# THE JUSTIFIABILITY OF RE-RUN ELECTIONS IN NIGERIA: A REVIEW OF THE CASE OF *ADELEKE V INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)*[1]*

**Abstract**

*In a democracy, periodic elections are an imperative so as to avoid creating political lock-ups and/or narrowing of the political landscape which ultimately eliminates competition among political actors. Such elections must be conducted in such a manner that secures the highest level of credibility for the exercise. It becomes a necessity in such a situation therefore, that both the Electoral Commission who conducts the elections and the courts that adjudicate on disputed returns from elections must be unbiased umpires who are not interested in the outcome of the exercise in terms of boosting the political fortunes of persons and individuals. If the exercise must be successful and impact positively on the polity, it must be carried out in strict compliance with the provisions of the Constitution and the Electoral Act. Nigeria's electoral system is founded on the provisions of the 1999 Constitution as amended, the Electoral Act 2010 as amended and subsidiary legislations made by the Electoral Commission pursuant to the powers vested on it by the Constitution and the Electoral Act. Worried by the havoc which re-run elections seem to have wrecked on the Nigerian polity and the seeming lack of legal authority for the conduct of such re-run elections, the author embarked on this research to enable the public to appreciate how the law stands in respect of this all impactful exercise. The author discovered that re-run elections in Nigeria is seemingly an affront on the 1999 Constitution as amended and therefore recommends that the policy of conducting re-run elections in Nigeria, as presently done by INEC should be stopped, forthwith, as it flies in the face of the Constitution of the country.*

**Keywords:** Democracy, Election, Re-Run Election, Nigeria

## 1. Introduction

From Osun State to Kano State, Plateau State to Bauchi State *et cetera*, there were agonizing cries that the electoral wills of the people were trampled upon and replaced with the will of a few by INEC, using the methodology of re-run elections. It was certain that the application of the said novel idea of re-run election produced results that were favourable to the political party in power at the center. It is good that we examine the statutory provisions that empower the conduct of various elections in Nigeria and see what they portend for the development of the nation.

## 2. Discussion of the Provisions

Section 133 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides that: 'A candidate for an election to the office of 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 (1) of the same Constitution provides that: 'A candidate for an election to the office of 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. Section 134 (2) provides: '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 (1) of the 1999 Constitution (as amended) provides that: 'A candidate for an election to the office of 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. Section 179 (2) provides: 'A candidate for an election to the office of Governor of a State shall be deemed to have been duly elected where, there being two or more candidates- (a) he has the highest number of

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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 1999 Constitution (as amended) 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. On the other hand, Section 77 (1) of the same Constitution provides that: '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 (1) of the same 1999 Constitution (as amended) also provides that: '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 (as amended) 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 Section 77 and 106 provides 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 amended) as reproduced above. Paragraph 28(1) of the 1st Schedule to the Electoral Act, 2010 (as amended)[2] 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[3] provides thus: '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 (as amended) 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) …
>
> (3) 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.

It should be noted that the clause…'and satisfied the requirements of this constitution and the Act pertains' only to elections to the office of the President and a Governor of a state). Section 53 of the Electoral Act, 2010 (as amended)[4] 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.

[2] As amended, in *parimateria* with paragraph 27(1) of the 1st Schedule to the Electoral Acts, 2002 and 2006.
[3]No. 227, W. R. N., 1960, which is in *parimateria* with paragraph 28 (1) of the 1st Schedule to the Electoral Act, 2010 (as amended). 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 judgment may be given in an election petition.
[4] Which is *inpari-materia* with s 54 of the Electoral Act, 2006.

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

(4) 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.

Paragraph 53 of the Electoral Act 2010 as amended is the origin of the provisions contained in paragraph 44(n) of the INEC Guidelines for the conduct of the 2018 and 2019 election in Osun State and other states. Outside the provisions contained in the said paragraph 44(n), there is nothing that empowers INEC to cancel an election and withhold return of a winner in that election to wait for the outcome of a re-run election. In the exercise of the powers to cancel an election and conduct a re-run election, INEC forgot that by the intendment of paragraph 53 of the Electoral Act 2010 as amended, it could only do so where over-voting has occurred in an election in a constituency or polling station. Nigeria's democracy is founded on a written constitution[5] 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 ground norm 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. In that case neither the executive arm of government to which INEC belongs nor the judiciary has got the powers to amend any law in the guise of applying or interpreting such law. It is trite law that the court, in the exercise of its interpretative jurisdiction, must stop where the statute stopped.[6] INEC therefore lacks the powers to import a practice recommended for elections cancelled for over-voting into other areas of election. In *Buhari v Obasanjo*,[7] the Court of Appeal stated the law in these words: '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'.

In the case of *Peter Obi v INEC &Ors* [8]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 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*[9] Lord Mersey stated that '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*,[10]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'.*

Presently, therefore, there is a great contention as to whether re-run elections as ordered by INEC for governorship elections in many states, senatorial districts and other elections are justified by any law in force in Nigeria. A perusal of our laws as reviewed above would reveal that it is only paragraph 53 (2)(3) and (4) of the electoral Act (2010) as amended that empowers INEC to stop the declaration of the result of an election and order re-run. The said provision should be read subject to the provisions of section 179 (2) of the 1999

[5]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.
[6]The case of *Awolowo v Shaghari* (1979) 6 – 9 S. C 1; *Buhari v Yusufu* (2003) 14 NWLR [pt. 841] 446; *Peter Obi v. INEC & ors.* (2007) 7 SCNJ 1 at 37; *Thompson v Gould & Co* (1900) A. C. 1.
[7](2003) 15 NWLR [pt. 843] 236.
[8] (2007) 7 SCNJ 1 at 37.
[9] (1910) AC 1.
[10] (1910) A. C.351.

Constitution as amended. Where the provisions of section 179(2) of the constitution and paragraph 53 (2)-(4) of the Electoral Act 2010 as amended are taken together, it would appear that the Electoral Commission has no powers to withhold declaration of a winner in an election where a candidate scored majority of lawful votes cast at an election and satisfied the requirements of section 179(2) of the constitution. In such situation, it seems imperative that a winner of the election must be declared and returned unless there is a tie in respect of winners of the election and that will make election to hold in places where election did not hold before. The Electoral Commission in Nigeria has in one of its worst forms of electoral corruption invented 're-run election' as a way to facilitate victory for it's preferred candidates as could be seen in elections conducted recently in the country.

**3. *Adeleke & Ors. v INEC & Ors.*[11]**

In the case of *Adeleke & Ors. v INEC & Ors.*, the 1st appellant was a candidate in the Governorship election which was conducted on 22nd September 2018 and 27th September 2018 in Osun State. He was sponsored by the 2nd appellant, a political party registered with the 1st respondent. The 2nd respondent was the candidate of the 3rd respondent, a political party registered with the first respondent, while other candidates from other political parties also participated in the election. The 1st respondent is the body charged with the responsibility of conducting elections into the office of the President, Governors, Senators, members House of Representative and members of House of Assembly. At the end of the election, the State Returning Officer appointed by the 1st respondent cancelled the results of the election in seven polling units, which cut across four local Government Areas in the State. After the cancellation of the election in seven polling units, the 1st appellant scored 254,698 votes, while the 2nd respondent scored 254,345 votes. From the number of votes scored by the parties, it was very clear that the 1st appellant scored the highest number of votes followed by the 2nd respondent. Also, it is a fact that the 1st appellant also satisfied the other requirements of section 79 of the 1999 Constitution as amended. The 1st respondent, however, declared the election inconclusive and ordered for a re-run of the election on 27th September, 2018. On 27th September, 2018, the re-run election took place in the four Local Government Areas. At the end of the re-run election, the 1st respondent declared the 2nd respondent as the winner of the election with 255,505 votes while the 1st appellant was credited with 255,023 votes. The appellants were dissatisfied with the declaration and return of the 2nd respondent as the winner of the election. Consequently, they filed a petition before the Osun State Governorship Election Tribunal on 16/10/2018, praying that the 1st appellant be declared the winner of the election, which was conducted on the 22nd September, 2018. In defence, the respondents on 9/11/2018 filed their reply challenging the competence of the petition and the jurisdiction of the Tribunal. On 16/11/2018, the appellants filed a reply to the respondents' reply wherein new issues were raised which caused the respondents to object vide a preliminary objection on 26/11/2018. At the end of the proceedings, the Tribunal in a split decision of 2-1 nullified the election in 17 polling units and declared the 1st appellant as the winner of the election, but struck out paragraphs 18, 23 and 24 of the appellants' reply and held that the courts had no jurisdiction to nullify paragraph 44(n) of the 1st respondent's Approved Guidelines which empowered it to declare the election inconclusive. The chairman of the Tribunal Muhammed I. Sirajo, J. dissented. He dismissed the appellants' petition. The respondents who were aggrieved with the majority decision of the Tribunal appealed to the Court of Appeal. The appellants were dissatisfied with certain aspect of the judgment of the Tribunal and cross-appealed. The appeal and the cross-appeal were heard and in a split decision of 4-1 delivered on the 9th May, 2019, the respondents' appeal was allowed. Aggrieved with the decision of the Court of Appeal, allowing the appeal and dismissing the cross-appeal, the appellants appealed to the Supreme Court. It was among the major contentions of the appellants at the apex court that paragraph 44 (n) of the 1st respondent's Approved Guidelines and Regulations for the conduct of the Osun State Governorship Election 2018 is void because it (a) is in conflict with the Electoral Act, 2010, as amended and the Constitution of the Federal Republic of Nigerian 1999 (as amended) and/or (b) has the effect of expanding or amending the Electoral Act 2010, as amended and Constitution of the Federal Republic of Nigeria, 1999 (as amended) and/or (c) confers additional powers on the INEC which were neither conferred or envisaged in the Electoral Act, 2010, as amended and the Constitution of the Federal Republic of Nigeria, 1999 (as amended). In respect of the said paragraph 44 (n) of the 1st respondent's approved Guideline and regulations for the conducts of the Osun State Governorship Election, 2018, arguments went forth that the said guidelines are null and void because it (a) is in conflict with the cumulative provisions of sections 69 and 70 of the Elector Act, 2010 as amended and section 179 of the Constitution of the Federal Republic of Nigeria 1999 as amended and/or (b) it has the effect of expanding or amending the cumulative provisions of sections 69 and 70 of the Electoral Act, 2010 as amended and section 179 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and/or (c) confers additional powers on the 1st respondent which were neither conferred nor envisaged by the cumulative provisions of sections 69 and 70 of the Electoral Act, 2010 as amended and section 179 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). In the final analysis the Supreme Court upheld the decision of the Court of Appeal on the election save for the dissenting judgments of Aka'ahs and Galumje, JJSC, to the

[11](2020)11 NWLR (pt. 1734)17.

effect that there was no basis for a re-run election in the circumstance as there are enough provisions in the constitution and the Electoral Act to warrant the declaration of the 1st appellant as the winner of the election at the first ballot, thereby rendering the re-run election unnecessary. According to the two eminent Jurists, there is no justification for re-run election under our laws particularly in the manner in which the Electoral Commission used that novel creation as an engine of fraud to take away victory from persons who duly won Gubernatorial elections in Osun, Kano, Plateau, etc.

Upon a perusal of the provisions of Nigeria's law on elections, particularly, the 1999 Constitution as amended which is the supreme law of the land, it is evident that there is a real conflict between the provisions of section 133, 134 and 179 0f the 1999 constitution as amended and the provisions of paragraph 44(n) of the INEC guidelines for the conduct of the 2017 and 2018 elections in Nigeria.[12] It is against the backdrop of the state of our laws as exposed above that one becomes worried as to the seeming inability of our courts and election tribunals to afford justice to persons questioning re-run elections in respect of both executive offices and legislative houses in Nigeria. The laws as x-rayed above in respect of elections into positions in the executive arm of government are also similar to what is applicable to the elections conducted into seats in the legislative houses. The law as it concerns elections into legislative houses is even more settled and ought not to be guessed.

Having in mind the provisions of the Constitution and the Electoral Act, 2010, as amended which has been examined in this work, 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 the office of the President, Governor or a member of a legislative house was validly elected at a first ballot or not. The Supreme Court has so far maintained an unwholesome silence on the validity of the controversial provision of paragraph 44(n) of the INEC guidelines for the conduct of elections. It is arguable, however, that the said provisions ought to be invalidated to the extent that it makes provisions that are in conflict with the provisions of section 133 and 79 of the 1999 constitution as amended as well as paragraphs 69 and 70 of the electoral Act, 2010 as amended. It may be contested in favour of the said provision that it is protected by paragraph 53 (4) of the Electoral Act 2010 (as amended). It is however instructive as stated earlier that the constitution of the Federal Republic of Nigeria is supreme to any other law in the country (including the Electoral Act, 2010 as amended and the regulations made therefrom, and if any law runs contrary to the 1999 Constitution of Nigeria, such law shall become void to the extent of the inconsistency.[13] To that extent, the provisions of the said INEC guidelines ought to have been pronounced by the courts as void. Moreover, the province of law-making remains in this land, the exclusive preserve of the Legislative arm of government. Where that arm of government has made a law on any subject matter, no other branch of government is allowed to interfere with that law and subject matter, where such said enactment is seen to work hardship by its operation, it is the legislature that would still return to change the said law through a legislative action. It is submitted, most respectfully, that paragraph 44(n) of INEC Guidelines for the conduct of the 2018 election falls into the realm of executive Law-making which can hardly find accommodation in our political arrangements known for the practice of separation of powers and the attendant checks and balances. From the results produced by re-run elections and from the point of view of practicability, it is not possible that every vote would count in an election and it is only valid votes that count in an election. Votes declared invalid do not count in an election and they do exist even in re-run elections. Results are declared in re-run elections without waiting for those that cast invalid votes in the re-run to come back and recast their ballots.

The same argument made for elections into executive positions goes for elections into Legislative Houses. However, there exists 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, the question is whether there are other requirements of the Constitution and Electoral Act that such a candidate ought to satisfy.[14] In the case of *Chukwuemeka Odumegwu Ojukwu v Edwin Onwudiwe & Ors*,[15] 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

[12] Section 1(3) of the 1999 constitution as amended provides that if any other law is inconsistent with the provisions of this constitution, this constitution shall prevail and that other law shall, to the extent of the inconsistency be void.
[13] s 1 (3) of the 1999 Constitution as amended.
[14] See generally, S.C Unachukwu: *The Requirement of Geographical Spread in Elections into Legislative Houses in Nigeria: A Critique of Statutory and Judicial Authorities*, Nnamdi Azikiwe University Journal of International Law and Jurisprudence Vol. 2 (2011) p 343.
[15](1984) 1 SC 172.

set aside and the return made by the returning officer restored. On further appeal to the Supreme Court, the Supreme Court affirmed the judgment 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 apex court in that case that what is required of a candidate in a legislative house election is majority of the valid votes cast at the election and nothing more.

In the case of *Suleiman Ajadi v Ajibola & Ors*[16] 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 in the areas where election was cancelled from the votes credited to the candidates in those areas and declared as returned the candidate who scored 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 section 133, 134 and 179 of the 1999 Constitution and Section 60 of the Electoral Act, 2002. The 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 ***abinitio***, 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*.[17]

Furthermore, in the case of *Olabode & Anor v Killa & 97* Ors[18] 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.[19]

However, there has 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[20] and similar provisions has 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 election.[21] 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.

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[16] (2004) 16 NWLR [pt. 898] 91, particularly at 175, pp. 204 – 206.
[17] *(1999) 7 NWLR [Pt 609]124. at p. 175, Paras E-G, 205-206, Paras F-A}.*
[18] (2010) Vol. 13 W. R. N. 73, particularly at 137 paras 20 – 45.
[19] S.C Unachukwu: (n 14) 349.
[20] *As amended.*
[21] 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.

It was in contemplation of the said argument that the Court of Appeal in *Oputeh v Ishida*[22] 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 is 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*,[23]*Adeola v Owoade*[24]*Sorunke v Odebunmi.*[25]

In *Ubale v Dadiya & Ors*[26]elections into the Balanga 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 Election 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 election petition tribunal held that it was wrong of the Commission to have conducted election in the entire 5 wards of the constituency rather than the 2 constituencies where elections were cancelled. The Court nullified the repeat 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 declared as elected the candidate who scored a majority of the lawful votes cast at the election.

With profound humility, it is submitted that these decisions that read the requirement of geographical spread into legislative houses elections can neither find support in law nor facts. The Constitution provided expressly for geographical spread in Presidential and Governorship (executive positions) elections.[27] By the intendment of 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 *i.e*. 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.[28] 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 the 1999 Constitution. The answer to this question is in the affirmative. Section 69 of the Electoral Act 2010[29] 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.[30] 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.[31]

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

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[22] (1993) 3 NWLR [pt. 279]34 at 52.
[23](1992) 4 NWLR (pt. 236) 462.
[24]Ibid.
[25] (1960) SC NLR 414.
[26]n 568.
[27]s 133,134 and 179 of the 1999 Constitution (as amended).
[28]s 77 and 106 of the 1979 Constitution (as amended).
[29]As amended and other statutes in *parimateria* 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).
[30] *Peter Obi v. INEC*. (n 6).
[31]*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.

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 has not voted is to disenfranchise some voters. In the case of *Edith Mike-Ejezie v. Hon. Ralph Okeke & ors*,[32] 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 this case in which the entire results 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. 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 voters 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.

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, 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 (as amended) empowers the Independent National Electoral Commission to cancel the result of an election where there is over voting, i.e. where the total votes cast at an election exceeds 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 (as amended), 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 Commission made paragraph 44(n) of its Manual for the Conduct of the 2018 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 (as amended) that is couched in mandatory terms.[33] 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 paragraph 44(n) of 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 would affect the outcome of the election if they vote, yet INEC made declaration/return of winners in the elections.[34] The question then is, on what pedestal shall the petitioners in such elections stand to challenge the declaration/return made? Certainly the Constitution

[32](Unreported) judgment delivered by the Legislative Houses Election Petition Tribunal sitting at Awka in Petition No. EPT/AN/NAE/HR/13/2007 dated 15th May, 2008.
[33] S.C Unachukwu: (n 14) 352.
[34]Such cases were recorded in the elections held in Nnewi North/South/Ekwusigo Federal Constituency. Aguata II State Constituency, Idemili South Constituency, Ogbaru II constituency, etc.

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 2010 (as amended) 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 2018 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 (as amended) nor the Manual for the Conduct of the Election can override the 1999 Constitution (as amended) that allows a candidate that polled a majority of the lawful votes cast at 'an election' to be declared elected/returned. If section 68 of the Electoral Act and paragraph 28 (1) of the First Schedule to the Electoral Act, 2010 (as amended) are considered, it would be discovered that once the result 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 (as amended) or paragraph 44(n) the INEC Manual for the election. This position is supported by the provisions of paragraph 28(1) of the First Schedule to the Electoral Act, 2010 (as amended) which 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'.

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 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'. On whether a tribunal or court can nullify an election for non-compliance with section 53 of the Electoral Act, 2010 (as amended) and the manual for the election, and order a re-run election, it seems that neither the tribunal nor court has got the *vires* to take over the functions assigned to the Electoral Commission in section 53 of the Electoral Act, 2010 (as amended). 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 (as amended) or the manual for the election. 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 result of the fresh election in the affected parts are brought and added to the earlier results before a candidate would be declared as elected.

**4. Conclusion and Recommendations**

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'*. (italics mine for emphasis). It 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 President or Governor, this happens where none 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 election should relate to the entire constituency and not to a part of or unit of the constituency was rightly restated by Ogbuagu, JCA (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 confirmed by the position of the Court of Appeal in *Njiokwuemeni v. Ochei & Ors*,[38] Per Muntaka Coomassie, JCA (as he then was) which position flows directly from the provisions of paragraph 28 of the First Schedule to the Electoral Act, 2010 (as amended). 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. The powers to suspend a return in an election to await the holding of a re-run election in the part where election result was cancelled or where election did not hold in the first place and to have the result of same added to the valid result of the election before a winner of the election is declared seems to belong to the Electoral Commission by the intendment of section 53 of the Electoral Act, 2010 as amended which is inconsistent with the relevant provisions of the 1999 Constitution as amended and ought to be voided and not merely be made subject to the supervision of the courts. Even at that the entire practice has no basis in law and ought not be, unless and until the legislature enacts a law to that effect.

[35](1910) A. C. 444 at 445.
[36]Ibid.
[37] (2004) 8 NWLR (Pt.876) 544 at 638; *Mallam Chibok v Bello & 2 Ors* (1993)1 NWLR (pt 267) 109 at 116.
[38] (2004) 15 NWLR (Pt. 895) 196 at 238.

The logic of avoiding the disenfranchisement of some parts of the electoral constituency may be morally desirable but certainly it does not present a solid legal base on which to stand to order re-run election considering the state of our laws. It is, therefore, recommended that our courts would reconsider those decisions supporting re-run elections and the relevant laws with a view to changing their stand on re-run elections. On the other hands where it appears that legislative action is required, it is hoped that the National Assembly shall find it important (and it is recommended to them to do so) to amend the 1999 Constitution and include the criteria for re-run elections as well as 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 thereof. Until such legislations are made, the present judicial decisions reading this requirement into the laws guiding elections into executive offices and Legislative Houses in Nigeria is 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.