Arising**

**Idayat Hassan
Director**

Centre for Democracy and Development (CDD)

Following the successful conduct of the 2011 general elections, the journey toward amending the body of laws for the conduct of elections began; the legal framework includes largely the 1999 constitution and 2010 electoral act as amended. This was premised on the need to improve the quality and credibility of future elections. The Independent National Electoral Commission (INEC), civil society organizations, foreign observer missions and other stakeholders proposed several amendments that could improve the quality of elections. After almost four years of back and forth in the legislature, these amendments never materialized, hence the conduct of the just concluded elections under the same legal regime. On a closer look, this look daunting, considering some of the challenges observed in the 2011 general elections. However, the present commission, which is fortunate to be the first commission to conduct two elections i.e. 2011 and 2015 general elections effectively and efficiently, utilized the same framework to deliver an improved and inclusive election.

This chapter will examine Nigeria's Electoral Act and constitution and other aspects of the legal framework of the country's electoral system, it will further examine how using the existing framework, the commission creatively introduced new innovation into election administration such as the Permanent Voters Card (PVC), Smart Card reader (SCR) and IDP voting in North East Nigeria. Additionally, the chapter will propose specific recommendation(s) to improve election administration in Nigeria.

Key words

IDPs, PVCs, 2015 elections, Nigeria, INEC, Boko Haram

The Legal Framework for Managing Elections in Nigeria

Credible elections are very important for the economic, social and political development of any nation. Indeed, the UN Declaration of Human Rights (1948), in Article 21(3), emphasised the importance of elections to human development and democracy:

The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The legal framework for the conduct of the 2011 elections consists of the amended 2010 Electoral Act¹ and the 1999 Constitution (as amended)². The INEC Establishment Act 1998 and the INEC (Amendment) Act 1998, and Guidelines issued by INEC. Of all these, the Constitution takes the first place in the order of precedence, in that any provision in any Act or Regulation which is contrary to its provision(s) is null, void and of no effect to the extent of such inconsistency.

This legal framework specifies the structure, role and responsibility of the electoral body, and the relationship between the electoral body and political actors, amongst others. The electoral laws addressed some of the issues raised by the Electoral Reform Committee. INEC is the administrative and election management body that is mandated to conduct elections in Nigeria. The fact that Nigeria is a party to the international instruments requires the country to deploy great efforts devoted to revising the electoral laws in order to enhance electoral credibility in the 2015 general elections.

The Independent National Electoral Commission

The Independent National Electoral Commission (INEC) is Nigeria's elections management body³. INEC was established within the framework of the Constitution (see Sections 153-155 of the Constitution for INEC powers and responsibilities) as a permanent institutional body whose task is to oversee the Nigerian electoral system. INEC is headed by a chairperson and twelve national commissioners, supported by Resident Electoral Commissioners (RECs) in the 36 states of the federation and the Federal Capital Territory, Abuja.

All INEC members are directly appointed by the President, in consultation with the Council of State, and confirmed by the Senate for a five-year tenure. INEC's duties include, *inter alia*, organisation of elections for political offices, excluding offices at the grassroots level⁴; registration of political parties; monitoring of political parties' activities, including their finances; and voters' registration.

INEC's independence is an important pre-condition for the successful execution of the Commission's duties and thankfully, the last review of the constitution has accorded INEC financial autonomy⁵ and administrative independence.⁶ The amendment also ensured that

¹ Hereinafter to be referred to as the Electoral Act

² Hereinafter to be referred to as the Constitution

³ INEC is saddled with conducting elections into all political offices in the country with the exception of the local government which is conducted by the State Independent Electoral Commissions (SIECs)

⁴ These offices are provided for under sections 76, 116, 132 and 178 of the 1999 Constitution and include the offices of president and vice president, governors and house of assembly of each state of the federation and membership of the Senate and House of representatives.

⁵ By virtue of Section 81 and 84(4) of the Constitution, INEC's funding is now drawn from the Consolidated Revenue Fund

commissioners no longer have to display partisan loyalty⁷. However, despite these laudable amendments, the appointment and removal of the INEC chair and his commissioners still remain the responsibility of the president. While we argue that the appointments of the board by the president constitutes a diminution to the independence of INEC. The reality was never obvious as what was witnessed during the last elections with rumours of Jega removal became almost daily false alarm, which contributed to heating up already tensed political climate. The need for a reform on the appointment of the INEC chairman cannot be over emphasised.

One of the critical challenges experienced in the last elections is the hierarchy in the commission, simply put, whose orders trumps the other. Acknowledged, the INEC chair is first amongst equals and Prof Jega was in the last elections. But the headquarters relation with its REC in the last questions raises fundamental questions on the independence of INEC. A readily available example is the Rivers and Akwa Ibom State. The question of why and how INEC could not override any decisions made by its electoral commissioners.

INEC has been empowered to determine the sequence of election into political offices, by virtue of Section 25 of the Electoral Act; and Sections 76, 116, 132 and 178 of the Constitution. INEC is empowered under the Constitution to register political parties. Since the landmark court decision in *Balarabe Musa vs. INEC*⁸, the conditions for political parties' registration have been liberalized. Nigeria at the moment has around 28 political parties. INEC is also empowered to deregister⁹ political parties that fail to win a seat in national and state assembly elections. There are presently cases in court challenging INEC' enforcement of this function. However, a real test of INEC power to register political parties emanated during the last elections, the Young Parties case. The independence of INEC has to be constitutionally guaranteed in all its operations and its management and control of the electoral process.

Political Finances

Political parties' finances constitute an important component of the electoral process. The constitution, electoral act and The Companies and Allied Matters Act (CAMA) are amongst the legal framework regulating campaign finance in Nigeria. The Electoral Act in sections 88-93) makes provisions for regulating campaign financing. Presidential and governorship candidates' campaign spending is limited to 1,000,000,000 and 200,000,000¹⁰ naira respectively in the Electoral Act.

⁶ Section 160 of the constitution grants INEC powers to make its own rules and regulate its internal affairs without control, approval or interference.

⁷ amendment to section 156 and section 14 of the Third Schedule of the Constitution,

⁸ SC. 228/2002

⁹ See section 78 (7) of the Electoral Act

¹⁰ See Section 91 (2)(3) of the Electoral Act

The main concern with political financing in the Nigerian political system is the limiting factor in the law. For instance Section 91(8b) of electoral act disregards “any expenditure incurred before the notification of the date fixed for the election with respect to services rendered or material supplied before such notification”. This is a legal loophole exploited by aspirants to candidates to justify their spending of considerable amounts of money prior to the official start of the election campaign.

Section 221 of the constitution clearly provides that; “No association, other than a political party, shall canvass for votes for any candidate at any election or contribute to the funds of any political party or to the election expenses of any candidate at an election. However in the last two elections (2011, 2015), we witnessed political parties making resort to third party spending. Those who took advantage of third party spending during the last elections include Dr. Goodluck Jonathan of Peoples Democratic Party (PDP). He utilized the platforms of groups such as Transformation Ambassador of Nigeria (TAN), Forward Nigeria, amongst others.

INEC is empowered by the Constitution to monitor finances of political parties, conduct an annual examination and audit of the funds of political parties, and publish a report to inform the public, however few parties continue to comply with the provisions. Political parties are also required to make their finances open to INEC’s scrutiny and can be scrutinised if need be by the National Assembly.

Underscoring the importance of managing campaign finances, section 90 (9) of the Electoral Act empowered INEC to place limitations on the amount of money or other assets an individual or group of persons can contribute to a political party. CAMA also expressly forbids companies in Section 38 (2) from funding or donating gifts, property or money to any political party or association. However, in the last elections, we witnessed the People’s Democratic Party governors collectively donate over 1 billion naira to former President Jonathan re-election campaign. The Re-election bid itself realized over N21 billion in flagrant breaches of electoral laws and brazen impunity. In flagrant disregard for the law, individuals such as Tunde Ayeni of Skye Bank donated N2 billion on behalf of himself and his unnamed friends with companies¹¹ donating humongous amount of money publicly in flagrant disregard of CAMA and other extant legal provisions.

The electoral act for instance is clear in its provisions that not more than N1million can be donated by individual to a candidate and contravention attracts a conviction a maximum fine of N1million or imprisonment of 12 months or both¹². However we are not aware of anybody prosecuted for breaching these provisions of the law. INEC however accepted it has

¹¹ See Govs, Businessmen, others donate N21.27 billion to Jonathan <http://www.punchng.com/news/govs-businessmen-others-donate-n21-27bn-to-jonathan/> accessed June 30th 2015 at 10.12am

¹² See section 91(9) 10) of the electoral act.

prosecutorial powers but lacks investigative powers to bring to book alleged culprits. In an interview, INEC voter education and publicity director, Oluwole Osaze argued in an interview with newsmen that: “only security agencies can investigate any party, person or company that violates any part of the country’s Electoral Act even though the commission has got prosecutorial power, this it cannot do until clear and concrete evidence are placed before it.”¹³ .”

Experiences from previous elections revealed INEC’ inability to monitor campaign finances, for instance in the 2011 elections in a shocking declaration, then INEC’s Chair, Professor Attahiru Jega¹⁴ stated “INEC does not even have a desk that handles campaign financing for the 2011 elections”. However in the just concluded elections INEC trained staff in the 774 local government areas, and they are believed to have been deployed to monitor the campaign finances, however challenges remain abound.

Considering the fact that campaign financing plays a decisive role in determining electoral outcome, the need for robust legal framework and enforcement cannot but be prioritised. It is imperative that the electoral laws straighten its definition of election expenses and spending with a view to tracking expenses before election notices are given, and prevent third-party financing. There is also an urgent need for INEC to strengthen its capacity to effectively monitor political parties finances and prosecute erring offenders.

Internal Democracy in Political Parties

Nigerian political parties are often criticized for their lack of internal democracy largely because they are dominated by few power elites otherwise call godfathers or godmothers who decide who gets what, selects candidates for elections, direct the planning and policy framework to suit their personal interests. Complaints arising from the party primaries showed several parties failed to open up spaces for eligible members to vie for positions. In the last elections, the Presidential aspirant in the PDP, Professor Akasoba Duke-Abiola dragged her party to court over its refusal to sell her a presidential nomination form thereby depriving her of the right to stand in the 2015 elections.¹⁵ The PDP was said to have printed only one form specifically for Dr. Goodluck Jonathan who had been adopted as the PDP's sole presidential candidate. There have been

¹³ N21bn donation: We can’t probe donors, says INEC <http://www.punchng.com/news/n21bn-donation-we-cant-probe-donors-says-inec/> The Punch Newspaper December 25, 2015 accessed June 29th at 11pm

¹⁴ in Daily Trust of May 8,2011

¹⁵ Abiola's widow drags PDP to court over for refusing her presidential nomination form – Nigerian Watch, November 13,2014: <http://www.nigerianwatch.com/news/5778-abiolas-widow-drags-pdp-to-court-over-for-refusing-her-presidential-nomination-form#sthash.aA31VP5X.dpuf> accessed June 29th 2015 at 4pm

See more at: <http://www.nigerianwatch.com/news/5778-abiolas-widow-drags-pdp-to-court-over-for-refusing-her-presidential-nomination-form#sthash.aA31VP5X.dpuf>

legislative efforts to improve Nigerian political parties' internal democracy. For example, the Electoral Act mandated INEC to monitor political parties' primaries and ensure that they conduct their activities in a democratic manner. The act provides in section 85(2) that:

The Commission may, with or without prior notice to the political party, attend and observe any convention, congress, conference or meeting which is convened by a political party for the purpose of

- (a) Electing members of its executive committees or other governing bodies;*
- (b) Nominating candidates for an election at any level; and*
- (c) Approving a merger with any other registered political party.*

Despite this legal provision, there are notable contradictions within the act itself. Some statutes, in particular, reduce the effectiveness and purpose of other statutes within the same act. Section 87 of the Electoral Act that deals with internal democracy in political parties and the democratic conduct of party primary elections loses its meaning when compared with Sections 31-38, 78-102 of the Electoral Act. More specifically, section 87(4)(c)(ii) clearly states that the aspirant with the highest number of votes shall be declared the winner of the party's primaries at the end of the voting, and that the aspirant's name shall be forwarded to the Independent National Electoral Commission as the party's candidate. Parallel to that, section 31(1) explicitly states that the Commission shall not reject or disqualify candidates even where the party decides to submit the names of persons that lost primaries or did not contest party primary elections in the first place.

Section 31(1):

Every political party shall, not later than 60 days before the date appointed for a general election under the provisions of this Bill, submit to the Commission in the prescribed forms, the list of candidates the party proposes to sponsor at the elections, provided that the Commission shall not reject or disqualify candidates for any reason whatsoever.

These two provisions are clearly incompatible and work directly against each other. By including the phrase '*any reason whatsoever*', the law stripped INEC of the ability to enforce compliance with requirements of internal party democracy.

Pre-Election Petitions

A lacuna in the legal framework for conducting elections in Nigeria is the absence of specific statutory provisions for the submission and adjudication of petitions prior to the elections. This implies that pre-election matters are treated as ordinary civil litigation cases. In line with Section 87(10) of the electoral act, Pre-election petitions are filed with INEC, the Federal and

State High Courts during the actual course of the electoral process. This renders the operational aspect of the electoral process more complicated, since judgements are often delivered few days into elections. However, the just concluded elections revealed a different scenario; largely pre electoral matters could not be dealt with by the court as the Judicial Staff Union of Nigeria (JUSUN) were on strike during the electioneering period, while the federal workers called off their strike weeks into the elections, State chapters continued with strike action. Most aspirants were denied of their day in court due to the strike action.

Election Petition Tribunals

Section 285 of the Constitution established tribunals for each of the 36 states of the federation and the Federal Capital Territory¹⁶. It further provides for the creation of national and state assembly election tribunal¹⁷ and governorship tribunal.¹⁸ The tribunal in the governorship and the federal/ state legislative tribunals are composed of 3 members with the quorum for each of them as the chairman and any other member. At the appeal court, the tribunal for Presidential elections shall be composed of at least 3 Justices,¹⁹ and 5 at the Supreme Court²⁰. The time for filing electoral disputes after the declaration of results is twenty one days²¹. And the election tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition, and an appeal arising from a decision of an election tribunal or court shall be heard and disposed of within 60 days from the date of the tribunal's delivery of judgment date.²²

The shortening of time in hearing electoral disputes is a step in the right direction but the filing processes of 21days is being abused by crafty petition lawyers who wait till the last few days to file their petitions thereby affording respondents little or no time to respond to the petition. A cursory look at the cases filed in the last elections shows many of the cases have been thrown out based on technicalities like this without affording parties the opportunity to call evidence to prove their case.

The unspecified amount of time granted to the Supreme Court as the final arbiter in gubernatorial and presidential election cases, to deliver its judgment remains a challenge. It is important that future amendments take cognisance of the need to conclude all election litigations prior to the inauguration of the winner. Without such provision, illegitimate candidates could hold office prior to the delivery of the final verdict with respect to the petitions filed against them.

¹⁶ The composition of these tribunals is set out in the sixth schedule of the same constitution.

¹⁷ Section 285(1)

¹⁸ Section 285(2)

¹⁹ (S. 239(2) 1999 Constitution as amended

²⁰ (S. 234) as amended

²¹ Section 285(5) 1999 Constitution as amended

²² See section 285 (7)

The swearing in of winners pending the determination of litigation remains a critical challenge that must be redressed in further amendments. This frustrates the hopes of candidates, leads to a waste of government resources. In a notable case in Osun State, an election petition dragged on for over three years before the incumbent governor was removed. This problem is exacerbated by the high number of filed election petitions. For example, in 2003, only a total of 574 election petitions were brought before election tribunals; the number rose to 1475 in the 2007 general elections; and in 2011, only about 400 petitions were filed mainly as a result of both the improvement in the legal framework and in the conduct of the polls. In the just concluded elections, figures bandied around is between 200 and over 600, however, we can still argue the figures are substantial. It is high time petitions are disposed before any winner is sworn into offices at all level. This amendment will improve the credibility of elections further.

Electoral Violence

Electoral violence continues to be a recurring decimal in the polity. This is largely fuelled with the amount of money associated with elective offices. The just concluded elections posed a different challenge considering the level of insecurity pervading the country. The Boko haram insurgency for once raised the bar as there were fears that elections will be impossible to conduct in several parts of the country while the insurgents can also exacerbate existing conflicts. The level of insecurity witnessed. The National Human Rights Commission in its Pre- election report and advisory in Nigeria' s 2015 elections reported 58 deaths resulted from 49 pre- election related violence across 22 states of the federation.²³

While the death tolls in the 2015 elections cannot compare to the post election violence of 2011 that led to the death of hundred and displacement of thousands of people, the tolls in the elections still remained high.

Section 227 of the Constitution and section 81 of the Electoral Act prescribe punishment for the contravention of electoral offences²⁴. However, the adequacy of the provisions to fight electoral violence, remains in question, one is the sentences is very light, secondly is the trial of election offences in regular court makes prosecution is highly ineffective as INEC is hampered by the small size of its legal department and cannot effectively prosecute.

²³ Pre- election report and advisory in Nigeria' s 2015 elections issued by the National Human Rights Commission, February 13, 2015

²⁴ Section 94 – Conduct of political rallies and processions; Section 95 – Prohibition of certain conducts etc of political campaigns; Section 96 – Prohibition of use of force or violence at political campaigns ; Section 119 – Disorderly behavior at political meetings; Section 128 – Disorderly conduct at Election Day; Section 129 – Offences on Election Day; and Section 131 – Threatening Conducts amongst others.

The central problem with enforcing penalties against those who engage in electoral malpractices is the absence of an Electoral Offences Commission. A challenge associated with containing electoral violence includes the inefficiency of the security agencies in overseeing elections. Traditionally the police are responsible for maintaining internal security and policing elections but faced with inadequate staff and necessary logistics; and the level of wanton destruction of lives and property in elections. Other security agencies have in recent years been involved in the policing of elections, however, there have been many instances where the police took active part in vote rigging and voter intimidation. The last governorship elections in Ekiti State also heightened the stakes in the concluded elections. The released audio tape #Ekitigate of how the military was used to the advantage of the ruling party puts the supposed impartiality of the of the security agencies in doubt.²⁵

These amongst other issues raised the question of the use of Nigerian Armed Forces in the security and supervision of the election. In three separate cases, the court ruled against the use of Nigerian Armed Forces in the security and supervision of the election until an enabling act of the National Assembly is passed. In a suit filed by Honourable Femi Gbajabiamila, on behalf of platform of All Progressive Congress²⁶. Joined as respondents are the President, Chief of Army staff, the Attorney General and other services chiefs. The petitioner argued that the military inhibited free movement, free access and intimidated voters in Osun, Ekiti, and Anambra states where they were deployed for elections. In addition, that it's not ideal to deploy military to supervise election in a democratic setting, and therefore urged that military not be deployed for the general elections. The court ruled the deployment of military constitutes a contravention of section 217(2) c) of the constitution and section of the Armed Forces Act.

Gender

Gender does not occupy a central position in either the Electoral Act or the Constitution. Apart from the provisions of Section 51 that designate separate queues for men and women where the culture does not permit intermingling of sexes, there is no provision targeting women participation in elections. However, the electoral guidelines grant preferential treatments to pregnant women, aged and nursing mother. However, the Modified Open Ballot system itself is a challenge as observations from the field shows many women after the accreditation processes do not return to vote. It is hoped in subsequent elections particularly with the introduction of the card reader, accreditation and voting are held simultaneously.

²⁵ **Idayat Hassan** Nigeria's election consumed by propaganda and doubt – <http://africanarguments.org/2015/03/03/nigerias-election-consumed-by-propaganda-and-doubt-by-idayat-hassan/>

²⁶ Rules against use of military for elections Nigeria Pilot, March 24, 2015 <http://nigerianpilot.com/rules-against-use-of-military-for-elections/#sthash.P8bPdTGf.dpuf>