

LEGAL ISSUE BRIEF

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Diagnosing the Legality of Declaration of Inconclusiveness of Elections in Nigeria

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It has been in public domain that the governorship elections took place in Osun State on Saturday, the 22nd day of September 2018. At the end of the voting and collation of results, no return was made as the Independent National Electoral Commission (INEC) declared the election inconclusive. This was as a result of the fact that, according to INEC, the number of invalid votes was more than the margin between the candidate of the Peoples Democratic Party (PDP), Ademola Adeleke, who polled 254,698 votes, and that of the All Progressives Congress (APC), Ademola Adeleke, had polled 254,698 votes; the margin between the two being 353 votes with 3, 498 cancelled votes. In consequence, INEC fixed September 27 for a rerun between the candidates of the two political parties. Prior to this period, INEC had, in 2015, declared the governorship election in Kogi State inconclusive because the total number of registered voters in 91 polling units, in 18 local government areas, where election was cancelled was 49,953, while the margin of votes between Prince Abubakar Audu of the APC and Capt. Idris Ichalla Wada of the PDP

was 41,353, which was less than the number of registered voters in the polling units where cancellation of votes took place. This brief probes the legal regularity or otherwise of such declarations by the INEC and makes recommendations for legislative activism as a way forward.

The Concept of Elections

Election is a set of activities whereby members of a community choose their leaders. The main purpose of an election is to put people into positions of leadership, by way of making preferred choices from available alternatives. At times, elections are conducted to approve or disapprove of important proposals made by the government. Such an election is often referred to as a referendum or a plebiscite. Also, an election can be conducted to endorse or reject the recall of a serving political office holder accused of non-performance or misconduct. All these types of elections have been held in Nigeria at one time or another. There are five types of elections, namely, general election, by-election, referendum, plebiscite and recall. Each of them aims at

endorsing or rejecting certain persons or public policies. Election is important, whether local or national. The number of voters who participate in an election vary from place to place. Election therefore creates a level playing field for everyone who is interested in contesting for public offices. Election processes help to reflect changing opinions and social concepts about citizenship and equality of individuals.¹

Election serves as a political leveler for all citizens, with the concept of all persons being equal before the ballot box i.e. one man, one vote. It also brings together the various parts of the country, and helps in the redistribution of the commonwealth, irrespective of religious, social, political or other differences. On the importance of elections, it has been stated as follows:

Free and fair elections are the cornerstone of every democracy and the primary mechanism for exercising the principle of sovereignty of people. Through such elections, citizens participate in the governance of their country by choosing those who govern in the quest for development. By their choices, the

citizens confer legitimacy and authority on those who govern, making it easier for them to mobilize public support and cooperation for the implementation of development programs. Free, fair and credible elections are therefore a crucial requirement for good governance in any democracy.²

A Panoramic Survey of Statutory Provisions Relating to Inconclusiveness of Elections

The point must be made from the onset that the criterion which the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and the Electoral Act 2010 (as amended) recognise for declaring a candidate duly elected is majority of lawful and valid votes. To this end, the Constitution provides that:

"A candidate for an election to the office of Governor of a State shall be deemed to have been duly elected where, there being two or more candidates -

¹ T Fotopoulos "The Meaning of Democracy", <<http://aceproject.org/ace-en/topics/ve/vea/vea01>> accessed December 2 2015

² Report of the Electoral Reform Committee, Volume 1 Main Report, 1 (2008)

- (a) he has the highest number of votes cast at the election; and
- (b) he has not less than one-quarter of all the votes cast in each of at least two-thirds of all the local government areas in the State.”³

In addition to the above, the Constitution vests INEC with the power to, by rules or otherwise, regulate its own procedure or confer powers and impose duties on any officer or authority for the purpose of discharging its function.⁴ Pursuant to the above provision, INEC issued Manual for Election Officials 2015 (Updated Version) which it relies on in conducting elections. The Manual provides as follows:

The State Collation/Returning Officer for the Governorship shall: Where the margin of win between the two leading candidates is not in excess of the total number of registered voters of the polling unit(s) where elections were cancelled or not held, decline to make a return until another poll has taken place in the affected polling unit(s) and the results incorporated into an new Form EC8D and subsequently recorded into a new form EC8E for Declaration and Return.⁵

A careful perusal of the provision of section 179(1) of the Constitution reveals that it does not admit of other conditions for declaring a candidate winner and returning him duly elected. In addition to the above, the Electoral Act further provides that:

If the Tribunal or the Court determines that a candidate who was returned as elected was not validly elected on the ground that he did not score the majority of valid votes cast at the election, the Election Tribunal or the Court, as the case may be, shall declare as elected the candidate who scored the highest number of valid votes cast at the election and satisfied the requirements of the Constitution and this Act.⁶

A combined reading of the above statutory provisions reveals that some votes would be unlawful and invalid. Consequently, where votes are cancelled or invalidated for any reason howsoever, including for being invalid and unlawful, such votes are immediately and automatically cancelled, deducted and consigned to the dustbin of history.⁷

Nature of Voided Votes and Judicial Attitude

³ Section 179(2)

⁴ Section 160(1)

⁵ Chapter 3, paragraph 3.11, Step 14

⁶ Section 140(3)

⁷ Lawyard: “Inconclusive Osun Poll: Ozekhome Accuses INEC of Murdering Democracy”, <https://www.lawyard.ng/inconclusive-osun-poll-ozekhome-accuses-inec-of-murdering-democracy/> (Accessed on 14/10/2018)

Only votes that INEC had adjudged illegitimate due to irregularities should be voided and were voided and cancelled. This cancellation and voidance of illegitimate votes effected all the political parties, not just APC and PDP, but especially Omisore's SDP, whose two strongest fortes in Ife axis were badly affected. Such voided votes are ignored and unreckoned with, for they are a non sequitur. In *Osunbor v Oshiomhole*⁸, cancelled votes had been counted and added to PDP/Osunbor's scores. The courts, up to the Supreme Court, held that when votes are cancelled, they are not reckoned with in determining the outcome of such an election. The courts thereafter deducted the invalidated votes and this gave victory to Oshiomhole in the hotly contested election. To avoid disenfranchisement of eligible voters, only votes in areas where election did not hold at all are considered for the purpose of calculating total votes.

Supremacy of the Constitution and Nullity of Inconsistent Provisions

The issue of validity of INEC Manual for Election Officials came up for determination in *Faleke v. INEC* where the Supreme Court gave approval to the usage of Manual for Election Officials in conducting a supplementary election as follows:

By virtue of section 160(1) of the 1999 Constitution, INEC has the constitutional power to regulate its own procedure or confer powers and impose duties on its officers for the purpose of discharging its

functions. Sections 73 and 153 of the Electoral Act, 2010, (as amended), contain similar provisions to ensure the proper discharge of its functions. Section 73 empowers the Commission to publish in the Gazette guidelines for elections which shall make provisions for the step by step recording of the poll in the electoral forms as may be prescribed. Section 153 empowers the Commission to issue regulations, guidelines or manuals for the purpose of giving effect to the provisions of the Electoral Act and for its administration. The above provisions give statutory backing to the Manual as a subsidiary legislation and where it is found to be relevant, its provisions must be invoked, applied and enforced. In the instant case, having discovered electoral malpractices in 91 polling units in the State, it was proper for the 1st respondent (INEC) to consult and apply the provisions of its Manual to determine the next course of action in the circumstances. Resort to its manual in the circumstances

⁸ (2007) 18 NWLR(part 1065) 32

did not amount to a flagrant disregard of the supremacy of the Constitutional provisions contained in section 179(2) of the Constitution.⁹

The above pronouncement of the Supreme Court is an affront on the Supremacy of the Constitution. The provision of section 179 exhaustively guides INEC in making a return at a governorship election. It must be restated here that the provisions of the Electoral Act and the INEC Guidelines are subject to the overriding authority of the provisions of the Nigerian Constitution, which is supreme. In the words of Ozekehome, SAN, “the Constitution is the Kabiyesi, Eze and Emir, in the hierarchy of Nigerian laws. All others are like Bales and Chiefs that must bow before this king.”¹⁰ The provisions of the Constitution therefore clearly override the provisions of the Electoral Act and any guidelines issued by INEC, by virtue of section 1(3) of the 1999 Constitution. They are consequently null and void to the extent of the inconsistency. This constitutional provision on the supremacy of the Constitution has received judicial blessing in a plethora of authorities such as the celebrated case of *Nyesom Wike v. Dakuku Peterside*¹¹.

The Perplexity of Double Standard by INEC

Contrary to the position taken by INEC in the 2015 governorship election in Kogi State and the recent Osun election, it failed to declare

the Lokoja/Kogi Federal Constituency rerun election of August 11 2018 inconclusive on similar facts, where the number of cancelled votes which stood at 19,000 exceeded the difference between the two candidates in the election which stood at 12,000 and the candidate of the APC, Haruna Isah was declared winner without declaring the election inconclusive. In that election the candidate of the APC polled 26,860 while the candidate of the PDP, Engr Bashir Abubakar polled 14,845 votes to come second, a total of 19,960 votes were cancelled as a result of violence in some polling units in two local government areas.¹²

Error of the Supreme Court in Validating the Relevant Provision of the INEC Manual Juxtaposed with International Judicial Attitude

It is obvious that the provision of the INEC Manual reproduced above is inconsistent with section 179(2) of the Constitution, the former having imported strange provisions that are contrary to the express provisions of the latter. It is one thing to have powers to make subsidiary legislation and it is another thing to make such subsidiary legislation within the ambit of the powers so granted. On this premise, the Supreme Court erred in not declaring the said provision of the Manual void. In *United States v. Two Hundred Barrels of Whisky*¹³, the parent Act provided for admitting duty-free animals specially imported for breeding purposes. The regulation made under the Act required the

⁹ Per Kekere-Ekun, JSC at pp. 120-121, paras. F-G

¹⁰ Ibid

¹¹ (2016) 7 NWLR (part 1512) 574

¹² Obahopo, B.: “Bye Election: INEC declares APC winner of Lokoja/Kogi Fed Constituency”, Vanguard (online), 12th August,

2018, <https://www.vanguardngr.com/2018/08/bye-election-inec-declares-apc-winner-of-lokoja-kogi-fed-constituency/> (Accessed on 16/10/2018)

¹³ 95 U.S. 571 [24 L.Ed. 491]

animals to be of a superior stock if they were to be admitted to be duty-free. The court held the regulation to be ultra vires as the parent Act included all animals while the regulation confined its operation to animals of a particular stock alone. Similarly, in *Indian Council of Legal Aid & Advice v. Bar Council of India*¹⁴, the Bar Council of India by Resolution No.64/93 dated 22nd August, 1993 added Rule 9 in Chapter III of part VI of the Bar Council of India Rules which resolution was gazetted on 25th September, 1993. The said newly added rule was to the effect that "A. person who has completed the age of 45 years on the date on which he submits his application for his enrolment as an advocate to the State Bar Council shall not be enrolled as an advocate." All the State Bar Councils in India were duly informed about the insertion of the said rule. The legality and validity of the rule was challenged as it was contended that it was inconsistent with Articles 14, 19(1) (g) and 21 of the Constitution and Section 24 of the Advocates Act, 1961. The Supreme Court of India found struck down the new Rule 9 as ultra vires the Act and opposed to Article 14 of the Constitution. This same line of reasoning was adopted in *Narendra Kumar v. Union of India*¹⁵, where the validity of the Non-Ferrous Metal Control Order, 1958 issued under section 3 of the Essential Commodities Act, 1955 was challenged as unconstitutional. The petitioners had not challenged the validity of the parent Act. It was argued that if the enabling Act was not considered unconstitutional, the rules made

thereunder could not be held to be unconstitutional. Rejecting the argument the Supreme Court held that even though a parent Act might not be unconstitutional, an order made thereunder can still be unconstitutional and can be challenged as violative of the provisions of the Constitution. It has long been established that where the Constitution sets the condition for doing a thing, no legislation of the National Assembly or of a State House of Assembly can alter those conditions in any way unless the Constitution itself as an attribute of its supremacy so authorises.¹⁶

Recommendations

In view of the forgoing analysis, the following measures are recommended:

- a. The National Assembly should take bold steps to amend the Constitution by expressing providing against importation of strange requirements for making a return at elections outside the provisions of the Constitution.
- b. There should be a provision in the Electoral Act in line with the provisions of the Constitution, stating clear requirements for making a return. This will automatically render impotent the provisions of the INEC Manual.
- c. There should be continuous legal education for judges, especially on international practices, to enhance

¹⁴ 1995 SCC (1) 732
¹⁵ 1960 AIR 430

¹⁶ *INEC v Musa* (2003) 3 NWLR (Pt.806) 72

their capacity for justice dispensation to minimise errors.

- d. INEC should revise its Manual and bring it in line with the provisions of the Constitution, especially in view of the unveiled contradictions.

Conclusion

It is already a notorious fact in Nigeria that only registered voters who have collected their Permanent Voters Cards (PVCs) are eligible to vote. Reliance on Chapter 3 paragraph 3.11 step 14 of INEC's Manual is

wrong by all standards. First, it offends the relevant constitutional provisions cited, and second, it amounts to self-contradiction on the part of INEC since not all registered voters can vote. Under paragraph 2.0. at page 8 of the Manual, only voters with PVCs are eligible to vote. What is the essence of reckoning with the total number of registered voters when it is not all registered voters that are eligible to vote but only those with their PVCs? The inconsistency of INEC in the application of the Manual calls for a rethink on the part of the election umpire as it breeds feelings of injustice among the citizenry.