

# LEGAL ISSUE BRIEF

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## Legality and Objective of the Use of Smart Card Readers in Nigeria's Electoral Process

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Electoral malpractices lead to loss of confidence in the electoral process; and lack of confidence by the citizenry in the democratic process is an impediment in deepening electoral democracy. Consequently, if the citizenry do not believe in the fairness, accuracy, openness, and basic integrity of the election process, the very basis of any democratic society will be threatened.

Thus, in view of the negative impacts of electoral malpractices, global attention is focused on how to mitigate this undemocratic behavior and improve the electoral process. One of such strategies to combat electoral malpractices is the introduction of information and communication technology into the electoral process. Though, the use of technology in elections is not an end in itself, but it assists in the various aspects of electoral administration. It is against this background that an electronic technologically based device, the Smart Card Reader, was introduced into the Nigerian electoral process

in 2015 to help improve and deepen electoral democracy.

The Smart Card Reader was the most highly contentious issue in the 2015 general elections in Nigeria. It was used for the first time in Nigeria's electoral process and it remains one of the greatest innovative measures employed in the 2015 general elections. Past elections in Nigeria have witnessed all forms of electoral malpractices, including multiple voting, impersonation, manipulation and falsification of results, which led to legal actions, electoral conflicts and violence. As a result of the prevalence of these malpractices, the Independent National Electoral Commission (INEC) introduced the Smart Card Reader to aid in authenticating and verifying on Election Day, the Permanent Voter Card (PVC) issued by INEC.

### **Objective of the Use of Smart Card Readers**

The Smart Card Reader is a technological device setup to authenticate and verify on Election Day, the PVC issued by INEC. The

device uses a cryptographic technology that has ultra-low power consumption, with a single core frequency of 1.2GHz and an Android 4.2.2. Operating System.<sup>1</sup> In other words, the INEC Card reader is designed to read information contained in the embedded chip of the permanent voter's card issued by INEC, to verify the authenticity of the PVC and also carry out a verification of the intending voter, by matching the biometrics obtained from the voter on the spot with the ones stored on the PVC.<sup>2</sup>

Among the fundamental basis for the deployment of the Smart Card Reader by INEC was to prevent electoral fraud; to allow the electorates votes to count; to reduce litigations arising from elections; to authenticate and verify voters; to protect the integrity and credibility of the election; to audit results from polling units across the federation; and to ensure transparency and accountability.<sup>3</sup> Others are to do a range of statistical analysis of the demographics of voting for the purposes of research and planning; to build public confidence and trust in the election; to reduce electoral conflicts; to ensure a free and fair election and to further deepen Nigeria's electoral and democratic process.<sup>4</sup> Despite the laudable goals and objectives of the Smart Card Reader, it generated debate amongst various stake holders on the legality or otherwise of

the device. On the one hand, proponents of the Card Reader, viewed the innovation as an effort to ensure the conduct of a free and fair election, while on the other hand, there have been arguments to the effect that INEC neither has the legitimate authority nor capacity to use the Card Reader.<sup>5</sup> The advocates of the device are of the view that the Card Reader procedure has the capacity to prevent or minimize rigging in the sense that there would not be multiple voting while the opponents believed that in the peculiar circumstances of the Nigerian situation, the card reader is designed to assist a certain political party to win the general election.<sup>6</sup> Further, the argument of the opponents is premised on the notion that the Card Reader must have been programmed to aid a pre-determined winner of the election by ensuring that so many persons would discriminately be disenfranchised to deny other parties of favorable votes, thereby ensuring the winning of an INEC preferred or pre-determined party.<sup>7</sup>

### **Legality of the Use of Smart Card Readers in Nigeria's Electoral Process**

The legality of the use of the card reader in Nigeria's electoral process is one crucial aspect of the debate that critics of the Card Readers have constantly contested. To examine this, a careful study of the Nigeria's

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<sup>1</sup> Independent National Electoral Commission (2015) Frequently Asked Questions. [http://www.inecnigeria.org/?page\\_id=28](http://www.inecnigeria.org/?page_id=28) Accessed 20 September 2018.

<sup>2</sup> Engineering Network Team (2015) Gains of the INEC Card Reader in the 2015 Elections. <http://go.engineer-ng.net/m/blogpost?id=6404812%3ABlogPost%3A103341> Accessed 20 September 2018.

<sup>3</sup> E A Alebiosu, "Smart Card Reader and the 2015 General Elections in Nigeria" (2015) <http://www.inecnigeria.org/wp-content/uploads/2015/07/Conference-Paper-by-Emmanuel-Alebiosu.pdf> Accessed 20 September 2018.

<sup>4</sup> *Ibid.*

<sup>5</sup> Policy and Legal Advocacy Centre, "The Constitutionality or not of the Use of Card Readers in the 2015 Elections in Nigeria" (2015), <http://placng.org/legist/the-constitutionality-or-not-of-the-use-of-card-readers-in-the-2015-elections-in-nigeria/> Accessed 20 September 2018.

<sup>6</sup> S C Peters, "Opinion: Illegality or otherwise of Card Readers in Nigerian Electoral Jurisprudence" (2015) <http://thewillnigeria.com/news/opinion-illegality-or-otherwise-of-card-readers-in-nigerian-electoral-jurisprudence/> Accessed 20 September 2018.

<sup>7</sup> *Ibid.*

electoral jurisprudence is essential, to determine whether or not the use of the smart card reader by INEC falls within the limits of the law.

Undoubtedly, INEC is a creation of the law, as the Commission as established under section 153 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) as a Federal Executive Body. As such, the Commission has the power to, among others; organize, undertake and supervise all elections in Nigeria,<sup>8</sup> arrange and conduct the registration of persons qualified to vote and prepare and maintain and revise the registration of voters for the purpose of any election.<sup>9</sup>

Additionally, the Constitution subjects the registration of voters and the conduct of elections to INEC's discretion<sup>10</sup>, while section 16 of the Electoral Act, 2010, (as amended) gives power to INEC to cause to print and issue voters card to voters whose names appear on the register. From the foregoing, INEC has express and implied powers to design means, procedures and processes that enable it exercise the powers granted to it under the Constitution including for example, the use of Permanent Voter Cards in General Elections.

However, despite INEC's power under the Constitution and the Electoral Act to regulate the conduct of elections in Nigeria, the opposing views on the legality of the Smart

Card reader appear to be as a result of the provisions of section 52 of the Electoral Act, 2010 (as amended). The section prohibits the use of electronic voting machine for the time being. On the other hand, advocates of the Smart Card Reader often distinguish the voting procedure prohibited by section 52 from the authentication process, which they posit that the smart card reader seeks to achieve.<sup>11</sup> This may be attributed to the fact that section 52 prohibits specifically, the use of an electronic voting machine and no other electronic device, such as the Smart Card Reader, which authenticates the identity of a voter by verifying that his fingerprints match the biometrics stored on the embedded chip of his or her Permanent Voter Card. A voting machine is defined as a mechanical device for recording and counting votes cast in an election.<sup>12</sup> As has been established, a Smart Card Reader is not built to record nor count votes.

Moreover, a more in depth study of electronic voting, reveals that in countries where remote electronic voting is used, the personal attendance of a voter at a voting center is not necessarily required as the person is able to vote from a different location, electronically.<sup>13</sup> This is not the case with the smart card reader. Therefore, it may be argued that by virtue of the provisions of section 52(1)(a) and (b) of the Electoral Act, a Card Reader is not an electronic voting machine but simply a system put in place to

<sup>8</sup> Paragraph 15 (a) Third Schedule Part I to the Constitution of the Federal Republic of Nigeria, 1999 (as amended)

<sup>9</sup> Ibid, Paragraph 15 (e)

<sup>10</sup> Section 118 of the 1999 Constitution, as amended.

<sup>11</sup> Policy and Legal Advocacy Centre, "The Constitutionality or Not of the Use of Card Readers in the 2015 Elections in Nigeria" (2015) <http://placng.org/legist/the-constitutionality-or-not-of-the-use-of->

[card-readers-in-the-2015-elections-in-nigeria/](http://placng.org/legist/the-constitutionality-or-not-of-the-use-of-card-readers-in-the-2015-elections-in-nigeria/) Accessed September 26, 2018.

<sup>12</sup> See the Definition of a "Voting Machine" in the Merriam-Webster Dictionary online. <https://www.merriam-webster.com/dictionary/voting%20machine> Accessed 5 October, 2018.

<sup>13</sup> Ibid.

curb over-voting, electoral fraud and impersonation.

Further, as a result of the novelty of the technology in Nigeria's electoral system, manifold legal issues on the use of the Smart Card Reader, characterized a plethora of petitions before various election petition tribunals. The legal issues in turn generated different interpretations and conflicting decisions of the tribunals and the Court of Appeal.

The Supreme Court has therefore taken a definite position, holding that, as the law stands today, card readers cannot substitute, overthrow or replace voter registers. The Supreme Court in many of its judgments recognizes and acknowledges the use of card reader machines. The court commends INEC for "...the innovation of card reader machine to bolster the transparency and accuracy of the accreditation process and to mandate the democratic norm of 'one man, one vote' by preventing multiple voting by a voter." *Per Kekere-Ekun, JSC in Nyesom v. Peterside & Ors.*<sup>14</sup> The commendation of INEC by the Supreme Court, does not, however, derogate from its finding that card readers cannot supplant voters' registers. There lies the grumble of many people with the judgments and reasons for the decisions of the apex court.

The first challenge to the legitimacy of Card Readers came up in *All Progressives Congress and Agbaje & Ors.*<sup>15</sup> The real issue in that case was whether or not irregularities

occasioned by the use and/or non-use of card readers can constitute grounds for questioning an election. Objection was raised before the trial tribunal against paragraph 13 (b) of the petition in which it was alleged that there were so many irregularities in respect of the use of card readers during the governorship election in Lagos State, as many polling units did not have card readers or did not make use of card readers even when available. The trial tribunal overruled the objection, holding that paragraph 13(b) of the petition, which complained of "irregularities in respect of the use of the card reader during the election", is a ground recognized under Section 138(1) (b) of the Electoral Act, 2010 (as amended). On appeal to the Court of Appeal, the court set aside the decision of the trial tribunal on the point which approved paragraph 13 (b) as a competent ground. From the decision of the Court of Appeal, it has been made clear, long before the decisions of the Supreme Court in *Nyesom v Peterside*,<sup>16</sup> *Emmanuel v Umana*<sup>17</sup> and petitions that malpractices occasioned by card readers cannot constitute grounds upon which an election may be challenged. The decision of the Court of Appeal in *All Progressives Congress and Agbaje & Ors*<sup>18</sup> establishes the long-standing principle that no ground of an election petition can be formulated outside the ones prescribed under section 138 (1) of the Electoral Act 2010 (as amended). In so far as malpractices occasioned by card readers do not form part of such grounds, they cannot

<sup>14</sup> *Wike Ezenwo Nyesom V. Hon. (Dr.) Dakuku Adol Peterside & Ors* SC.1002/2015

<sup>15</sup> *All Progressives Congress V. Mr. Joseph Olujimi Kolawole Agbaje & Ors* (2015) LPELR-25668 (CA)

<sup>16</sup> *Supra.*

<sup>17</sup> *Udom Gabriel Emmanuel V. Umana Okon Umana & Ors,* SC.1/2016.

<sup>18</sup> *Supra.*

stand. Ogbuinya, JCA who delivered the lead judgment in that case puts it more succinctly:

The evolution of the concept of smart card reader is a familiar one. It came to being during the last general election held in March and April, 2015 in Nigeria...The concept, owing to its recent invention by INEC, a non-legislative body, traces its paternity to the Manual for Election Officials, 2015: Chapter 2, pages 35-42. Put the other way round, the extant Electoral Act 2010, as amended, which predates the concept, is not its parent or progenitor. Since it is not the progeny of the Electoral Act, a ground in a petition, fronting it as a ground to challenge any election does not have its blessing, nay Section 138(1) of it. Put simply, a petitioner cannot project the non-presence or improper use of smart card reader as a ground for questioning an election it does not qualify as one.

Although no reference is made by the Supreme Court to the pronouncement of the Court of Appeal, the apex court, nevertheless, sustains the basic principle that INEC Guidelines or Manual for elections cannot withstand or override a legislative enactment like the Electoral Act 2010.<sup>19</sup>The issue that came before the Supreme Court for

determination in most of the cases was the effect of the provisions of INEC Guidelines and Manual on voters' registers, as against the provisions of the Electoral Act 2010 (as amended). The Supreme Court has held that Card Readers cannot supplant voter registers. In *Okereke v Umahi & 2 Ors*,<sup>20</sup> Nweze, JSC., states that "indeed, since the INEC Guidelines and Manual which authorized the use and deployment of the electronic Card Reader Machine were made in exercise of the powers conferred by the Electoral Act, the said card reader cannot, logically, depose or dethrone the Voters' Register whose juridical roots are, firmly, embedded or entrenched in the self-same Electoral Act from which it (the Voter Register), directly, derives its sustenance and currency."

Thus, any attempt to invest it (the Card Reader Machine procedure), with such overarching pre-eminence or superiority over the Voters Register, is like converting an auxiliary procedure – into the dominant procedure – of proof, that is, proof of accreditation. This is a logical impossibility. See also *Mahmud Aliyu Shinkafi & Anor v Yari & 2 Ors*<sup>21</sup> per Okoro JSC, where his Lordship opined that "a principle of law that is well established cannot be abolished simply because an Appellant failed to prove his case in accordance with those principles. My understanding of the function of the Card Reader machine is to authenticate the owner of a voter card and to prevent multi-voting by a voter. I am not aware that the Card Reader machine has replaced the voter's register or

<sup>19</sup> O Yesufu, "Card Readers and Supreme Court judgments" (2016) <http://thenationonlineng.net/card-readers-and-supreme-court-judgments/> Accessed 26 September 2018

<sup>20</sup> *Edward Nkwegu Okereke V. Nweze David Umahi & 2 Ors*, SC.1004/2015

<sup>21</sup> *Mahmud Aliyu Shinkafi & Anor v Yari & 2 Ors* (SC.907/2015).

taken the place of statement of result in appropriate forms.”

Further, with regard to the issue of accreditation, Card Readers, were not designed to accredit voters. Accreditation entails a process of presenting oneself to a presiding officer with one’s voter’s card and the process of checking of a voter’s name on the voter’s register including the ticking of the name. In order to separate accreditation from actual voting, the INEC Guidelines and Manual for Election Officials provides that accreditation shall hold between 8.00 am and 1pm or such time as the last person on the queue finishes, while voting commences at 1.30pm or so soon thereafter when accreditation must have been completed till the last person concludes.<sup>22</sup> Therefore it is right to argue that the Supreme Court is correct to confine Card Reader Machines to their basic objective and purpose, i.e. to authenticate owners of voter cards.

The election process consists of accreditation, voting, collation and declaration of results. The importance of accreditation in an election process cannot be over-emphasized. It is a pre-requisite for a valid vote in the conduct of an election. Therefore, before a vote can be validly returned, there must have been proper accreditation of the voter. The Court of Appeal in *Fayemi & Anor. v Oni & Ors*<sup>23</sup> held that a ballot without accreditation cannot be a valid ballot paper, and without a valid ballot paper there can be no valid election. Any vote returned without an accreditation for a

particular voting unit such votes cannot be said to have been obtained through due electoral process. The importance of accreditation was further stressed in that case, where the Court of Appeal (which was the final court in that case) nullified the election of some wards for lack of accreditation.

Section 49 of the Electoral Act 2010 (as amended) describes the process of accreditation in a most explicit way as follows –

49(1) A person intending to vote with the voter’s card shall present himself to a presiding officer at the polling unit in the constituency in which his name is registered with the voter’s card.

(2). The Presiding Officer shall, on being satisfied that the name of the person is on the register of voters issue him with a ballot paper and indicate on the register that the person has voted.

From the provision of subsection (2) above, it is clear that register of voters form the pivot upon which proper accreditation is predicated, and not the Card Reader Machines. Simply put, accreditation entails the presiding officer ensures that the name of the prospective voter is in the register before a ballot is issued and marking of the register to indicate that he has voted. Where registers are not marked against the names of voters contained there, it would be assumed there was no accreditation. If votes are returned

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<sup>22</sup>Manual for Election Officials 2015 (Updated Version)  
<http://www.inecnigeria.org/wp-content/uploads/2015/02/Election-Manual-2015-.pdf> Accessed 26 September 2018.

<sup>23</sup> 2005 All FWLR (Pt. 265) 1047.

under such circumstance, it would be concluded that such votes were scored through a flawed process. The corollary is also correct. Names that are marked on voters' registers, *prima facie*, suggest that such voters have been accredited until the contrary is proved. And, of course, the onus rests squarely on the petitioner to establish the fact that such voters have not been accredited.

Consequently, as a result of the controversy with the Smart Card Readers in the 2015 elections with regard to its legality, the National Assembly attempted to resolve this controversy by including in the first and second Electoral Act (Amendment) Bill transmitted to the President in February and June 2018 respectively,<sup>24</sup> a clause amending section 49 of the Electoral Act, 2010 (as amended). The proposed amendment is stated as follows-

Section 49 of the Principal Act is amended by substituting for subsections (1) and (2), new subsections (1) and (2) -

“(1) A person intending to vote in an election shall present himself with his voter's card to a Presiding Officer for accreditation at the polling unit in the constituency in which his name is registered.

(2) The Presiding Officer shall use a Smart Card Reader or any other technological device that may be prescribed by the Commission, for the accreditation of voters, to verify, confirm or authenticate the particulars of the voter in the manner prescribed by the Commission.”

The implication of this proposed amendment is that the use of the Smart Card Reader by INEC for the authentication of voters will have a strong legal backing, devoid of further controversy as to its legality, as opposed to its inclusion in the INEC Guidelines or manual for elections,<sup>25</sup> which is a subsidiary legislation.

However, an in-depth analysis of clause 49(2) presupposes that any other procedure utilized for the verification of voters will be expunged, the sub-clause states specifically that “The Presiding Officer *shall* use a Smart Card Reader or any other technological device that may be prescribed by the Commission, for the accreditation of voters, to verify, confirm or authenticate the particulars of the voter...” this connotes that verification or authentication of voters can only be done via a *Smart Card Reader or any other technological device* that may be prescribed by the Commission.

Consequently, it may be argued that the notion created by this clause as to the

<sup>24</sup> See [SB 645] Electoral Act (Amendment) Bill, 2018, Clause 19 on the amendment of Section 49 Electoral Act, 2010 (as amended) <https://nass.gov.ng/document/download/9918> Accessed 2 October 2018; [SB 654] Electoral Act (Amendment) Bill, 2018, clause 18 on the amendment of section 49 Electoral Act, 2010 (as amended) <https://nass.gov.ng/document/download/9915> Accessed 2 October 2018.

<sup>25</sup> The Manual for Election Officials 2015 (Updated Version) makes provision for the introduction of smart card readers to make the polling process more transparent and credible...at p. 35 <http://www.inecnigeria.org/wp-content/uploads/2015/02/Election-Manual-2015-.pdf> Accessed 2 October 2018.

exclusion of other forms of verification or authentication of voters, creates fresh problems, to the extent that it is silent on what procedure of verification or authentication of voters that should be employed if the Smart Card Reader or other technological device prescribed by the Commission malfunctions or cannot be utilized for any other reason.

Secondly, section 49(2) of the Electoral Act, 2010, provides that "...the Presiding Officer shall, on being satisfied that the name of the person is on the register of voters, issue him a ballot paper and indicate on the Register that the person has voted." The amendment clause is silent on the next step after accreditation, which is the issuance of a ballot paper and an indication that the person has voted; it merely makes provision for the use of the Smart Card Reader and nothing more. This provision is undoubtedly a germane aspect in the conduct of elections in Nigeria, as such should be revisited.

Notably, despite the passage of the amendment bills by the National Assembly, it is yet to be assented to by the President; the amendment bills sent to the President for assent at three different occasions have been met with refusals by the President due to "some drafting issues" that remain unaddressed.<sup>26</sup> However, it is imperative to note that the Presidency has stated that issues about the use of Card Reader was completely excluded from the 3rd Electoral Amendment Bill transmitted to the President for assent on August 3 2018.<sup>27</sup>

Further, in the communication of the President to the National Assembly on the Bill transmitted on February 20, 2018, and the 2nd one transmitted on June 27, 2018 for consideration, the Card Reader was not mentioned as a subject of infraction nor reservation in any manner whatsoever.<sup>28</sup>

Simply put, there was provision for Card Reader in the first two Bills transmitted to President which were now expunged by the National Assembly in the Bill transmitted on the 3<sup>rd</sup> of August 2018.

### Conclusion

When the words used in a statute are clear, it must be given their natural and ordinary meaning. It is therefore clear that electronic voting which is prohibited by the Electoral Act is not the same as the Smart Card Reader. As such, the use of the Smart Card Reader as part of the accreditation process in the conduct of general elections cannot be said to be contrary to any legal framework with regards to the conduct of elections in Nigeria.

It is apparent that the electronic voting machine and the Card Reader are two different devices that are not necessarily deployed together for all purposes. The further import of which is that electronic voting or the use of electronic voting machine for voting is not the same thing as using the Card Reader to determine the identity of voters in the process of accreditation of voters. What Section 52(2) of the Electoral

<sup>26</sup> Q E Iroanusi, "2019: Card reader excluded from electoral bill sent to Buhari by NASS – Ita Enang" Premium Times Newspaper September 11<sup>th</sup> 2018, <https://www.premiumtimesng.com/news/top->

[news/283231-2019-card-reader-excluded-from-electoral-bill-sent-to-buhari-by-nass-ita-enang.html](https://www.premiumtimesng.com/news/top-news/283231-2019-card-reader-excluded-from-electoral-bill-sent-to-buhari-by-nass-ita-enang.html) Accessed 2 October 2018.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*



Act, 2010, as amended prohibits as indicated earlier is the use of electronic voting machine but not the use of card reader for authentication of voters and that is where it stops. Thus, for all intents and purposes, a card reader simply verifies and authenticates the identity of the voter. Accordingly, as has been established, this view has also been reflected in the position of the Supreme Court.

However, it is imperative to resolve any form of controversy resulting from the legality of the use of Smart Card Readers in elections in Nigeria. As such it is laudable that the National Assembly took the initiative to include the use of Smart Card Readers in its 2018 amendments of the Electoral Act, as this will give the use of smart card readers a

strong legal backing and subsequently end the controversies. Regrettably, the non-inclusion of the use of Smart Card Readers in the most recent amendment bill transmitted to the President for assent, represents a setback in the process of including the use of Smart Card Readers in the Electoral Act.

Although there is much to applaud about the initiative to amend the Electoral Act, 2010 to include the use of Smart Card Readers, the clause has not been perfectly drafted. Thus amendments to address the issues pointed out in this paper is of importance and should be considered in the near future; while also ensuring the re-inclusion of the amendment of section 49 in future amendment to the Electoral Act.