

Nigeria: Election Law

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NIGERIA

ELECTION LAW

Executive Summary

In preparation for the 2011 elections, Nigeria has made various changes to laws governing elections, mainly the Electoral Act and the Constitution. Among the changes are steps taken to guarantee the independence of the Independent National Elections Commission (INEC) and to reorganize Election Tribunals and their powers. The issue of what amounts to a full term of a governorship, an issue that has recently been a subject of litigation before federal courts, has also been finally settled through a Constitutional amendment.

Introduction

Nigeria is a federation of thirty-six states and conducts elections periodically for federal as well as state political offices. The Nigerian National Assembly is composed of the Senate and the House of Representatives. There are three Senatorial districts in each of the thirty-six states, and the Federal Capital, Abuja, is counted as one district, which brings the total number of senators to 109.¹ For purposes of allocating seats in the House of Representatives, Nigeria is divided into 360 Federal constituencies, each of which is represented by one member in the House.² For the purpose of presidential elections, the federation is considered to be one constituency in which everyone who qualifies to vote for a member of a legislative house is eligible to vote.³ Each state has a legislative body known as a House of Assembly, with the number of seats ranging from 24 to 40, representing in as far as it is possible an equally divided number of residents.⁴ For purposes of gubernatorial elections, each state is considered to be one constituency, in which everyone qualified to vote in state Assembly elections is eligible to vote.⁵ Every four years, Nigeria conducts elections for these elected political offices in three phases: National Assembly elections, presidential elections, and gubernatorial as well as state Assembly elections.

¹ Constitution of the Federal Republic of Nigeria, §§ 48, 71, 3 LAWS OF THE FEDERATION OF NIGERIA (1999), available at the International Center For Nigerian Law (ICFNL) website, <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> (last visited Apr. 11, 2011).

² *Id.*

³ *Id.*, §132.

⁴ *Id.* §§91, 112.

⁵ *Id.* §178.

The 2011 election season in Nigeria, which kicked off on April 9 with the National Assembly polls, followed by Presidential elections on April 19, is in its final stretch.⁶ The last phase of the election season will include the gubernatorial and state assembly elections, which are set to take place on April 26.⁷

The last election, which was conducted in April 2007, was widely criticized. The National Democratic Institute, one of the institutions that observed the elections, reported that the 2007 election was full of irregularities (including underage voting, ballots that did not include all the names of the candidates, errors in voter registration, lack of secrecy of voting, and inadequate polling stations), in addition to improper conduct such as stealing ballot boxes, intimidation, and vote buying.⁸ The European Union Election Observation Mission (EU EOM), which was also one of the observers, found that the elections did not meet basic regional and international standards.⁹ It concluded that the elections were, among other things, “marred by poor organization, lack of essential transparency, widespread procedural irregularities and significant evidence of fraud.”¹⁰ The lack of credibility of the 2007 elections was also recognized by the late Nigerian President Umaru Yar’adua, who soon after his inauguration in 2007 formed the Electoral Reform Committee, with the specific mandate of devising ways of making elections in Nigeria free and fair.¹¹

The preparations for and the elections already held this season have been marred with logistical and security, as well as legal issues. For instance, the National Assembly elections were originally scheduled for April 2, but they had to be postponed due to some logistical issues, one of which was the lack of the necessary voting materials in the 120,000 polling stations.¹² There have also been reports of violence in campaign rallies and polling stations, as well as at vote counting centers.¹³ In addition, the constitutional challenge to sections of the Electoral Act, 2010 by a political party¹⁴ and the court battle before the Court of Appeal in Abuja on whether gubernatorial elections should take place in five of the thirty-six Nigerian states have added

⁶ Independent Nigerian Election Commission, *General Elections 2011: Countdown*, <http://www.inec.nigeria.org/general-elections-2011-countdown/> (last visited Apr. 11, 2011).

⁷ *Id.*

⁸ NATIONAL DEMOCRATIC INSTITUTE (NDI), FINAL NDI REPORT ON NIGERIA’S 2007 ELECTIONS, (Apr. 2008), http://www.ndi.org/files/2313_ng_report_election07_043008.pdf.

⁹ Press Release, European Union Election Observation Mission, Elections Fail to Meet Hopes and Expectations of the Nigerian People and Fall Far Short of Basic International Standards (Apr. 23, 2007), http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/nigeriapressrelease/nigeriapressreleaseen.pdf.

¹⁰ *Id.*

¹¹ Emily I. Alemika & Etannibi E.O. Alemika, *Democracy, Elections, and the Roles of Citizens*, 3 JOURNAL OF PUBLIC LAW AND CONSTITUTIONAL PRACTICE (No. 1) 7, 1-16 (2010).

¹² Julia Ritchey, *Nigeria Readies for Poll Despite Doubts Over Process*, VOICE OF AMERICA (Apr. 8, 2011), <http://www.voanews.com/english/news/africa/Nigeria-Readies-for-Poll-Despite-Doubts-Over-Process-119485609.html>.

¹³ Julia Ritchey, *Nigeria Counting Votes From Parliamentary Elections*, VOICE OF AMERICA (Apr. 9, 2011), <http://www.voanews.com/english/news/africa/Polls-Open-In-Nigerias-Parliamentary-Election---119528314.html>.

¹⁴ Hanibal Goitom, *Nigeria: Constitutionality of Provisions of Electoral Act 2010 Challenged in Court*, GLOBAL LEGAL MONITOR (Apr. 5, 2011), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402607_text.

complications to this election season.¹⁵ The riots in the northern part of Nigeria after the presidential victory of the incumbent, President Goodluck Jonathan, if they widen, could derail the remaining phase of elections.¹⁶

That said, elections in Nigeria this season have already won praise, with observers calling the polls by far the “fairest in decades.”¹⁷ It is, however, important to note that the elections are far from finished, with voting for the gubernatorial, state and some National Assembly seats still to come. After the completion of voting, election petitions and a process to address conflicts arising out of the elections will also proceed.¹⁸

This report briefly describes some of the notable changes introduced to the two main pillars of the Nigerian election system, the Independent National Elections Commission (INEC) and election petition procedures, in preparation for the 2011 elections.

INEC

Established by the Constitution, INEC is a juridical person that may sue or be sued in its own name.¹⁹ Its mandate is to conduct elections in Nigeria for the offices of President, Vice President, Members of the National Assembly (both the Senate and House of Representatives), Governors, Deputy Governors, and members of state Houses of Assembly.²⁰ Its functions include the following:

- organizing, undertaking, and supervising all elections to the offices of the President and Vice-President, state Governor and Deputy Governor, and members of the Senate, the House of Representatives, and the House of Assembly of each state of the Federation;
- registering political parties in accordance with the provisions of this Constitution and an act of the National Assembly;
- monitoring the organization and operation of the political parties, including their finances, conventions, congresses, and party primaries;
- arranging for the annual examination and auditing of the funds and accounts of political parties and publishing a report on that examination and audit for public information;
- arranging and conducting the registration of persons qualified to vote, as well as preparing, maintaining, and revising the register of voters for the purpose of any election under this Constitution;

¹⁵ Hanibal Goitom, *Nigeria: INEC Appeals Court Ruling Exempting Five States from Upcoming Gubernatorial Elections*, GLOBAL LEGAL MONITOR, (Apr. 7, 2011), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402614_text.

¹⁶ Joe Brock, *Many Dead in Nigerian Election Protests*, REUTERS (Apr. 18, 2011), <http://af.reuters.com/article/topNews/idAFJOE73H02Q20110418>.

¹⁷ *Id.*

¹⁸ Electoral Act, §134 (2010), copy of the final version of the bill available at Policy and Legal Advocacy Center (PLAC) website, <http://placng.org/Electoral%20Act%202010-%20as%20Gazetted.pdf> (last visited Apr. 18, 2011).

¹⁹ Constitution of the Federal Republic of Nigeria, § 153, 3 LAWS OF THE FEDERATION OF NIGERIA (1999). Electoral Act, §1.

²⁰ Jesuorobo E. Idugboe, *Issue of Jurisdiction and Locus Standi Under the Electoral Act 2006*, in LAW AND CONTEMPORARY ISSUES 14, 13-26 (S.E. Edeko, ed., 2007).

- monitoring political campaigns and providing rules and regulations to govern the political parties;
- ensuring that all Electoral Commissioners and newly elected and returning officers take and subscribe to the oath of office prescribed by law; and
- delegating any of its powers to any Resident Electoral Commissioners as needed.²¹

In addition, it is tasked with the function of providing voter and civic education, promoting “knowledge of sound democratic election process,” and conducting referenda as needed.²²

One of the factors that compromised the credibility of past elections, including the 2007 elections, is said to be the lack of structural independence of INEC. This was one of the main issues taken up by the Electoral Reform Committee in 2007.²³ Among the recommendations that the Committee made was the necessity for guaranteeing the independence of INEC, both through the way that the Commission is funded and through the appointment process for its members.²⁴

The constitutional amendments made in preparation for the 2011 elections, partially resolved the issues considered by the Electoral Reform Committee. Changes were made to the way INEC is funded; an amendment was made to the Nigerian Constitution to allow INEC to be funded from the Consolidated Fund.²⁵ This put INEC on a par with the way the judiciary and the National Assembly are funded.²⁶

With regard to the appointment and dismissal process for the Chairperson and the twelve National Electoral Commissioners of INEC no changes were made. However the existing procedures for appointment appear solid. The chairman of INEC is appointed by the President of the Federation, subject to confirmation by the Senate.²⁷ The removal of the chairperson is harder to accomplish; to do so, the President needs the support of a two-thirds majority of the Senate.²⁸

However, changes have been made to tighten the appointment process of the Resident Electoral Commissioners, of whom there is one for every state and the Capital Territory and to whom INEC may delegate any of its powers. The appointment of a Resident Electoral Commissioner in the past was a presidential prerogative. Today, a presidential appointment of a Resident Electoral Commissioner requires Senate confirmation.²⁹

²¹ Constitution of the Federal Republic of Nigeria, §153, (Third Schedule, §21) , as Amended by Constitution of the Federal Republic of Nigeria (First Alteration) Act No. 1 of 2010.

²² Electoral Act, § 2.

²³ Alemika & Alemika, *supra* note 11.

²⁴ *Id.*

²⁵ Constitution of the Federal Republic of Nigeria, §81, as Amended by Constitution of the Federal Republic of Nigeria (First Alteration) Act No. 1 of 2010.

²⁶ *Id.*

²⁷ *Id.* at §154.

²⁸ *Id.* at §157.

²⁹ *Id.*, at §153 (Third Schedule, §14.).

A notable constitutional amendment was also made to insulate INEC from the control of the President of the federation in running its affairs. Like any other independent body created under the Constitution, INEC had the power to issue rules “to regulate its own procedure or confer powers and impose duties on any officer or authority for the purpose of discharging its functions.”³⁰ To do so, however, it needed presidential approval.³¹ The need for presidential approval was eliminated by constitutional amendment, giving INEC absolute power to regulate itself for the purpose of carrying out its functions.³²

Another notable amendment to the Constitution addressed the power of INEC to postpone elections. One of the issues this election season, as indicated in the Introduction, has been the repeated postponement of elections by INEC. The presidential election was initially scheduled for January 22, but was postponed more than once.³³ In addition, INEC had to postpone elections at the last minute, mostly due to organizational problems. This has given rise to accusations of inappropriate tampering with the process.³⁴ However, the postponements by INEC appear to have been within the bounds of the law. For instance, with regard to presidential elections, the Constitution set a certain time period within which elections must be held and from which derogation was prohibited. It mandated that such elections should take place “not earlier than sixty days and no later than thirty days before the expiration of the term of office of the last holder of that office.”³⁵ A constitutional amendment was made to expand the period in which presidential elections must be held. The Constitution now requires that such elections be held “not earlier than one hundred and fifty days and not later than one hundred and one hundred and thirty days before the expiration of the term of office of the last holder of that office.”³⁶ Within this period of time, INEC has the power to set or postpone an election date.³⁷

The power of INEC to postpone elections within the general parameters set by the Constitution, although wide, is not unlimited. INEC may only postpone an already set election date in the following circumstances:

³⁰ Constitution of the Federal Republic of Nigeria, §160.

³¹ *Id.*

³² Constitution of the Federal Republic of Nigeria, (Third Schedule., §160), as Amended by Constitution of the Federal Republic of Nigeria (First Alteration) Act No. 1 of 2010.

³³ Peter Clottey, *Most Nigerian Political Parties Agree to Election Postponement*, VOICE OF AMERICA (Sept. 23, 2010), <http://www.voanews.com/english/news/africa/Most-Nigerian-Political-Parties-Agree-to-Election-Postponement--103680089.html>.

³⁴ *Nigeria Parties Back Poll Delays*, VOICE OF AMERICA (Apr. 4, 2011), <http://blogs.voanews.com/breaking-news/2011/04/04/nigeria-parties-back-poll-delays/>.

³⁵ Constitution of the Federal Republic of Nigeria, §132.

³⁶ Constitution of the Federal Republic of Nigeria, §132, as amended by Constitution of the Federal Republic of Nigeria (First Alteration) Act No. 1 of 2010, 98 FEDERAL REPUBLIC OF NIGERIA OFFICIAL GAZATTE No. 2 (Jan. 11, 2011) & the Constitution of the Federal Republic of Nigeria (Second Alteration) Act No. 2 of 2010, 98 FEDERAL REPUBLIC OF NIGERIA OFFICIAL GAZATTE NO. 3 (Jan. 12, 2010).

³⁷ Constitution of the Federal Republic of Nigeria, §132, as amended by Constitution of the Federal Republic of Nigeria (First Alteration) Act No. 1 of 2010, 98 FEDERAL REPUBLIC OF NIGERIA OFFICIAL GAZATTE No. 2 (Jan. 11, 2011) & the Constitution of the Federal Republic of Nigeria (Second Alteration) Act No. 2 of 2010, 98 FEDERAL REPUBLIC OF NIGERIA OFFICIAL GAZATTE NO. 3 (Jan. 12, 2010).Electoral Act, §26.

If there is reason to believe that a serious breach of the peace is likely to occur if the election is proceeded with on that date or [if] it is impossible to conduct the elections as a result of natural disasters or other emergencies.³⁸

The vagueness of the language appears to leave INEC wide discretionary powers. All that the INEC is required to do to postpone an election is have a “cogent and verifiable” reason, which could be as serious as riots or a simple logistical problem of not having sufficient voting materials in the polling station, one of the reasons given for postponing elections this season.³⁹

Election Petition

Establishing an independent body to oversee elections is not sufficient to guarantee free and fair elections without an efficient and reliable system to address election related disputes. Election petition is different from ordinary civil or criminal proceedings and therefore, is governed by specially designed rules.⁴⁰ The Nigerian election petition system is governed by the Constitution and the Electoral Act. The Constitution mainly establishes election tribunals and allocates those tribunals and courts jurisdiction to adjudicate election disputes, whereas the Electoral Act outlines detailed rules governing the process. In preparation for the 2011 election season, some changes have been made to Nigeria’s election petition system. The changes mainly focused on reorganizing election tribunals and their jurisdictions.

The law that governed the 2007 elections mandated that there be at least one National Assembly Election Tribunal to make determinations on election issues concerning the National Assembly election.⁴¹ In addition, the law mandated the establishment of at least one election tribunal in every state (known as Governorship and Legislative Houses Election Tribunals) to adjudicate election petitions surrounding the elections of governors, deputy governors, and members of state Houses of Assembly.⁴² The National Assembly, governorship, and state assembly tribunals consisted of a chairman (judge of a high court) and four other members,⁴³ and a quorum was established by the presence of the chairman and two other members.⁴⁴

In the recent amendment process, some changes were introduced to the structural arrangement of election tribunals. The amended Constitution consolidated some of the roles of the National Assembly and the Governorship and State Houses of Assembly election tribunals into one by establishing a tribunal called the National Assembly and State Houses of Assembly

³⁸ Electoral Act, §26.

³⁹ *Id.*

⁴⁰ Idugboe, *supra* note 20.

⁴¹ Constitution of the Federal Republic of Nigeria, §285(1).

⁴² *Id.* at §285(2).

⁴³ *Id.* at §285(3) (*schedule six*).

⁴⁴ *Id.* at §285(4).

Election Tribunal.⁴⁵ There will be at least one such Tribunal for the Federation.⁴⁶ The number of members of this tribunal was made smaller than that of its predecessors (the National Assembly Election Tribunal and the Governorship and Legislative Houses Election Tribunal); it is made up of only a Chairman and two other members.⁴⁷ A quorum can be effectively established with the chairman and one other member.⁴⁸

The jurisdiction of the National Assembly and State Houses of Assembly Election Tribunal is more limited than that of the previous National Assembly Election Tribunals. The National Assembly Election Tribunals, before the amendment, had jurisdiction to make determinations on whether:

- a person has been validly elected;
- the term of a person under the Constitution has ceased;
- a seat of a member of the National Assembly has been vacant; and
- a suit before an Election Tribunal has been instituted properly.⁴⁹

Under the amended Constitution, the jurisdiction of the National Assembly and State Houses of Assembly Election Tribunals is limited to determining whether a person has been validly elected to the National Assembly or the House of Assembly of a state.⁵⁰ Its jurisdiction is, however, identical to that of the Governorship and Legislative Houses Election Tribunals, which had jurisdiction over election petitions arising out of races for State Houses Assembly and whose jurisdiction was limited to determining whether a person had been validly elected to such office.⁵¹

Some of the jurisdictional powers formerly enjoyed by the National Assembly Election Tribunal have been shifted to the Federal High Court. The Federal High Court now has jurisdiction to adjudicate and determine whether a term of office of a member of the National Assembly or a state House of Assembly has ceased and whether or not the seat has become vacant.⁵²

Procedural changes were also introduced to petitions concerning the offices of governors and deputy governors. Before the 2010 amendments, election petitions concerning these offices

⁴⁵ Constitution of the Federal Republic of Nigeria, §285 (1), as Amended by Constitution of the Federal Republic of Nigeria (First Alteration) Act No. 1 of 2010 & the Constitution of the Federal Republic of Nigeria (Second Alteration) Act No. 2 of 2010.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* §285(4).

⁴⁹ Constitution of the Federal Republic of Nigeria, §285.

⁵⁰ Constitution of the Federal Republic of Nigeria, §285 (1), as Amended by Constitution of the Federal Republic of Nigeria (First Alteration) Act No. 1 of 2010 & the Constitution of the Federal Republic of Nigeria (Second Alteration) Act No. 2 of 2010.

⁵¹ Constitution of the Federal Republic of Nigeria, §285(2).

⁵² Constitution of the Federal Republic of Nigeria, §§251 & 272, as Amended by Constitution of the Federal Republic of Nigeria (First Alteration) Act No. 1 of 2010.

were, as indicated above, dealt with by the Governorship and Legislative Houses Election Tribunals, of which there was one in every state.⁵³ These Tribunals have been replaced by Governorship Election Tribunals, of which there also is one in every State of the Federation; these tribunals enjoy original jurisdiction to make determinations as to whether any person has been validly elected to the Office of the Governor or Deputy Governor.⁵⁴

Determination of whether the term of office of a Governor or Deputy-Governor has ceased or the position has become vacant now lies with the Federal High Court.⁵⁵ In a recent case, the issue of whether the tenure of five governors had ended and whether their seats are open for contest in the 2011 election season was adjudicated by the Federal High Court in Abuja and was taken before the Court of Appeal in Abuja only on appeal.⁵⁶ At issue in that case was a constitutional provision, as it existed prior to the 2010 amendments, on tenure of governors which specifically stated:

...the Governor shall vacate his office at the expiration of period [sic] of four years commencing from the date when –

(a) in the case of a person first elected as Governor under this Constitution, he took the Oath of Allegiance and oath of office; and

(b) the person last elected to that office took the Oath of Allegiance and oath of office or would, but for his death, have taken such oaths.⁵⁷

Governors of three states (Adamawa, Kogi, and Sokoto) sued INEC before the Federal High Court of Abuja for the purpose of preventing it from opening their seats for election in 2011.⁵⁸ Their argument, simply put, was that their tenure could not have ended, because the regular gubernatorial elections held in the last election season (April 2007) were voided, forcing them to wait until 2008 to take the oath of office after re-run elections. INEC, in turn, argued that because the governors won the re-run elections, their tenure commenced on the day they took their first oath of office.⁵⁹ The High Court ruled in favor of the petitioners and barred INEC from holding gubernatorial elections in five States (including Cross River and Bayelsa, states with situations similar to the other three) in 2011, a ruling INEC appealed to the Court of Appeal.⁶⁰ The Court of Appeal in Abuja, in a ruling issued on April 15, 2011, upheld the High

⁵³ Constitution of the Federal Republic of Nigeria, §285(2).

⁵⁴ Constitution of the Federal Republic of Nigeria, §285 (2), as Amended by Constitution of the Federal Republic of Nigeria (First Alteration) Act No. 1 of 2010 & the Constitution of the Federal Republic of Nigeria (Second Alteration) Act No. 2 of 2010.

⁵⁵ *Id.* at §272.

⁵⁶ Goitom, *supra* note 15. *See also* Constitution of the Federal Republic of Nigeria, §246, as Amended by Constitution of the Federal Republic of Nigeria (First Alteration) Act No. 1 of 2010 & the Constitution of the Federal Republic of Nigeria (Second Alteration) Act No. 2 of 2010.

⁵⁷ Constitution of the Federal Republic of Nigeria, §180(2).

⁵⁸ Goitom, *supra* note 56.

⁵⁹ *Id.*

⁶⁰ *Id.*

Court's ruling.⁶¹ In doing so the Court of Appeal noted that “[i]n law, there were no elections in the five states in April 2007 ... Nobody can be validly elected in an invalid election.”⁶²

Although INEC was not able to convince the High Court and the Court of Appeal of its view on when a gubernatorial term actually starts, the legislature (both at the federal and state level) has implemented at least part of INEC's position through constitutional amendment. The amended Constitution states that:

In the determination of the four year term [of a Governor], where a re-run election has taken place and the person earlier sworn in wins the re-election, the time spent in the office before the date the election was annulled, shall be taken into account [to constitute part of the term].⁶³

Under the amended Constitution, if a gubernatorial election is nullified after the winner has taken the oath and commenced his/her term and if the same person wins a re-run election, the time that that person served as governor before the former election was nullified is counted as part of the four-year term. This provision reverses the Court of Appeal ruling, which retroactively cancelled any amount of time a person had served as governor if the election that the person won is later nullified, but it does not fully embrace the position of INEC in that it appears to be applicable only to the time the person serves between the first win and its nullification.

The same amendment was also introduced with regard to the tenure of a President of the Federal Republic of Nigeria.⁶⁴

Conclusion

Whether the elections in Nigeria this season will be fairer and freer than those of the past is yet to be seen. Although early reports suggest that this election season was much fairer than the last one, there are still polls left to conduct, and the post-constitutional election petition machinery has yet to be tested. Even if elections this season win high praise from observers, the impact that the above enumerated amendments and other changes made to the Nigerian electoral system, if any, would probably not be quickly evident.

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⁶¹ Hanibal Goitom, *Nigeria: Court of Appeals Upholds High Court Ruling, No Gubernatorial Elections in Five States*, GLOBAL LEGAL MONITOR (Apr. 18, 2011), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402631_text.

⁶² *Id.*

⁶³ Constitution of the Federal Republic of Nigeria, §180 (2)(A), as Amended by Constitution of the Federal Republic of Nigeria (First Alteration) Act No. 1 of 2010.

⁶⁴ *Id.* at §135(2)(A).