THE REQUIREMENT OF GEOGRAPHICAL SPREAD IN ELECTIONS INTO LEGISLATIVE HOUSES IN NIGERIA: A CRITIQUE OF STATUTORY AND JUDICIAL AUTHORITIES*

Abstract

Nigeria operates a democratic arrangement that is hinged on elective principles. The country's electoral system is founded on the provisions of the Constitution, the Electoral Act and subsidiary legislations made by the Electoral Commission pursuant to the powers vested on it by the Constitution and the Electoral Act. Neither, the 1999 Constitution nor the Electoral Act, 2010 imposed the requirement of Geographical spread on a candidate in an election into Legislative Houses. What the Constitution requires of such candidates is to obtain a simple majority of the valid votes cast at such elections. There are two lines of authority on whether or not geographical spread is required of candidates in elections into legislative houses. The practice of repeat elections in areas where elections did not hold as scheduled or was cancelled seems to be hinged on the belief that geographical spread is required in all elections in Nigeria. In its interpretative jurisdiction, the duty of the court is to expound and not to expand the law. Where there is a lacuna in law, it is the province of the legislature to remedy same by way of enactments and not otherwise. It is doubtful whether, re-run elections and requirement of geographical spread in elections into Legislative Houses in Nigeria has got justification in law. It is the objective of the author to analyse judicial and statutory authorities on the subject matter so as to ground the view that the requirement of geographical spread and re-run elections, so far as they concern elections into Legislative Houses in Nigeria have no foundation in law.

Introduction

There is no doubt that Nigeria is one of the countries in the world where constitutional democracy is in practice. Nigeria's democracy is founded on a written constitution[1] which has provided for a Presidential Federalism with one of its implications as distinct Executive, Legislative and Judicial arms of government. The Constitution of the country being the supreme law provides for elective principles, the constitution of the electoral body, its powers and the mode of conducting valid elections.

It is one of the laws upon which our democratic arrangement stands that the Legislature makes laws for the good governance of the country and the federating states, the Executive enforces the laws made by the legislature while the Judiciary interprets the laws and shows the way where there is confusion as to the real intention of the legislature. It is trite law that the court, in the exercise of its interpretative jurisdiction, must stop where the statute stopped[2] In **Buhari v. Obasanjo**[3]. The Court of Appeal stated the law in these words:

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1 See the Constitution of the Federal Republic of Nigeria, 1999 (referred to hereinafter as 'the Constitution') and its predecessors, particularly at Sections 4, 5 and 6

2 **Awolowo v. Shaghari** (1979) 6 – 9 S. C 1; **Buhari v. Yusufu** (2003) 14 NWLR [pt. 841] 446; see further **Peter Obi v. INEC & ors** (2007) 7 SCNJ 1 at 37; **Thompson V Gould & Co** (1900) A. C. 1

3 (2003) 15 NWLR [pt. 843] 236

> Where the words of a statute are clear, they should be given their natural, literal and grammatical meanings. "Where a lacuna exists in the law, the remedy lies in an amendment by the legislature, the function of the court being only to declare and not to give the law.

It is against the backdrop of the above decision and others similar to it that one becomes worried as to the discordant tunes coming from our courts on the issue of geographical spread in elections into Legislative Houses in Nigeria. It is my objective to reproduce here and examine some of the provisions of our statutes and some discordant judicial decisions on the issue.

Relevant statutory provisions

Section 133 of the Constitution of the Federal Republic of Nigeria, 1999 provides that:

133(1) A candidate for an election to the office of the President shall be deemed to have been duly elected to such office where, being the only candidate nominated for the election;

a. he has a majority of YES votes over NO votes cast at the election; and
b. he has not less than one quarter of the votes cast at the election in each of at least two-third of all the States in the Federation and the Federal Capital Territory, Abuja but where the only candidate fails to be elected in accordance with this section, then there shall be fresh nominations.

Section 134 of the Constitution provides that:

134 (1) A candidate for an election to the office of the President shall be deemed to have been duly elected, where, there being only two candidates for the election;

a. he has the majority of votes cast at the election; and
b. he has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the States in the Federation and the Federal Capital Territory, Abuja.

(2) A candidate for an election to the office of President shall be deemed to have been duly elected where, there being more than two candidates for the election-

a. he has the highest number of votes cast at the election; and
b. he has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the States in the Federation and the Federal Capital Territory, Abuja.

Section 179 of the Constitution provides:

179 (1) A candidate for an election to the office of the Governor of a State shall be deemed to have been duly elected to such office where, being the only candidate nominated for the election-

a. he has a majority of YES votes over NO votes cast at the election; and

b. he has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the local government areas in the State, but where the only candidate fails to be elected in accordance with this subsection, then there shall be fresh nominations.

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

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.

The provisions of Sections 133 and 134 of the Constitution relate to the office of the President of the Federal Republic of Nigeria, while Section 179 of the Constitution relates to the office of a Governor of a state in Nigeria and both the President and Governor of a state belong to the executive arm of government in Nigeria.

On the other hand, Section 77 of the same Constitution provides that:

77 (1) Subject to the provisions of this Constitution, every Senatorial District or Federal constituency established in accordance with the provisions of this part of this Chapter shall return one member who shall be directly elected to the Senate or the House of Representatives in such manner as may be prescribed by an Act of the National Assembly.

Section 106 of the same Constitution also provides that:

106(1) Subject to the provisions of Section 107 of this Constitution, a person shall be qualified for election as a member of a House of Assembly if-

a. he is a citizen of Nigeria;

b. he has attained the age of thirty years;

c. he has been educated up to at least the School Certificate level or its equivalent; and

d. he is a member of a political party and is sponsored by that party.

Section 69 of the Electoral Act, 2010 provides that:

> In an election to the office of the President or Governor whether or not contested and in any contested election to any other elective office, the result shall be ascertained by counting the votes cast for each candidate and subject to the provisions of Sections 133, 134 and 179 of the Constitution, the candidate that receives the highest number of votes shall be declared elected by the appropriate Returning Officer.

It is to be noted that the provisions of Sections 133, 134 and 179 of the 1999 Constitution do not affect Legislative Houses election. Rather Sections 77 and 106 provide that both members of the National Assembly and the House of Assembly of the States shall be elected in accordance with laws made in an Act of the National Assembly. The National Assembly did make such laws to govern the election and a

declaration/return of successful candidates in elections into the Legislative Houses in Nigeria when it made elaborate provisions in Section 69 of the Electoral Act, 2010 as reproduced above.

Paragraph 28(1) of the 1st Schedule to the Electoral Act, 2010[4] provides that:

> At the conclusion of the hearing, the Tribunal shall determine whether a person whose election or return is complained of or any other person, and what person, was validly returned or elected, or whether the election was void, and shall certify the determination to the Resident Electoral Commissioner or the Commission.

Regulation 104 (1) of the Election Regulations[5] provides thus:

> In considering that petition, the Judge is under a duty under Regulation 104 (1) to declare what person was duly elected. The regulation indicates what judgement may be given in an election petition it reads: 104(1). At the conclusion of the trial, the court shall determine whether a person whose election or return is complained of or any other person, and what person, was duly returned or elected, or whether the election was void, and shall certify such determination to the Electoral Commission.

Section140 of the Electoral Act, 2010[6] provides that:

(1) Subject to subsection (2) of this Section, if the Tribunal or the Court as the case may be, determines that a candidate who was returned as elected was not validly elected on any ground, the Tribunal or the Court shall nullify the election.

(2) 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…

Section 53 of the Electoral Act, 2010[7] provides that:

(1) No voter shall vote for more than one candidate or record more than one vote in favour of any candidate at any one election.

(2) Where the votes cast at an election in any constituency or polling station exceeds the number of registered voters in that constituency or polling station, the election for that constituency or polling station shall be declared null and void by the Commission and another election shall be conducted at a date to be fixed by the Commission.

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4 As amended, in *pari materia* with paragraph 27(1) of the 1st Schedule to the Electoral Acts, 2002 and 2006

5 No. 227, W. R. N., 1960, which is in *pari materia* with paragraph 28 (1) of the 1st Schedule to the Electoral Act, 2010 (as amended)

6 *Op cit*

7 As amended, which is in *pari materia* with Section 54 of the Electoral Act, 2006

Where an election is nullified in accordance with subsection (2) of his section, there shall be no return for the election until another poll has taken place in the affected area.

(3) Notwithstanding the provisions of subsections (2) and (3) of this section the Commission may, if satisfied that the result of the election will not substantially be affected by voting in the area where the election is cancelled, direct that a return of the election be made.

Judicial interpretations of the relevant statutory provisions

Having in mind the provisions of the Constitution and the Electoral Act, 2010, one can conveniently say that there exists a legal framework for the determination, by our adjudicatory bodies (courts and tribunals) of questions as to whether a candidate to a Legislative House was validly elected.

However, there exist two lines of authorities on the issue of whether or not a candidate who polled a majority of valid votes cast at an election into a Legislative House ought to be declared as validly elected where election was nullified or did not take place in some parts of the constituency in dispute. In other words, whether there are other requirements of the Constitution and Electoral Act that such a candidate ought to satisfy. In the case of **Chukwuemeka Odumegwu Ojukwu v. Edwin Onwudiwe & ors**[8], elections were not held or were not validly conducted in 53 of the 140 polling units in the Senatorial Zone, it was found as a fact that elections were validly conducted only in 87 of the 140 polling units. The election petition tribunal nullified the return of the 1st respondent. At the Court of Appeal, the decision of the tribunal which nullified the election was set aside and the return made by the returning officer restored. On further appeal to the Supreme Court, the Supreme Court affirmed the judgement of the Court of Appeal to the effect that the return was validly made even though elections were nullified in 53 of the 140 wards that made up the senatorial district. It was the position of the court in that case that what is required of a candidate in a Legislative House election is the majority of the valid votes cast at the election and nothing more.

In the case of **Suleiman Ajadi v. Ajibola & ors**[9] the Court of Appeal was of the firm view and did hold that the clause "and satisfied the requirements of the Constitution and this Act" used in Section 136(2) of the Electoral Act, 2002 does not apply to an election into a Legislative House. The court nullified some of the votes cast at the election in the areas where elections did not hold validly, subtracted the votes credited to the candidates in those areas and declared as returned the candidate who scored the majority of the lawful votes cast at the disputed election after the subtraction of invalid votes. The court had this to say:

> The phrase "satisfied the requirements of the constitution and this Act" in Section 136(2) of the Electoral Act, 2002 can be misleading and lead to absurdity if taken in isolation. Its true import is appreciated if it is read with sections 133, 134 and 179 of the 1999 Constitution and Section 60 of the

8 (1984) 1 SC 172

9 (2004) 16 NWLR [pt. 898] 91, particularly at 175, 204 – 206

> Electoral Act, 2002. This deals with the election of the President of the Federation and the Governor of a state, thus, it is only in respect of an election into the office of the President of the Federation or a Governor of a state that the phrase, "satisfied the requirements of the Constitution and this Act in Section 136(2) of the Electoral Act, 2002 is relevant. The election of a Senator should not be confused with that of the President or a Governor. There is no other requirement to be satisfied by a Senatorial candidate after securing the highest number of lawful votes. It is not the purport of Section 136(2) of the Electoral Act that a person with the highest votes after the nullification of the original winner must also show that he is qualified in other respects before he could be declared a winner. And where there is nothing which disqualifies the candidate from contesting the election *ab initio,* the court can validly make an order to declare him the winner of the election without usurping the statutory powers of the Independent National Electoral Commission. See further **Balewa v. Muazu** {[1999] 7 NWLR [Pt 609]124 at Page 175, Paras E-G, 205-206, Paras F-A}

Furthermore, recently, in the case of **Olabode & Anor v. Killa & 97 ors**[10] the Court of Appeal re-affirmed the position of the law that a candidate in a Legislative House election does not need to satisfy any other requirement of the Constitution or the Electoral Act outside scoring a majority of the lawful votes cast at the election. The court invalidated the result of the election in several wards and used the remaining scores of the candidates to declare the appellant as the winner of the disputed election.

However, there have been contrary arguments, opinions and judicial decisions on this matter to the effect that the words "and satisfied the requirements of the Constitution and the Act" in Section 140(3) of the Electoral Act, 2010[11] and similar provisions have placed on a candidate in an election, even election into a Legislative House, the duty to satisfy all the requirements of the Constitution and the Electoral Act in respect of elections particularly, the fanciful duty to protect the right of all registered voters to vote at the election. This argument is always buttressed with the view that we practice in Nigeria a constitutional democracy, where every person's vote must count and that it is anti-democratic to deny any section of a constituency the right to participate in choosing whom their representative should be. That for a candidate into a Legislative House to be declared as elected and returned where election did not hold in some parts of the constituency or were nullified, he must prove that the votes invalidated by the Tribunal/Court or that ought to come from an area where election did not hold would not have affected the outcome of the

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10 (2010) Vol 13 W. R. N. 73, particularly at 137 paras 20 – 45

11 *Op cit*

election[12]. If the arguments posited by the proponents of this later view are based on the immorality of disenfranchising some voters as it seems to be, then such arguments, with due respect have missed the mark as law and morality are not conterminous with each other. While law deals with legality and certainty, morality deals with what ought to be and to that extent is too volatile to found a political structure. However, the proponents of the said views also place reliance on Section 53(4) of the Electoral Act, 2010 and similar provisions before it.

It was in contemplation of the said argument that the Court of Appeal in **Oputeh v. Ishida**[13] held that:

> ...it depends on the circumstances, whether failure to hold a poll in any polling station or stations of a particular constituency would substantially affect the result of the election in that constituency. If it would not, then, although it is improper to disenfranchise certain voters by failure to hold such poll, the election will not for that reason alone be avoided. But if it would or likely to substantially affect the election, any result declared without such poll cannot be regarded as a win by the successful party based on a majority of lawful votes…

Many other cases have been decided along the same line, such cases include **Ezike v. Ezeugwu**[14], **Adeola v. Owoade**[15] **Sorunke v. Odebunmi**[16]

In **Ubale v. Dadiya & Ors**[17] elections into the Balanga State Constituency of Gombe State held in 3 wards of the 5 wards that make up the constituency. The appellant who was the candidate of Action Congress Party (AC) won in the 3 wards where elections were validly conducted. The Independent National Electoral Commission (INEC) rescheduled a fresh election in the entire constituency which was boycotted by the appellant in protest. Nevertheless, the commission carried on with the election and thereafter declared the 1st respondent as elected/returned. The Court of Appeal sitting over the decision of the elections petition tribunal held that it was wrong of the Commission to have conducted elections in the 5 wards of the constituency rather than the 2 constituencies where elections were cancelled. The Court nullified the repeated election but declined to declare the appellant as elected/returned in accordance with the reliefs he sought, rather the court ordered the Commission to conduct elections into the remaining 2 wards of the constituency and add the result thereof to the result of the election in the 3 wards of the constituency already validated and thereafter declare as elected the candidate who scored a majority of the lawful votes cast at the election.

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12 This was the position taken by the courts in the following cases: **Ezike v. Ezeugwu** (1992) 4 NWLR [pt. 236] 462; **Adeola v. Owoade** (1999) 9 NWLR [pt. 617] 30 **Ubale v. Dadiya & Ors** (2008) 15 NWLR [pt. 1114] 602

13 (1993) 3 NWLR [pt. 27934 at 52

14 *Supra*

15 *Supra*

16 (1960) SC NLR 414

17 *Supra*

With profound humility, it is submitted that these decisions can, neither find support in law nor facts. The Constitution provided expressly for geographical spread in Presidential and Governorship (Executive positions) elections[18]. By the *Exclussio alterius* rule of judicial interpretation, what is not expressly mentioned is intended to be excluded. Governorship and Presidential elections where geographical spread was provided for are of the same specie that is elections into Executive positions. In the case of elections into the National Assembly and State Houses of Assembly, the Constitution did not provide for geographical spread either directly or by implication. What the Constitution did was simply to leave the manner of conducting a valid election into these positions to a law made by an Act of the National Assembly[19]. The question should be, whether there is a law made by the National Assembly in furtherance of the constitutional duty placed on it by Sections 77 and 106 of the 1999 Constitution. The answer to this question is in the affirmative. Section 69 of the Electoral Act 2010[20] provides what a candidate in a Legislative House election should do to be declared as elected/returned.

Section 69 of the Electoral Act, 2010 (as amended) was made subject to Sections 133,134 and 179 of the Constitution only and not subject to any other law, whether statute, common law, customary law, convention or practice.

It is trite law that the provisions of the Constitution should be construed strictly and so also the provisions of Electoral Laws[21]. The Judges involved in the interpretation of statutory provisions have always been reminded to bear in mind the confines of their duty which is the interpretative province and not legislation. A court of law interpreting a statute is bound to stop where the statute stopped[22].

It is now clear that neither the 1999 Constitution nor the Electoral Act, 2010 has provided for the requirement of geographical spread in Legislative Houses election.

Turning to point of facts, it has always been argued that to declare the result of an election into a Legislative House where all the parts of the constituency have not voted is to disenfranchise some voters. In the case of **Edith Mike-Ejezie v. Hon. Ralph Okeke & ors**,[23] The Election Petition Tribunal, after making a finding that the petitioner scored a majority of the lawful votes cast in 11 of the 25 wards of the constituency where election validly held, went on to order for fresh election in the remaining wards. The tribunal relied on Section 54 of the Electoral Act, 2006 and stated as follows:

> …. we are not persuaded by the submissions of the Learned Senior Counsel to the petitioner that in the circumstances, of

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18 Sections 133,134 and 179 of the 1999 Constitution

19 Section 77 and 106 of the 1979 Constitution

20 As amended and other statutes in *pari materia* with it such as Section 60 of the Electoral Act, 2002, repealed and replaced by the Electoral Act, 2006 which itself has been repealed and replaced by the Electoral Act, 2010 (as amended)

21 **Peter Obi v. INEC** *op cit*

22 **Buhari v. Yusufu** (2003) 14 NWLR [pt. 840] 446; **Buhari v. Obasanjo** (2003) 15 NWLR [pt. 843] 236. **A.G Ondo State v. A. G. Ekiti State** (2001) 17 NWLR [pt. 743 706; **A.G Bendel State v. A. G. Federation** (1981) S. C 1; **Ishola v. Ajiboye** (1999) 6 NWLR [pt. 352] 506

23 (Unreported) judgement delivered by the Legislative Houses Election Petition Tribunal sitting at Awka in Petition No. EPT/AN/NAE/HR/13/2007 dated 15th May, 2008

> this case in which the entire result of half of the Federal Constituency has been voided and nullified that the tribunal should proceed to declare the petitioner as validly elected. We would be unjust and that would amount to a complete disenfranchisement of the entire electorates in the Anambra West Constituency, part of the Anambra East/West Federal Constituency. In our view that would run against the spirit and intendment of the provisions of both the Electoral Act, 2006 and the 1999 Constitution of Nigeria which guarantees the right of the people of Anambra West to have a say in who is eventually elected and declared as their representative in the Federal House of Representative in the Anambra East/West Federal Constituency….

The foregoing argument and decisions based on them, with due respect, are not founded on law or facts. There is no election in which all eligible voters have ever voted or will ever vote. Even in the charade of elections which Nigerian elections have become of recent, it is not all the total number of votes registered in a state or constituency that are always ascribed to the candidates. The actors usually have the wisdom to leave out some percentage of registered votes as those that did not vote. Assuming also that all the registered voters in a constituency come out and vote, there will always be invalid votes which their owners will never be invited to come back and re-cast their votes; to that end, such persons never participated in choosing who should represent them. The argument of trying to prevent the disenfranchisement of some voters fails therefore to provide justification for this contention.

Is There Justification for Importing the Requirement of Geographical Spread and Re-run Elections into Legislative Houses Elections?

It is instructive that neither the Constitution nor the Electoral Act has made it mandatory for all the registered voters in a constituency or state to vote in an election before the result of the election could be validly declared. The position of our law seems to be, with respect to that in a Legislative House election, the person who scored a majority of the lawful votes cast at an (one) election *simpliciter* should be declared as elected/returned.

Section 53 (2) of the Electoral Act, 2010[24] empowers the Independent National Electoral Commission to cancel the result of an election where there is over voting, that is where the total votes cast at an election exceed the total number of registered voters. The said section further permits another (repeat) election to be held in the area where election was cancelled and the result thereof added to the other results before a declaration and return is made in respect of the election. Section 53(3) of the 2010 Electoral Act[25], says that there shall be no return on the election where there is cancellation in accordance with section 53(2) until the repeat election is conducted. It is pursuant to the above provisions that the Independent National Electoral

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24 As amended

25 *Op cit*

Commission made its Manual for the Conduct of the 2010 Elections. In the said manual, there is a provision that where election is cancelled or did not take place in any particular area, the Commission shall withhold from declaration/return in respect of the election until election is conducted in the affected area and the result thereof added to the other results already declared to ascertain the winner of the election.

It is not the entire section 53 of the Electoral Act, 2010[26] is couched in mandatory terms. It is equally not stated in the said Electoral Act what shall be the consequences of failure to comply with both the provisions of section 53 of the Electoral Act 2010 (as amended) and the INEC Manual for the Conduct of the 2010 Elections on the issue of repeat elections.

Presently, there are many instances where elections were cancelled or did not hold in some wards or polling units and the total number of voters registered in the affected areas will affect the outcome of the election if they vote, yet INEC made declaration/return of winners in the elections[27]. The question then is, on what pedestal shall the Petitioners in such elections stand to challenge the declaration/return made? Certainly, the Constitution does not make it mandatory that election must hold in all the polling units before declaration/return could be made and it does not require geographical spread in elections into Legislative Houses. Section 53 of the Electoral Act is not couched in mandatory terms, particularly as it came short of stipulating the sanction that shall follow non compliance. In the same vein, the Election Manual 2010 seems to be only a mere guide to Electoral Officials as to how to conduct the elections that may not affect the provisions of the constitution and the Electoral Act on the matter. Equally, neither Section 53 of the Electoral Act, 2010 nor the Manual for the conduct of the Election can override the 1999 Constitution that allows a candidate that polled a majority of the lawful voters cast at "an election" to be declared elected/returned. If section 69 and paragraph 28 (1) of the First Schedule to the Electoral Act, 2010 (as amended) are considered, it would be discovered that once the results of such elections are declared, nullification of such declaration/return may not be founded on failure to comply with Section 53 of the Electoral Act, 2010 or the Manual for the Election. Once INEC has declared a winner of an election, what a court or tribunal faced with a determination in a Legislative Houses election petition should determine is simply whether the person returned secured a majority of the valid votes cast at the election if not nullify his return and return, the person who score majority of the valid votes or otherwise declare the entire election as void.

This position is supported by the provisions of paragraph 28 (1) of the First Schedule to the Electoral Act, 2010 (as amended) which provides:

> At the conclusion of the hearing, the Tribunal shall determine whether a person whose election or return is complained of or any other person, and what person, was validly returned or elected, or whether the election was void, and shall certify the determination to the Resident Electoral Commissioner or the Commission.

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26 *Op. cit*

27 Such cases were recorded in the 2011 elections held in Nnewi North/South/Ekwusigo Federal Constituency. Aguata II State Constituency, Idemili South Constituency, Ogbaru II constituency, etc. of Anambra State of Nigeria

By the intendment of that paragraph, it is the duty of the Election Petition Tribunal and appellate courts to review what was done by the Electoral Commission in the conduct of an election and come out with one of two decisions *viz:*

> Whether the person whose return or election is complained of or any other person and what person was validly returned or elected or whether the election was void.

Looking at those provisions of the law, it does not seem to lie on the tribunal or court, once the Electoral Commission has declared a result and returned a candidate, to suspend the life of the electoral process. The tribunal or court should either support the life of the process by validating what was done or modify it while still validating it or terminate its life entirely instantly by voiding it.

In **Okunola v Ogundiran**[28] the Supreme Court, per Ademola CJF (of blessed memory), interpreting regulation 104 (1) of the Election Regulations, 1960[29] which is in *pari materia* with paragraph 28 (1) of the First Schedule to the Electoral Act, 2010, (as amended) held thus:

> In considering that petition, the Judge is under a duty under Regulation 104 (1) to declare what person was duly elected. The regulation indicates what judgement may be given in an election petition it reads: 104(1). At the conclusion of the trial, the court shall determine whether a person whose election or return is complained of or any other person, and what person, was duly returned or elected, or whether the election was void, and shall certify such determination to the Electoral Commission.

On whether a tribunal or court can nullify an election for non-compliance with section 53 of the Electoral Act, 2010[30] and the Manual for the Election, and order re-run elections, it seems that neither the tribunal nor court has got the *vires* to take over the function assigned to the Electoral Commission in Section 53 of the Electoral Act, 2010[31]. Once the Commission declares the result of an election, the law does not empower the court or tribunals to resort to section 53 of the Electoral Act, 2010 or the Manual for the Election.

In the case of **Peter Obi v. INEC & ors**[32] the Supreme Court held per Aderemi JSC that:

> The duty of a judex is to expound the law and not to expand it. This is because "law making" in the strict sense of the term is not the function of the judiciary but that of the legislature. If there is any defect found in the said Section 54(2) it is for the legislature to put it right by new

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28 (1962) All N. L. R. 84 at 89

29 Which is in *pari materia* with paragraph 28 (1) of the First Schedule to the Electoral Act, 2010, (as amended)

30 *Op cit*

31 *Op cit*

32 (2007) 7 SCNJ 1 at 37

> legislation; it is not for the court to do that as done by the lower Tribunal by reading words into it by substituting itself for INEC who is exclusively empowered to cancel election in some polling stations in a case of over- voting and conduct another election in place of the cancelled election before making a return at the election…."

In **Thompson v. Gould & Co**[33] Lord Mersey stated:

> It is a strong thing to read into an Act of parliament words which are not there, and in the absence of clear necessity, it is a wrong thing to do.

Similarly in **Vickers, Son and Maxim Ltd v. Evans**[34] Lord Loreburn observed thus "we are not entitled to read words into an Act of Parliament unless clear reasons for it is to be found".

To this end, the tribunals and courts cannot validly exercise the functions entrusted to the Electoral Commission under Section 53 of the Electoral Act, 2010[35] to cancel election in some parts of a constituency, order fresh election in such parts and suspend declaration/return until the results of the fresh election in the affected parts are brought and added to the earlier results before a candidate would be declared as elected.

It is submitted that the position of the Supreme Court in **Obi's case**[36] is on all fours with the law on that subject matter. Except an election/return is void, there ought to be no order as to fresh election in some parts of a constituency or state before declaration of result of an election.

It should always be borne in mind that the words used in the Constitution and the Electoral Act are "…valid votes cast at the election". It is submitted that these words can never be the same as "valid votes that ought to be cast at the elections".

is the position of the law that if a bye- election, run-off election or fresh election is to be ordered by the tribunal or court, it should relate to the entire constituency or state and not a part of it and that must be preceded by the nullification of the entire result of the election for that state or constituency. Where it is an election into the office of the President or Governor, this happens where non of the candidates obtained the requisite geographical spread and in other elections, where the election was a nullity.

The law that a bye-election or fresh should relate to the entire constituency and not to a part of or unit of the constituency was rightly restated by Ogbuagu J.C.A (as he then was) in **Bayo v. Njidda & ors**[37]. That before a bye-election or fresh election can be ordered, a nullification of the entire election must precede it was also

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33 (1910) AC 1
34 (1910) A. C. 1
35 (1910) A. C. 444 at 445
36 *Ibid*
37 (2004) 8 NWLR (Pt876) 544 at 638; see also **Mallam Chibok V Bello & 2 ors** (1993)1 NWLR (pt 267) 109 at 116

confirmed by the position of the Court of Appeal in **Njiokwuemeni v. Ochei & ors**[38], per Muntaka Coomassie JCA which position flows directly from the provisions of paragraph 28 of the First Schedule to the Electoral Act, 2010[39]. This is to the effect that except where the entire election was nullified by the tribunal or court, there ought not to be a re-run.

Conclusion

It does not seem that our laws have placed on a candidate for an election into any office, other than that of the President or Governor of a State, the requirement of obtaining geographical spread or indeed any other requirement whatsoever in the Constitution or Electoral Act. What is required of such a candidate is a simple majority of the lawful votes cast at an election. Once election has been validly conducted in a part or parts of a Constituency. It is enough to cause a winner to emerge, particularly, where the Electoral Commission has exercised its discretion under Section 53 of the Electoral Act, 2010[40] and declared a winner of the election. It does not lie with the court which cancelled elections in part of the Constituency to order for fresh elections in the part where election is cancelled or did not hold and to have the result of the same added to the valid result of the election before a winner of the election is declared. If the legislature had wanted it to be so, it would have so enacted.

The logic of avoiding the disenfranchisement of some parts of the constituency may be morally desirable but certainly it is not justifiable to thereby order re-run election considering the state of our laws. We hope that the National Assembly shall one day find it important (and it is hereby recommended to them to do so) to include the requirement of geographical spread as one of the hurdles that must be scaled by a candidate in an election into a legislative house before one can be declared as elected and returned as winner. Until such legislations are made, the present judicial decisions reading this requirement into the laws guiding elections into Legislative Houses in Nigeria are nothing short of extending or expanding the law to an area it did not cover. "Judicial Legislation" remains a novel, not accommodated in our political and constitutional arrangements. Our courts may wish to reconsider these decisions.

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38 (2004) 15 NWLR (Pt 895) 196 at 238

39 *Op cit*

40 As amended