

ELECTORAL PROCESS LAW & JUSTICE



**Prof. Wahab O. Egbewole SAN
Akin O. Oluwadayisi Ph.D**

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Electoral Process

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Editors

Prof. Wahab Egbewole

Akin O Oluwadayisi Esq.

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Chapter - 13

Resolution of Political Disputes through Arbitration as a form of Alternative Dispute Resolution (ADR) Mechanism in Nigeria

Authors

M T Adekilekun

Senior Lecturer, Department of Business Law, Faculty of Law,
University of Ilorin, Nigeria

S A Basiru

Principal Partner, Basiru Ajibola & Co. and Lecturer (Non-
Stipendiary) Osun State University, Osogbo, Nigeria

D A Ariyoosu

Senior Lecturer, Department of Business Law, Faculty of Law,
University of Ilorin, Nigeria

Chapter - 13

Resolution of Political Disputes through Arbitration as a form of Alternative Dispute Resolution (ADR) Mechanism in Nigeria

MT Adekilekun, SA Basiru and DA Ariyoosu

Abstract

Achieving seamless political successions through peaceful, free and fair elections in Nigeria has been a major challenge. From 1960 when Nigeria got her independence till date, there have been serious issues and disputes generated and engendered by disputed elections where lives and properties have been lost. In fact, this has been one of the major excuses for military takeovers in Nigeria. Some of the identified problems include but are not limited to imposition of candidates on the party and its members, electoral irregularities and riggings, lack of internal democracy within the party, qualification and disqualification of candidates by the Independent National Electoral Commission or by administrative panels who lack the requisite powers to do so and wrongful and illegal substitution of candidates. This paper seeks to examine the history and causes of political disputes in Nigeria and argues that Alternative to Dispute resolution is a viable means of settling political disputes in Nigeria if properly applied.

Keywords: Alternative dispute resolutions; political disputes; Nigeria

Introduction

Achieving seamless political successions through peaceful, free and fair elections in Nigeria has been a major challenge. From 1960 when Nigeria got her independence till date, there have been serious issues and disputes generated and engendered by disputed elections where lives and properties have been lost. In fact, this has been one of the major excuses for military takeovers in Nigeria ^[635]. Some of the identified problems include but are not limited to imposition of candidates on the party and its members, electoral irregularities and riggings, lack of internal democracy within the party, qualification and disqualification of candidates by the Independent National Electoral Commission or by administrative panels who lack the requisite

powers to do so and wrongful and illegal substitution of candidates.

Political parties, being the platforms through which politicians seek for political and economic powers are susceptible to serious disputes. These disputes arise from both pre-election and post election exercises ^[636]. In every age and clime, the pursuit and maintenance of power and influence amongst persons and nations/peoples have been the source of most conflicts and crises especially on the continent of Africa.

In Nigeria, before the enactment of the Electoral Act in 2006, disputes at Party Primaries were shielded from judicial inquiry by the doctrine of political question ^[637]. As at that time, the respective political party constitutions in Nigeria provided for the procedure of substitution and nomination of candidates for elections. Nomination and sponsorship of a candidate are pre-primary election affair of the political parties. Even where a candidate feels aggrieved about the conduct of the party primaries, the courts have held that such political disputes are not suitable for judicial adjudication.

However, since the enactment of the Electoral Act of 2006 and the subsequent amendment of the 2010 Electoral Act, political parties have been barred from acting arbitrarily in the conduct of primary elections. Where a contestant is dissatisfied with the conduct of party primary elections, the Electoral Act has vested jurisdiction in the court by virtue of the provisions of S. 87(9) of the Act to examine whether the conduct of the party primaries were in accordance with the Electoral Act, the Party's constitution and the Guidelines ^[638]. By the above provisions, the courts are clothed with the powers to examine the complaints of any aspirant that intends to challenge the conduct of party decisions as regards its primary elections.

Legal Framework for the Resolution of Political Party Disputes in Nigeria

Resolution of political disputes is not new in Nigeria. In fact, since 1960, successive Nigerian Constitutions and the Electoral Acts/laws have always provided for it. For the purpose of clarity, this discussion will be discussed under the following sub heads viz:

- a) Resolution of political disputes through the courts and
- b) Resolution of political disputes through Alternative Dispute Resolution (ADR)

Resolution of Political Disputes through the Courts

Traditionally, the duty of the court in relation to the disputes brought

before it is to deliver judgment based on the party's legal rights and obligations ^[639]. The court is not concerned with whether or not the judgment ensures the attainment of peace and tranquillity between the parties.

The Constitution of the Federal Republic of Nigeria 1999 (as amended) and the Electoral Act, 2010 (as amended) recognise the fact that political conflicts may arise in the course of electioneering and that for a nation to continue to have peace and tranquillity, these conflicts have to be resolved for the peace and progress of the nation. It is important to state that resolution of political disputes by the courts would be further subdivided into Pre and Post-election disputes.

Pre-election disputes are disputes that arise before the elections. They are very common in Nigerian courts. They arise mostly as a result of the failure of political parties to follow the laid down rules and regulations in the selection of its candidate. This may arise from the issue of sponsorship or nomination of a candidate ^[640], substitution of a candidate to mention but a few ^[641].

Section 87(9) of the electoral Act provides that an aspirant who has any complaints against his political party can seek in the court of law. Section 87(9) of the Act provides:

Notwithstanding the provisions of this Act or rules of a political party, an aspirant who complains that any of the provisions of this Act and the guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court or the High Court of a State or Federal Capital Territory for redress.

As stated earlier in this paper, the above quoted section of the Electoral Act confers jurisdiction on the courts to hear complaints from a candidate who participated at his party's primaries ^[642]. It is the requirement of the law that any political party that conducts primaries shall give all aspirants equal opportunity of being voted for by members of the party ^[643]. In *Ufomba v. INEC (2017) LPELR-42079(SC)*, the Supreme Court held that where a political party conducts its primary and a dissatisfied contestant at the primary election complains about its conduct (of the primaries) the courts have jurisdiction by virtue of S. 87(9) of the Act to entertain the complaints.

After the conduct of the elections, whatever dispute that arises can only be entertained by the election petitions Tribunal that is statutorily empowered to handle all election petition matters ^[644]. Section 285(2) of the constitution establishes the Governorship and Legislative Houses Election

Tribunal which shall to the exclusion of any other court or tribunal have jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor or as a member of any legislative House ^[645]. Appeals from the Governorship Election Tribunal terminate at the Supreme Court while the legislative houses stops at the Court of Appeal.

Resolution of Political Disputes through Arbitration

In Nigeria, it is widely believed that land, chieftaincy and election disputes are not arbitrable ^[646]. The Arbitration and Conciliation Act ^[647] does not stipulate any particular subject matter that may not be referred to arbitration. The question of whether or not a dispute is arbitrable is therefore left for interpretation by the Courts. In *Ogunwale v. Syrian Arab Republic*, the Court of Appeal held that the test for determining whether a dispute is preferable to arbitration is that the dispute or difference must necessarily arise from the clause contained in the agreement. That such agreement must take its root from the Arbitration Clause ^[648] or Submission Agreement.

A dispute is generally not arbitrable if it cannot be the subject of accord and satisfaction or is exempted from arbitration by law. Examples of these exemptions could be found in cases of crime which is believed to be against the state. The Administration of Criminal Justice Act even provides for Plea bargaining ^[649] which is a form of Alternative to Dispute Resolution. If any dispute is not either expressly or impliedly excluded from arbitrability, there is nothing in law and practice that excludes it from resolution through any of the forms of Alternative to Dispute Resolution (ADR) ^[650].

In election petition, the rule provides for the conduct of a Pre-trial conference whereby parties are asked whether the petition can be resolved through alternative means of dispute resolution or not. There have been very few cases in Nigeria where election disputes were resolved during pre-hearing session ^[651]. This goes to show that since there is no law or regulations barring parties from settling electoral disputes through ADR, parties are therefore not precluded from agreeing to settle the disputes through the instrumentality of Alternative Dispute Resolution.

Critiques of Adopting Arbitration in the Settlement of Election Disputes in Nigeria

Arbitration is not without its shortcomings. Its usage in the settlement of labour and commercial disputes is coming under fire from many quarters ^[652]. Many people will definitely doubt whether its adoption in the settlement of the electoral process is wise or not.

The first potential challenge of adopting Alternative Dispute Resolution in the settlement of election disputes is its precedent. One of the most common criticisms of Arbitration is that non-judicial settlement of disputes deprives future litigants of the precedential value of outcomes ^[653]. It will be difficult for the law to develop when disputes are resolved out of court ^[654]. This is because there will be no reportage of the decisions of the arbitral panel which will later serve as a binding force of precedent.

Another potential hurdle in adopting arbitration in the settlement of election disputes is the question of legitimacy of the arbitral forum. Over the years, election disputes have almost always been resolved through the instrumentality of the courts. A very important question to ask before adopting it is would the parties and members of the public accept the outcome of such arbitral proceedings? Answers to the above question would most likely depend on whether or not the public perceived the arbitral process as fair and transparent. For this reason, any agreement to arbitrate election disputes must be transparent, comprehensive and must ensure that it includes process protections that ensure that public buy-in.

Another potential hurdle of using Alternative dispute resolution for the settlement of election disputes is whether the government (States and Federal) and or the electoral umpire (INEC) are empowered to impose Alternative method of settling dispute (ADR) as a means of settling disputes on the parties. A general and community reading of the provisions of the Constitution of the Federal Republic of Nigeria as well as the Electoral Act 2010 (as amended) would reveal that the recognised method of resolution of election disputes is through the Courts and Tribunal. In fact, Section 6 of the constitution provides that the judicial powers of the Federal shall be vested in the courts.

The do or die attitude of Nigerian politician possess another important challenge. Politicians in Nigeria are so desperate for power and influence. The attendant violence that follows campaigns and elections in Nigeria are clear signs of these desperations. This is because the nature of politics in Nigeria is that the winner takes all. Unless there are express legislative provisions directing candidates to submit to the ADR, politicians are not likely to do so. There is the tendency that Nigerian politicians will employ every avenue to scuttle the process for their selfish reasons.

Gains of Using ADR for Settlement of Election Disputes in Nigeria

It is generally believed that arbitration has many advantages over litigation. In the business world, practitioners can attest to this position. In

the case of a pre-dispute agreement to arbitrate, agreement is reached when temperaments are calm and, critically, when parties have no way of knowing which procedural decisions will benefit which party ^[655]. The cost effectiveness and flexibility are one of the greatest advantages of using arbitration for settling election disputes. The advantages are discussed hereunder as follows:

Flexibility

A fundamental underpinning of arbitration is its flexibility. It is one of the greatest advantages of arbitration. In arbitration, parties are free to structure and draw up the agreement to arbitrate well in advance of a dispute arising or they can write an agreement to arbitrate after a dispute has arisen. Parties are free to appoint persons they would like to resolve their dispute or they can even agree on a process by which an arbitrator (or a panel of arbitrators) will be selected if a dispute arises. Parties can map out the scope of the dispute to be resolved in the arbitral forum, leaving other parts to courts.

Neutrality of Arbitrators

This neutrality gives arbitration independence and loyalty primarily to the parties. This is also of particular importance where parties from different parts of the world would like to have an arbitrator on the tribunal who understands their background and thinking, and the circumstances and situations from which they come. It is often possible to balance a tribunal by selecting arbitrators with different skills and knowledge as well as experience and background.

Finality

Another great benefit of arbitration is its finality. As a general rule the decisions of arbitrators are to be final and binding. The finality of arbitration helps businesses keep dispute resolution costs manageable and infinitely more predictable. There are no or very limited grounds on which arbitrators' awards can be appealed for example, on the basis that the arbitrator's conclusions are wrong. Equally, the grounds upon which the decisions of arbitrators can be challenged and set aside are limited to where the arbitrators have either exceeded the jurisdictional authority in the arbitration agreement or have committed some serious breach of natural justice.

Cost Effectiveness

Alternative Dispute Resolution methods are by far cheaper means of settling election disputes than litigation. Litigating through the Election Petitions Tribunal has proved to be very costly especially considering the

amount charged by lawyers in the prosecution of election disputes in Nigeria. Where arbitrations can be held quickly and the awards issued with no delay, the costs thereof may be significantly reduced in contrast to the lengthy period being used by the Tribunal. The Constitution has limited the period by which the tribunal can hear and entertain a petition to a maximum of 180 days ^[656].

Confidentiality

Due to the private nature of arbitration, many consider that arbitration is also a confidential process. As a result, what transpired in the arbitration proceeding will not only be kept private between the parties but will remain absolutely confidential. This means that the existence of the arbitration, the subject matter, the evidence, the documents that are prepared for and exchanged in the arbitration and the arbitrators' awards cannot be divulged to third parties. In the age of the Internet, the attractiveness of confidential arbitration proceeding cannot be understated ^[657]. Still, just because most arbitration is conducted confidentially, it need not be so. Because arbitration is a creature of contract, parties can contract for as transparent a process as they would like.

Conclusions

Imagine a situation where the Independent National Electoral Commission (INEC) is empowered to require all candidates contesting elections to sign an agreement to submit any dispute(s) arising from either the primaries or general election to arbitration. In such a case, the electoral umpire may structure such a clause which will be contained in the requisite forms to allow the candidates to negotiate the specific terms of the agreement ^[658] or the terms might even be enabled by statute ^[659]. Such agreement to arbitrate might also include language that binds the candidates to certain practices such as timelines, qualifications/non-qualifications, ballot-counting standards, and other rules and standards required for the conduct of proper elections. The agreement might be mandatory, imposed on all candidates as a condition before being voted for. The agreement might further contemplate that the arbitral decision be judicially reviewable; or the parties could agree that all decisions emanating from the arbitral forum are final and non-reviewable.

This short paper posits that the above stated position (ADR) is an under-explored mechanism for resolving pre and post-election disputes in Nigeria. Experience has revealed that the judiciary has often proven poorly suited to resolve disputed elections. The history of disputed elections in Nigeria has brought the Federal, state and federal government to a political precipice

numerous times in the nation's history. A transparent, comprehensive, and fair arbitration process could well provide a viable alternative to settlement of disputes than litigation.

Recommendations

In Nigeria, the greatest hurdles against using ADR as a settlement mechanism for election disputes are the absence of a comprehensive legal framework, the do-or-die attitude of the Nigerian politicians and the possible lack of cooperation among the politicians to abide by the decision of the arbitral panel. These and other challenges are not insurmountable. The following are recommended in order to ensure ADR as a viable alternative to settlement of election disputes:

Amendment of the Constitution, the Electoral Act and the Parties Constitutions to Incorporation of ADR as a settlement Mechanisms in Party's Constitution

Amendment of the Constitution and the Electoral Act will help in providing the required legal backing for the application of ADR to election disputes in Nigeria. The law will also empower the government or the electoral umpire to make provisions or take certain steps towards ensuring that ADR comes to place. There is also the need to strengthen the provisions relating to resolution of disputes by the political parties in their respective parties' constitutions. Rather than providing for settlement of political disputes by politicians within the same party, the party's constitution could provide that such dispute(s) be referred to the conventional dispute settlement mechanism.

The need for cooperation by the Politicians to make ADR work

Politicians and members of the public should be encouraged to drop their do-or-die attitude so as to allow ADR to take its place in the resolution of election disputes in Nigeria. Lawyers also have great roles to play in ensuring there is maximum cooperation and support for the arbitral panel to work effectively in order to get the desired results.

Enforceability of the Decisions of the Arbitral Panel

Decisions of the Arbitral Panel should be made to be immediately enforceable as a judgment obtained from the court of law. This is very important in order not to make the Arbitral panel as a toothless bulldog. For decisions of arbitral Panel in the settlement of political disputes to be effective, there should be the proper mechanisms for its enforcement.

Appointment of Experts in Election Matters as Arbitrators

This is one of the greatest advantages of arbitration over litigation in that experts who are especially skilled are appointed to the panel as arbitrators. Resolution of election disputes will require people who have specific knowledge and understanding of the subject matter will give greater confidence to the parties in the arbitration process.

Strengthening of Internal Democracy within the Political Party

Issues of sponsorship and nomination of candidates for elections have always been one of the greatest problems being faced by political parties. Political parties should as much as possible strengthen their internal democracy so as to reduce the possibility of conflicts within the party. This will in turn help in reducing the numbers of cases of conflicts emanating from the political parties.

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640. See *Olley v. Tunji* (2013) 10 NWLR (PT 1362) 275 at 328.
641. See *CPC v. Ombugadu* (2013) 18 NWLR (Pt 1385) 67 at 152.
642. See *PDP v. Sylva* (2012) 13 NWLR (PT1316) 85 at 125.
643. See Section 87(3) of the Electoral Act.
644. See *Ibrahim & Anor v. Dogara & Ors* (2015) LPELR-40892(CA).
645. See *ANPP v. PDP* (2006) 17 NWLR (Pt 1009) 467 at 487.
646. According to statistics, these are the most common areas of disputes in Nigeria.
647. Cap 18 Laws of the Federation of Nigeria

648. An Arbitration Clause in a Written Contract sets out the obligations which the parties undertake to perform towards each other.
649. Plea bargain connotes an agreement between a defendant and a prosecutor, in which the defendant agrees to plead guilty in exchange for an agreement by the prosecutor to drop one or more charges, reduce a charge to a less serious offense, or recommend to the judge a specific sentence which is lesser than that the accused is ordinarily entitled to.
650. Mbam Chris, Resolution of Political Parties Disputes through Arbitration & Alternative Disputes Resolution (ADR), Page 216.
651. Wadada v. Abdullahi Adamu (Unreported)
652. See generally Jean R. Sternlight, Creeping Mandatory Arbitration: Is It Just?, 57 STAN. L. REV. 1631 (2005).
653. Rebecca Green, Arbitrating Ballot Battles. Kentucky Law Journal, Vol. 104 Page 716.
654. Under the litigation procedure. A court's duty is not to maximise the ends of private parties nor simply to ensure the entronement of peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.
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656. See S. 285(6) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).
657. See generally Woodrow Hartzog & Frederic Stutzman, The Case for Online Obscurity, 101 CALIF. L. REV. 1, 22–23 (2013) (explaining the heightened privacy interests at stake when case records are available in a searchable computer database).
658. Any agreement to arbitrate must be in conformity with the Constitution of the Federal Republic of Nigeria, the Electoral Act as well as the Electoral Guidelines.
659. This will be through the laws made by either the National Assembly or the State Houses of Assembly as the case may be.