

As Nigeria's Judges Get Set to Begin Voting

By Prof. Chidi Odinkalu

This week, the opening salvo will be fired to signal the onset of the final round of voting in Nigeria's electoral marathon. This is not a reference to the state-level ballots that occurred around the country on Saturday, March 18. I refer instead to something far more consequential. Democracy may be about choices and decisions by citizens in theory. As practised in Nigeria, however, citizens are mostly spectators. In every election, Nigeria's judges have the final votes. Every election cycle in Nigeria has three seasons. The campaign season belongs to the parties, the politicians, and godfathers. This is followed by the voting season, during which the security agencies, thugs, and the Independent National Electoral Commission (INEC) hold sway. Thereafter, matters shift to the courts for the dispute resolution season, which belongs to the lawyers (mostly Senior Advocates of Nigeria, SANs) and judges. All three are separate but interdependent. Of 1,490 seats contested federally and in the states in 2019 (excluding the FCT Area Council ballots), the courts decided 805 (54.02%). This is higher than just over 45% recorded in 2015 and 51% recorded in 2011 but lower than the high of 86.35% from the nadir of 2007.

So, by 2019, Mahmood Yakubu's INEC had bled all the confidence that Attahiru Jega, his predecessor, had built in the electoral process. In 2023, he



shamelessly pulverized what was left of it. With elections to federal offices concluded on February 25 and to state offices on 18 March, election petition season is now formally open. On March 22, the first landmark will be reached with the expiration of the 21-day deadline for filing petitions arising from the presidential election results announced on 1 March.

Already, every piece of evidence points to the likelihood that this will be no ordinary season. On March 3, 48 hours after the announcement of the results, the Court of Appeal ordered the INEC to grant access to the parties to inspect the materials generated from the presidential elections. Three days later, the order was served on the INEC. Instead of

complying, the Commission stone-walled. On 13 March, INEC Chairman, the execrable Mahmood Yakubu, informed lawyers for the parties who demarche him at the INEC headquarters in Abuja that he had nothing to hide before quickly reminding them that most of the documents that they wanted were in the states and not at the INEC Headquarters. As with all the acts of infamy to which this INEC chairman has become habituated, he said this with a straight face. This decentralization of obfuscation is original but unlawful. Under the Constitution and the Electoral Act, Nigeria is one constituency for the presidential election, and the INEC Chairman is the only returning officer. The idea that documents used in the election are in the custody of INEC states offices is quite nonsensical. It is his place to organise custody in such a manner that the standards of access to them are uniform and predictable. By sending the lawyers on an obstacle course through 36 States and the FCT, Mahmood manifests his design to frustrate election dispute resolution. Livy Uzoukwu, the SAN leading the legal team for Labour Party's Peter Obi, credits INEC's stone-walling with forcing them to reduce the scope of their inspection of materials from 36 states to just nine. Even then, by March 16, they had granted the lawyers access in only two states.

In Nigeria, every election petition is

What Nigeria's Supreme Court does in 2023 will matter. Like the major parties, all actors in Nigeria's election petition process have learnt to build "structures". For the parties, their structures are in the infrastructure of election rigging, or what former governor of Ekiti State, Kayode Fayemi, once famously called the criminal network of "five gods and the godfather", including the highest levels of INEC, the security services, thugs, and the judiciary.

heard by a panel of three, five or seven judges. If they don't agree, the judges will decide by majority vote. To win, a party must have the votes of two judges out of three (first instance), three justices out of five (appeal) or four justices out of seven (Supreme Court). Where there is such disagreement, there will be dissents. The heightened role of judges in elections is essentially a feature of the presidential system of government. In Nigeria, Kayode Eso handed down the first notable dissent in this field in the Supreme Court decision in Obafemi Awolowo's challenge to the victory of Shehu Shagari in the 1979 presidential election. Six of the seven justices, led by Chief Justice Atanda Fatayi-Williams, ruled that the elections were in "substantial compliance" with the law, but Eso, the junior justice on the panel, filed a memorable dissent. Sometimes, the decisions of the courts inexplicably diverge. Following elections in September 1983, Nigeria's Supreme Court heard two cases arising respectively from the governorship elections in Anambra and Ondo States. The issues were broadly the same: the then ruling party, the National Party of Nigeria (NPN), was credibly accused of rigging the elections in both states, enabling the Federal Electoral Commission (FEDECO) to announce NPN candidates as winners when they lost. In Anambra, the citizens mostly went back to their businesses.

In Ondo State, the citizens decided to make the State ungovernable burning everything in sight. On December 30, 1983, the Supreme Court upheld the Anambra governorship election by a majority of six to one but invalidated the Ondo Governorship result by the same margin.

Hours later, on the night of the same day, soldiers sacked the government. By the time the court issued its reasons on January 6, 1984, Maj-Gen. Muhammadu Buhari was already one week old as a military ruler.

It is not only in Nigeria that election courts can announce incomprehensible outcomes. In 2006, Uganda's Supreme Court considered a petition by opposition candidate, Kizza Besigye, against incumbent President Yoweri Museveni.

Increasingly, however, they have become performative rituals for sanctifying electoral burglary and celebrating judicial capture. The beneficiaries are the burglars and the judges. The best the victims can often expect to receive is a timorous Pontius Pilate mistaken as a valiant judge. In 2023, Nigeria's judges can sculpt a different narrative.

In its decision, the court concluded that "there was non-compliance with the provisions of the Constitution, Presidential Elections Act and the Electoral Commission Act, in the conduct of the 2006 Presidential Elections"; that there was "disenfranchisement of voters by deleting their names from the voters register or denying them the right to vote" and that "the principle of free and fair elections was compromised by bribery and intimidation or violence in some areas of the country." Nevertheless, Chief Justice Benjamin Odoki led three other judges in a majority of four to uphold the outcome in favour of Museveni.

Sometimes, the decisions in election petitions are dodgy. When it decided the election petition against the outcome of the December 2012 presidential election filed by then-opposition candidate Nana Akuffo-Addo, on August 29, 2013, Ghana's Supreme Court announced a majority of six against three in favour of upholding the declaration of President Mahama as the winner. Economist, George Ayittey, wrote that the announced decision was "bungled. There was an inexplicable four-hour delay in announcing the verdict, fueling speculation that something fishy was happening behind the scenes. Then Justice Atuguba announced a 6-3 verdict dismissing the petition. A day later, the verdict was changed to 5-4." In a study of the judgment published in 2014 under the

title *The Burdens of Democracy in Africa: How Courts Sustain Presidential Elections*, late Nigerian lawyer Bamidele Aturu showed that five of the nine justices who sat on that election petition, in fact, ordered a partial or total rerun of the election. In effect, rather than the announced majority of six-three in favour of President Mahama, the verdict was, in fact, five-four against him.

More recently, miracles have occurred. In August 2017, Kenya's Chief Justice, David Maraga, led the Supreme Court to strike down a presidential election in Africa for the first time. In May 2020, Malawi's Supreme Court did the same. In Nigeria four months earlier, the Supreme Court, on January 13, 2020, declared Hope

Uzodinma governor of Imo State despite his having been returned fourth in the election.

What Nigeria's Supreme Court does in 2023 will matter. Like the major parties, all actors in Nigeria's election petition process have learnt to build "structures". For the parties, their structures are in the infrastructure of election rigging, or what former governor of Ekiti State, Kayode Fayemi, once famously called the criminal network of "five gods and the godfather", including the highest levels of INEC, the security services, thugs, and the judiciary.

For INEC, it is in the ruling party and the power network of incumbency at the federal and state levels. For the judiciary, it is in the same mutual benefit network of incumbency in the various branches of government at various levels. Election petitions have become a preoccupation of judges in Nigeria and around Africa and a defining process in public perception of the courts. In the past, they provided moments of high forensic and judicial drama.

Increasingly, however, they have become performative rituals for sanctifying electoral burglary and celebrating judicial capture. The beneficiaries are the burglars and the judges. The best the victims can often expect to receive is a timorous Pontius Pilate mistaken as a valiant judge. In 2023, Nigeria's judges can sculpt a different narrative.