AN ANALYSIS OF THE DISCRETIONARY POWERS OF THE COURT: A CASE STUDY OF ELECTION PETITION TRIBUNAL DECISIONS.

BY

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**A DISSERTATION SUBMITTED
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CERTIFICATION

This is to certify that this Dissertation is the original work of Valentine Ogbonna Ayika (with registration number PG/NLS/1900016) carried out under the guidance and supervision of Mrs. J.O Adesina (SAN). This work has not been presented either in part or whole in this institution before or any other faculty in any university for the award of any degree.

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APPROVAL

This Dissertation titled "the Legal Effects of Judicial Discretion on the Mandate of the People Consequent upon the Lacunae and other deficiencies in the Electoral Acts particularly the Electoral 2010: A Case Study of Election Petition Tribunal Decisions" has been read and approved for the Institute for Legislative and Democratic Studies (NILDS), Abuja.

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Mrs. J.O Adesina (SAN) **Date**

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(External Examiner) **Date**

DEDICATION

I dedicate this dissertation to God Almighty my creator, my strong pillar, my source of inspiration, wisdom, knowledge and understanding. He has been the source of my strength throughout this work and on His wings only have I soared. I also dedicate this dissertation work to my dear wife, **Mrs Cecilia Ayika JP,** who has been a constant source of support and encouragement during this work, my wonderful children and only beloved brother, **Chief Clement Ayika** and his family. I am truly thankful for having you all in my life. A special feeling of gratitude to all my former lecturers especially my supervisor, **Mrs. J.O Adesina (SAN)** for her guidance in a unique way. I also dedicate this dissertation to my many friends and political allies and followers who have supported me throughout the process.

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Finally, it is with true pleasure that I acknowledge the contributions of my amazing partner, **Mrs Cecilia Ayika JP** who assisted immensely in typesetting of this work.

ABSTRACT

Available literatures showed that election related litigations are on the increase and the resultant judgements, in some cases, controversial and conflicting. Some of the reasons for this, it was observed are that the relevant laws and regulations governing elections in Nigeria are replete with deficiencies, which, among others, necessitated the resort to discretionary powers by the courts to fill up the gaps. The deficiencies and the consequent exercise of judicial discretion, to a larger extent, had negative impact on the sustenance and deepening of Nigeria's democracy. A situation that demanded for research and necessary actions. The research identified and examined the defects, ambiguities and lacunae in the relevant electoral laws and regulations particularly the Electoral Act 2010 (as amended) and the resultant effects of the exercise of judicial discretion by the courts on the mandate of the people. The overwhelming importance of democracy and the need for its sustenance demanded for research on how the mandate of the people was affected by the exercise of judicial discretionary powers. The methodology adopted in the work is doctrinal with the aid of statutes, case laws, textbooks, articles and journals, opinion of scholars and internet materials. The study discovered that the resultant effects of the deficiencies in the Electoral laws prompted judicialization of elections in Nigeria which in turn necessitated resort to discretionary powers by the courts. The study found that the courts in some cases abused or misapplied its discretionary powers for some reasons such as personal, political, religious or economic interest. The periodical amendments of the relevant laws and regulations were a consequence of the prevalence of pre and post election disputes and the corresponding judicial decisions coupled with societal dynamics and overwhelming desire by Nigerians for credible and acceptable elections. The election petition cases analyzed in the work showed that the resort to discretion by the courts is rampant and often led to conflicting judgments which in some cases were against the electoral wishes of the voters. The study recommended that the electoral laws and regulations should be periodically amended to cure the deficiencies and the gaps. The research recommended that controversial election related decisions should be reviewed by the National Judicial Council, NJC, or a judicial Committee set up for that purpose. The work having discovered that exercise of judicial discretion by the courts particularly in post-election matters is inevitable further recommended that amendments of the electoral laws and regulations should be geared towards ensuring that such exercise must be judicially and judiciously done. The study particularly recommended for an introduction of electronic voting and transmission systems into the Electoral Acts.

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National Assembly Act

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LIST OF ABBREVIATIONS

AG	Attorney General
All NLR	All Nigerian Law Reports
APC	All Progressive Congress
APGA	All Progressive Grand Alliance
CA	Court of Appeal
CFRN	Constitution of the Federal Republic of Nigeria
FRN	Federal Republic of Nigeria
LPELR	Law Pavilion Electronic Law Report
NILDS	National Institute for Legislative and Democratic Studies
NWLR	Nigeria Weekly Law Report
PDP	People's Democratic Party
SC	Supreme Court
US	United States
USA	United States of America
WRN	Weekly Reports of Nigeria

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

Democracy is synonymous with periodic elections which are governed by laws and regulations particularly, in Nigeria for instance, a number of laws and regulations govern the electoral process such as the 1999 Constitution as altered, the Electoral Act, the political party Constitutions and Guidelines as well as Independent National Electoral Commission (INEC) Guidelines. These laws and rules, with particular emphasis on the Electoral Act, had undergone several amendments with aim of ensuring comprehensibility, unambiguity, consistency and certainty in their provisions. Despite the efforts mentioned above, there still subsists lacunae in the Electoral Act which election tribunals have relied upon in exercise of their discretion to impact on the mandate of the people. The mandate of the people is expressed when the larger population of voters in a free and fair democratic election select their leaders by majority of votes cast. The ultimate power in an election resides in the people who by majority of votes select their preferred candidate over another. As regards electoral issues, justice can only be seen to be done when the mandate of the people is respected and protected by election tribunals. However, due to the lacunae that still exist in the Electoral Act, interested or disgruntled parties may approach the court to exploit it in one way or the other.

The duty of the judiciary as an arm of government is to interpret laws enacted by the legislature. This constitutional duty it must discharge even when no clear guidelines, parameters or laid down procedure are handed down by the legislature. In such a situation, the courts are enjoined to exercise some discretionary powers in order to meet the justice of the case before it. However, these discretionary powers of the judiciary are sometimes abused, or misapplied for some reasons such as personal, religious, economic or political

interests. *Dingyadi v. INEC* [1]**.** The resultant effects of abuse or misapplication of exercise of judicial discretionary powers are conflicting judgments of courts of coordinate jurisdiction and the issue of judicial forum-shopping by litigants.

One of the many controversial decisions of courts in election petitions is the recent decision of the Supreme Court in the case of *Hope Uzodimma & Anor v Hon. Emeka Ihedioha &* Ors[2]. The decision of the apex court in that case has been a subject of debate among scholars especially on the wrong signal or the general impact that it has on the society with regards to the sanity and sanctity of the judiciary as an unbiased umpire. Another case of that kind is the case of *Amaechi v INEC*[3] where the apex court declared Rotimi Chibuike Amaechi the winner of an election which he substantially did not participate in. In that case, Celestine Omehia campaigned on the platform of PDP and on the day of the election he was the one on the ballot meaning that the voters cast their votes for him. Yet the court declared Rotimi Chibuike Amaechi the winner of that election. This singular questionable decision brought about the introduction of section 285(13) in the Fourth Alteration of the 1999 Constitution. According to the section, for a person to be declared a winner in an election that person must have participated in all the stages of the elections.

In view of the foregoing, there is overwhelming need to examine how effective is the Electoral Act in regulating elections in Nigeria, how the discretionary powers of the court enhance effective justice delivery, if and how ambiguities in the Electoral Act influenced judicial and judicious exercise judicial discretionary powers and how a comprehensive Electoral Act will ensure effective justice delivery in electoral matters?

[1] (2011) 18 NWLR (pt.1224) pg.154." PER ADEKEYE, J.S.C (P. 40, Paras. A-C)
[2] (2020) LPELR-50260 (SC)
[3] (2007) 7-10 S.C. 172

1.2 Statement of Research Problem

A sustainable democracy requires a credible and acceptable elections which in turn depends on the laws and regulations governing elections in Nigeria. The outcome of Nigerian electoral processes remains a far cry from the expectations of Nigerians and falls far below what is obtainable in the developed countries. Nigeria's capability to conduct free, fair, credible, and peaceful elections has always been questioned. This is because successive elections have been marred by violence and myriad irregularities and deficiencies in the electoral laws. All elections held since 1999 to date have largely fallen below acceptable international standards, degenerating, as they had, from mere thuggery and hooliganism to large-scale irregularities and violence which have characterized the country's 'tortuous' journey to democratization.[4]

From available literatures and judicial decisions it is clear thatthere are issues with the existing legal framework which leads to lacunae and other deficiencies in the laws and regulations that gives rise to discretionary powers of courts. The way and manner the courts have exercised its discretionary powers particularly in election related matters leaves so much to be desired in that the decisions are not always judicial and judicious *UBA v. UKACHUKWU & ANOR*[5]. Judicial and judicious resolution of political disputes has always been a herculean task[6]. This is as a result of undue influence of politicians and overbearing meddlesomeness of the executive over the judiciary especially in Nigeria were the judiciary is not totally independent and the scope of corruption is endemic.

4(https://www.researchgate.net/publication/256428576_Consolidating_Nigeria's_Democracy_through_Effective_Management_and_Settlement_of_Electoral_Violence)
[5](2013) LPELR-22045(CA)
[6] S O Abdulfatai, 'Legal Implications of Judicial Review on Political Disputes' (2019) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, Vol. 10 (2), p. 85

The task of sustainable democratic system requires careful judicial decisions in matters that are highly political.[7] Election tribunal judges are expected to be wary, independent and courageous in applying the rule of law in order to give effect to the wishes of the people in a democratic election.

1.3 Aims and objectives of the Study

The aims of this research work are to identify and examine the legal effects of the exercise of judicial discretionary powers on the mandate of the people pursuant to deficiencies in the electoral laws and regulations with particular reference to the 2010 Act vis-à-vis the study of election petition tribunal decisions.

To this end, the work has the following objectives:

1. To identify and examine the effects and implications of judicial discretion on the mandate of the people
2. To identify and critically analyze the deficiencies in the Electoral Acts with special emphasis on the provisions of the 2010 Act.
3. To examine cases of misuse of judicial discretionary powers in Nigeria especially in electoral matters.
4. To articulate the amendments or reforms needed in the Electoral Act for effective justice delivery in electoral matters in Nigeria.

1.4 Research Questions

This research work attempts to answer the following research questions:

(a) How effective is the Electoral Act in regulating elections in Nigeria?

(b) To what extent does the discretionary powers of the court enhance effective justice delivery?

[7] A Left-wich, 'Two Cheers for Democracy' (1996) *The Political Quarterly*, vol. 67 No.4 .334

(c) To what extent has ambiguities in the Electoral Act influenced judicial and judicious exercise judicial discretionary powers?

(d) How will a comprehensive Electoral Act ensure effective justice delivery in electoral in electoral matters?

1.5 Scope and Limitations of the Study

The scope of this research work is on the examination of the legal effects of exercise of judicial discretion on the electoral mandate of the electorates in Nigeria based on the lacunae, ambiguities and other deficiencies in the Electoral Acts prior to and with particular reference to the Electoral 2010. The study examined the historical background and jurisprudence behind the setting up of election petition tribunals in Nigeria and reviewed some notable decisions of courts/tribunals in election matters.

On the limitations of the study, factually, research is done with the aim of gathering more information on a particular subject/topic. However, in the process of conducting the research, researchers, as in the instant case encountered some challenges. In academia, research is placed on the highest pedestal which demands that specific ethical guidelines must be observed with good sense when carrying out research of any kind. This researcher encountered problem with the usage of basic ethical guidelines particularly in the area of conflict of interest. On this point the researcher having lost his mandate at an Election Petition Tribunal struggled to remain objective and unbiased in the research work.

The adoption of doctrinal research methodology, though best suited for this research work, was uniquely challenging as it is more abstract and quite different from the other common research methodologies. The non-deployment of empirical research methodology led to many subjective conclusions.

Following the broken educational system and lack of proper record keeping of Nigerians, it is only normal to expect a library system that is not functioning well.[8]

Most of the libraries in universities in Nigeria including my current school provide minimal research materials (books, journals, newspapers etc.). In most cases they are old materials. Most of the libraries that are well equipped in Nigeria are private-owned libraries. All these compelled the researcher to spend more time visiting both public and private libraries for optimal access to relevant research materials.

Another important sources of data for this research is the Internet which, though there are numerous information therein, retrieving the volume of information needed for meaningful doctrinal research methodology as in the instant case expensive and time consuming. Additionally, the lack of a database of a comprehensive list of election petition cases and a compendium of previous Electoral Acts in Nigeria posed a serious barrier to this study.

Before the conclusion of this work, the Electoral Act 2010 was amended which brought about the extant Electoral Act 2022. The coming into effect of the current Electoral Act midway into this work will take a lot of shine off this study as future works on election related matters will mostly center on the 2022 Act. Unfortunately some of the findings and recommendations in this study was not considered during the debate for the recent Electoral Act Amendment Bill 2022 hence was not reflected in the amended Electoral Act 2022.

1.6 Significance of the Study

This research is significant in beaming its searchlight into the roles, institutional and systematic reforms needed for election tribunals to meet the ends of justice in the discharge of their duties. The work also identified and examined some of the lacunae in the Electoral

[8]https://www.ajol.info/index.php/cjlis/article/view/68233

Acts in Nigeria generally and the 2010 Act particularly which have been the subject of exploitation by courts and litigants contrary to the general mandate of the people.

In the final analysis, this work is intended to guide future researchers, academics, jurists, policy-makers and the general public as regards electoral issues.

1.7 Summary of Related Literatures Reviewed

Premised on the overwhelming importance of credible and acceptable dispute resolution generally and election related ones in particular, several scholars, law teachers' political scientists etc., have researched on related topics. Some of such works considered in this study made their arguments and submissions in accordance with their orientation, discipline, background and personal biases etc. Dr. C E Aduaka worked on judicial discretion and its application under the Nigerian legal system on a general note. The work looked at exercise of discretion as an act or deed on the personal judgment of the person exercising it and in accordance with his conscience and should be free from and unfettered by external influence or suggestions. It defined judicial discretion as the exercise of judgment by a judge or court based on what is fair under the circumstance and guided by the rules and principles of law. To Dr. C E Aduaka, every discretion be it judicial or judicious must be based on prudence, rationality, sagacity, astuteness, considerateness and reasonableness. These principles were enumerated in the following cases **Akinyemi v Odu'a Investment Co Ltd [9], University of Lagos v Aigoro [10] , Onuorah v Okafor [11] ,Ekwuno v Ifejika [12] and Egbunike v Muonweokwu[13]**

Dr. C E Aduaka views discretion as being akin to judicial-law making and queries the constitutionality or otherwise of it. Bearing in mind the provision of Section 4 of the 1999

[9](2012) 17 NWLR pt. 1329, p.609
[10](1985) 1 NWLR 1 p143
[11](1983) 2 SCNLR 244
[12](1960) SCNLR 320
[13](1962) 1 SCNLR 97

Constitution of Federal Republic of Nigeria (as amended) which assigned law-making functions to the legislature and dolls out the principle of separation of powers in practice. He is of the opinion that it may be an encroachment for the judiciary to purport to exercise law making powers. He further advised on the need to maintain a balance between judicial creativity and judicial tepidity (a consequence of rigid adherence to precedent, or literal interpretation, that may result in injustice to those who seek refuge in the alter of justice) as a way of avoiding judicial recklessness which can arise if judges were given unfettered power to exercise their discretion in cases before them.

On what constitutes judicial and judicious discretion the study relied on the decision in the case of **African Continental Bank Ltd v Nnamani [14],** where it was held that the exercise of the court's discretion is said to be judicial if the judge invokes the power in his capacity as judge qua law. In other words, an exercise of a discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes. On the other hand, an exercise of a discretionary power is said to be judicious if it carries or conveys the intellectual wisdom or prudent intellectual capacity of the judge as judex. In this second situation, the exercise of the discretion must be replete with such wisdom and tenacity of mind and purpose. The exercise must be based on a sound and sensible judgment with a view of doing justice to the parties. Here, the judge's disposition about life is brought to play and his mindset and view about life as he has to use his discretion prudently in the absence of any guiding principle where the law is silent: **Offor v State[15]**

In criminal cases, Aduaka pointed out that judges exercise enormous discretion; from the commencement of the trial to the end, prominent of which is in the grant of bail and

[14](1980) JELR 33940 (SC)
[15](2012)18 NWLR pt. 1333 p421

sentencing. He relied on the decision in the case of **Ali v COP** [16]. Where Anyebe, J held that: "Granting of bail pending the determination of an appeal before this court is, under Section 34(2) of the Criminal Procedure Code upon which this application is founded, a matter of unfettered discretion of the court bearing in mind that where a judicial discretion if to be exercised, it is to be done according to the rules of reason and justice, not arbitrary, vague and fanciful, but legal and regular". He admitted that the exercise of discretion upon known facts involves the balancing of a number of relevant considerations upon which opinions of individual judges may differ as to their relative weight in a particular case. But that will not necessarily affect the justness of the exercise of the discretion, so long as the facts are available and reasonably appreciated.

The work by Dr. C E Aduaka focused on judicial discretion generally concentrating on its meaning, what constitutes it and types with few references to certain issues of criminal matters without making any reference to its effects on electoral matters in relation to the deficiencies in the electoral laws and regulations. The omission has created the need for this work. This research agrees with his submission that whichever of the two approaches in exercise of discretion, be it judicial or judicious, the exercise must be based on a sound and sensible judgment with a view to doing justice to the parties. His description of judicial discretion as the exercise of judgment by a judge or court based on what is fair under the circumstance and guided by the rules and principles of law is not all encompassing bearing in mind that not all exercises of discretion are guided by rules and principles. This work also preferred the use of a conjunctive word 'and' between judicious and judicial approaches as it relates to discretion. Having agreed with part of his submission on judicial discretion, this work however further probes the exercise of judicial discretion in relation to election petition tribunals with a view to ascertaining its effect on the mandate of the voters.

[16](2002) JELR P44479 CA

Professor Wendy Lacey[17], Worked on the use of international human rights law by judges in the exercise of their discretionary powers. She opined that while resort to international law as an aid to the development of the common law, the interpretation of statutes, and the exercise of administrative discretion has been widely considered, the relevance of international standards to judicial discretion has not. In reflecting upon the development in Australian jurisprudence, she considered the decisions of three judges. These are: Justice Kirby[18], Justice Perry[19]and Justice Miles.[20] She discovered that Australian case laws points to the emergence of a new development in the use of international human rights law by judges in the exercise of their discretionary powers. This is a positive application of discretionary powers which this research aligns with.

Professor Wendy Lacey[21]noted that Judicial discretion is exercised when a judge is granted a power under either statute ('statutory discretion') or common law that requires the judge to choose between several different, but equally valid, courses of action. This is a very narrow view of the meaning and purport of judicial discretion. The leading authority in this regard is ***House v The King***[22]This case also established that appealable errors committed in the exercise of a discretion include: acting upon a wrong principle; allowing extraneous or irrelevant matters to guide the discretion; mistaking the facts and failing to take account of a material consideration. However, it will not be enough that the appellate court would have exercised the discretion differently.

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[17]Lacey, Wendy "Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere" [2004] MelbJlIntLaw 4; (2004) 5(1) Melbourne Journal of International Law 108)

[18]Justice of the High Court of Australia and former President of the New South Wales Court of Appeal),

[19]Justice of the Supreme Court of South Australia

[20]Former Chief Justice of the Supreme Courts of the Australian Capital Territory and Justice of the New South Wales Supreme Court

specifically on construing the words in statutes according to accepted principles regarding the use

[21]ibid

[22] (1936) HCA40-55CLR499

Instead, the discretion must involve an error of law which has led to 'an unreasonable or plainly unjust' result, or has involved a 'substantial wrong', before the discretion will be taken to have been improperly exercised by the lower court.

One of the Justices of the Supreme Court of South Australia, Justice Perry, since 1996 has made several references to the role of international human rights law in the exercise of various judicial discretion. His approach has, however, focused of international law.

The principal case of relevance is the decision in **Walsh v Department of Social Security** [23]**.** In that case, both parents of three children had been convicted of social security fraud and sentenced to terms of imprisonment. Each of the three children suffered from chronic asthma for which they were regularly hospitalized and whose medication had always been administered by their mother. An appeal was made against the harshness of the custodial terms, and the manner in which the sentencing discretion was exercised. The particular ground of relevance was whether the sentencing Magistrate had erred in not considering or inadequately considering whether a conditional release order should be made pursuant to Crimes Act[24]. Justice Perry held that each sentence was well within the sentencing discretion. However, his Honour then continued:

> the case has one unusual feature not present in any of the various cases to which counsel made reference during the course of their submissions. That is, that the sentences, both of which were to be served forthwith, would result in three young children, the youngest only just two years of age, being separated from both of their parents during the period of their imprisonment.

[23](1996) 67 SASR 143
[24]Section 20 of the Crimes Act 1914 (Cth)

After considering the fact that all three children were asthmatic, regularly hospitalized and dependent on their mother for receiving their medication, Justice Perry further held: In this case, it was particularly important that the learned sentencing Magistrate have regard to the combined effect of the sentences imposed upon both appellants upon the welfare of their dependent children. Common law principles of sentencing would compel consideration of that consequence. The need to have regard to that factor is referred to expressly in the *Crimes Act*,[25] which lists the various matters which the court must take into account in determining the sentence to be passed. One of them is the probable effect that any sentence or order under consideration would have on any of the person's family or dependents'. Various international instruments which have been entered into by Australia emphasize the protection by the society and the State of the family as the natural and fundamental group unit of society, and preservation of the rights of the children. Although such international instruments do not form part of Australian law, they serve to underscore the importance of provisions such as the Crimes Act[26], which where possible, should be construed and applied consistently with them. Justice Perry considered that, in the **Walsh v Department of Social Security**,[27] the provision was clear and unambiguous in its terms, and on the words of the section alone, the sentencing magistrate had clearly erred in exercising the discretion. Thus, resort to international instruments was unnecessary, and the mother's sentence was changed to a conditional release order On the assertion by Professor Wendy Lacey on the justifications for appellate courts to review discretionary decisions of trial courts, this study considers the lack of exercise of discretion judicially and judiciously as some of the reasons to warrant review of discretionary decisions of trial court De Smith[28].in his own work

[25]Section 16A(2) of the Crimes Act,

[26] Section 16A(2)(p) the Crimes Act

[27](1996) 67 SASR 143))

[28]De Smith (De Smith's Judicial Review of Administrative Action (Stevens & Sons, London, 1959))

defined discretion and differentiated it from duty. De Smith defined the legal concept of discretion as an implied power to make a choice between alternative courses of action, and if only one course can be adopted, it is not the exercise of discretion but the performance of a duty". Discretionary decisions are those where the judge has an area of autonomy, free from strict legal rules, in which the judge can exercise his or her judgment in relation to the particular circumstances of the case[29]. **Keith Hawkins** in his work observed that, **"***Discretion is 'the space … between legal rules in which legal actors may exercise choice"***.** He further observed that in speaking of autonomy and choice, *The tendency for judges to develop guidelines regulating the exercise of discretion was rationalized by Brennan J in Norbis v Norbis*[30]However, it must be acknowledged that the exercise of discretion is usually limited by guidelines or principles, or by reference to a list of relevant factors to be considered. While discretion permeates both the common law and many, if not most, statutory instruments, discretionary powers are never absolute and must also be exercised within a broader legal and social context[31].

Carl Schneider[32], researched on the tension between rules and discretion in family law. He observed that there is an unremitting struggle between rules and discretion. That the tension between these two approaches to legal problems continues to pervade and perplex the law today. Perhaps nowhere is that tension more pronounced and more troubling than in family law. It is probably impossible to practice family law without wrestling with the imponderable

[29] https://www.pljlawsite.com/2009art15.htm

[30] 1986) 161 CLR 513, 536 ('Norbis'): '[While an unfettered discretion is] a versatile means of doing justice in particular cases … unevenness in its exercise diminishes confidence in the legal process'

[31] *For an analysis of the professional and institutional (eg, non-legal) restraints upon the exercise of discretionary powers by judges, see Hawkins, 'The Use of Legal Discretion', above n 10, 38; Torstein Eckhoff, 'Impartiality, Separation of Powers, and Judicial Independence' (1965) 9 Scandinavian Studies in Law 9, 33; Lord Hodson, 'Judicial Discretion and Its Exercise' (Presidential Address at the The Holdsworthy Club of the Faculty of Law, The University of Birmingham, Birmingham, UK, 1962), 14–15; Lord McCluskey, Law, Justice and Democracy (1987) 9; Carl Schneider, 'Discretion and Rules: A Lawyer's View' in Hawkins, 'The Uses of Discretion', above n 10, 47, 80–1*

[32] *(Schneider, Carl E. "The Tension between Rules and Discretion in Family Law: A Report and Reflection." Fam. L. Q. 27 (1993): 229-45.)*

choice between rules and discretion. He remarked, "Limitations on discretion are as inevitable and abundant as the sources of discretion … discretionary decisions are rarely as unfettered as they look"[33]. This study differs in opinion from the assertion of this literature in that the study opined that not in all cases that exercise of discretion are within legal or procedural framework. After all the primary purpose of discretion is to bridge legislative and procedural gaps. Dr Alfred Abhulimhen-Iyoh [34] In his work defined judicial discretion as the power or right to make official decisions using reason and judgment to choose from acceptable alternatives.

Davis, Kenneth C[35]. He alerted that judges as human beings are prone to human weaknesses. Hence, whenever the courts are exercising their judicial discretion on matters before them, the outcome of such actions cannot be totally free from the personal prejudices, whims and caprices of the "judge". To him the law is ultimately a product of what a judge deems right under different situations. He submitted that the exercise of law is completely a product of the judicial discretion of a judge. Under the criminal justice system, he opined that judges are often able to exercise a degree of discretion in deciding who will be subject to criminal penalties and how they will be punished.

He concluded that "in spite of several challenges, judicial discretion remains one of the viable options available to "judges" in exercising the law in Nigerian courts in relation to criminal matters. The law regulates society and conflicts therein. Courts are created by the law as the last hope of the common man to obtain redress, when his rights are trampled upon

[33] *ibid*

[34] A Abhulimhen-Iyoh, 'Judicial Discretion of Judges in Criminal Cases in Nigeria: Prospects and Challenges'
(2015) available at https://vdocuments.net/judicial-discretion-of-judges-in-criminal-cases-in-nigeria-lawandprocedurenigeria.html <accessed on 1st February, 2022>

[35] Davis, Kenneth C (1971). Discretionary Justice: A preliminary inquiry Champaign, Illinois University of Illinois P5

in reality, the law is what a judge says the law is, partly or entirely connected with his social environment, economic condition, personality thought, emotion, interest, and psychology. The reasons for giving "judges" judicial discretions are to cater for unforeseen situations in the course of adjudication and to prevent unnecessary outcomes procedurally. From the above, it is clear that judicial discretion, which the courts exercises, no matter how logically designed and its procedures are, may be abused, and completely utilized to prevent justice"[36]. The work focused on an evaluation of the prospects and instances of judicial discretion by judges in criminal matters. Thus, his research is narrow and restricted. However, this study intervenes with a broad based research on judicial discretion especially in relation to the Election Petition Tribunal in Nigeria mindful of the fact that until we get our electoral processes right other aspects of our system will remain defective. . On his own study, A. A Kana [37] studied Perspectives and Limits of Judicial Discretion in Nigerian Courts. His work although wider than the study of Dr. Alfred and Aduaka, focused on the exercise of judicial discretion in issues of bail, sentencing and injunctions without any reference to the Electoral Acts which the present study beams its search light on. The point of note here is that unless and until our electoral system and the consequent electoral dispute resolution mechanisms are right other spheres of our lives will remain defective.

Generally, in this intervention, this research fills the gap in knowledge with respect to a holistic review or evaluation of the legal effects of judicial discretion on the mandate of the electorates in a democratic Nigeria the lacunae in the Electoral Acts particularly the 2010 Act.

[36]Paquette, J. and D. Allison (1997) a Decision-Making and Discretion: the Agony and Ecstasy of law and administration" Education and law journal 8 (September): P 161.

[37] A A Kana, 'Perspectives and Limits of Judicial Discretion in Nigerian Courts'(2014) Journal of Law, Policy and Globalization, ISSN 2224-3259 (Online) Vol.29, 2014

1.8 Theories of Judicial Discretion and interpretation.

The judiciary is the branch of the government that is assigned the duty of interpreting laws made by the legislature and settling disputes. The primary interpretive role of the judiciary is to discover the intentions or purposes of laws as enacted by the legislature. In the discharge of its functions, the court uses different interpretation approaches such as literal, golden, mischief and purposive. Equally, it may call in aid some canons or instruments of interpretation. This forms the basis for the inherent and discretionary powers of courts.

Scholars are divided as regard the best approach which courts are to adopt in other to give effect to legislative intentions. There are justifications for these disparities. First, statutes are usually written in general terms required to be applied to a particular case. Secondly, the meaning of words used in legislation depends on the context, time and place and might change over time[38]. For these reasons and many more, the legislature may enact a statute in general terms, enough to cover unforeseen situations.[39] Also, vague or equivocal words used in a statute might be the result of a compromise from the legislature to the courts to give it the interpretation that will best execute the policy priority.[40] H. L. A. Hart illustrated the challenges of legislative provisions and the need for statutory interpretation.

There are many theories of statutory interpretation such as textualism, purposivism and intentionalism. The major ones are textualism and purposivism. Both theories agreed that the primary function of the judiciary is to faithfully interpret statutes enacted by the legislature in an effort to discover the legislative intentions in them[41]. By so doing, they recognized the legislative supremacy of the legislature as the organ of government that is assigned the

[38] VC Brannon, *Statutory Interpretation: Theories, Tools and Trends*, (Congressional Research Service, 2018) 1.

[39] 30 *ibid*, p. 1 & 2

[40] *ibid*.

[41] *Ibid,* p.10 [34]

primary duty of making laws. However, they disagree with each other on the best approach to discovering the actual or objective legislative intent [42]

The proponents of purposivism argue **"***that legislation is a purposive act, and judges should construe statutes to execute that legislative purpose"*[43]. They focus on legislative process, having regards to the problem that the legislature was trying to solve by enacting the contested legislation and inquiring how the statute achieved that goal[44]. Henry Hart and Albert Sack advocated for the *"benevolent presumption… that the legislature is made up of reasonable men pursuing reasonable purpose reasonably*[45]**".** However, they noted a caveat to the effect that the presumption should not hold if the contrary is proved to appear in the text of the statute[46]

The purposive theorists believe that judges can best observe legislative supremacy by paying attention to the legislative process. They argued that to preserve the integrity of statutes, courts should pay attention to how the legislature makes its purposes known through text and other materials that consist of legislative history.[47]They believe that when courts interpret legislations in ways that respect what the legislatures consider their work product, the court not only is more likely to reach the correct result, but also promote comity with the first branch of government[41]. They also rely on policy context and other evidence which a reasonable person who is conversant with the circumstances informing the statute as suppressing the mischief and advancing the remedy. However, purposivism has been criticized on the ground that it is likely impossible to find one shared intention behind any legislation and it will be improper for judges to endeavor to find legislative purpose since

[42]*Ibid,* pp.10 & 11
[43] RA Katznann, *Judging Statutes* 31 (2014) cited in VC Brannon, *ibid*, p. 11.
[44] Henry Hart & Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1182 (William N Eskridge, Jr & Philip P Frickey eds, 1994)
[45] ibid
[46]VC Branon, *op cit*, p.11
[47]Ibid p 13

they are not well- equipped to understand how complex legislative processes bear on the final law enacted by the legislature.

On the other hand, the textualists focus on the words of a statute with an emphasis on text over any unspecified purpose[48]. They argue that courts should focus on reading the words of the statute as any ordinary member of the legislature would have read them. They seek for the meaning that a reasonable person would gather from the text of the legislation when placed alongside the remaining body of the legislation [49]

The textualists look at the structure of a legislature and hear the words as they would sound in the mind of a skilled and objectively reasonable user of words [50] They believe that court best respect legislative supremacy when they follow rules that prioritize the statutory text[48]. They focus on the words of statute because it is that text that survived political processes.[51] However, textualism is criticized on the ground that it is overly formalistic in approach to determining the meaning of a legislative text which ignores the fact that courts have been delegated interpretive powers by the Constitution[52].

There is also the hybrid (convergence) theory of statutory interpretation. The hybrid theorists do not necessarily identify themselves as belonging to either purposivism or textualism. Instead, they consider both theories and decide which of them will best achieve the intention of the legislature. They believe that the starting point of any legislation is the text[53].

There is another theory regarding the mandate of the people which is called classical elitism. The classical elite theory articulates that every society has a ruling minority that controls

[48]John F. Manning Columbia Law Review Vol. 106, No. 1 (Jan., 2006), pp. 70-111 (42 pages) Published By: Columbia Law Review Association, Inc. https://www.jstor.org/stable/4099461<accessed on 5th January, 2022

[49]https://www.everycrsreport.com/reports/R45153.html<accessed on 5th January, 2022

[50] ibid

[51] Ibid.48

[52]*ibid*

[53]*ibid*

power.[54]While modern elites subscribe to this assumption, their concern is its sustainability which is only achievable through new elite recruitment.[55] The theory originates from works of sociologists such as Weber[56], Michels[57], Pareto[58] and Mosca[59]. Thus, the elite have been defined as a distinct group with access to resources.[60] Although small in number they are the most powerful and influential people in a system.[61]

However, opinions are divided on elitism. There are two major views on elitism. The liberal pluralists emphasize exclusive preservation of power for the elite. They also posited that changes are likely to happen over time. On the other hand, the Critical Elite Perspective focuses on elite power concentration and cohesiveness, leading to resistance to change and limited openness and inclusiveness.[62]

Elitism is very much concerned with structures, especially authority structure.[63] Arguably, despite all the criticisms against the elite theory, it remains relevant in explaining not just power relations and control in a polity but also helps to understand a country‘s leadership formation. Democracy is elite-driven where majority are ruled by a minority in an endless circle. Thus, modern democracies are tantamount to elite domination. G. Mosca posited that

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[54] R Lopez-Pintor, ‘Mass and Elite Perspectives in the Process of Transition to Democracy’ (1987) in Enrique A. Baloyra (ed.) Comparing New Democracies. Boulder, CO: Westview Press, p.16

[55] E O Oni, ‘The Politicisation Of Election Litigation in Nigeria’s Fourth Republic’ (2020), being a thesis submitted in fulfillment of the requirements for the Award of Degree of Doctor of Philosophy in Political Science, School of
Social Sciences, College of Humanities, University of KwaZulu-Natal, Pietermaritzburg, South Africa, p 33

[56] M Weber, *Economia y Sociedad*. Mexico DF: Fondo de Cultura Económica (2005)

[57] R Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Democracy*. New Brunswick, NJ: Transaction Publishers. (2009)

[58] V Pareto, *The Mind and Society.* London: Jonathan Cape Limited. (1935)

[59] G Mosca, *The Ruling Class.* New York: McGraw-Hill. (1939)

[60] *ibid*

[61] Hossain, N. and Moore, M, Arguing for the Poor: Elites and Poverty in Developing Countries', (2002). IDS Working Paper, Brighton: Institute of Development Studies, No. 148.

[62] E M Olsen, *Sociopolitical Pluralism*, Westview Press. (1993)

[63] Lopez-Pintor, R. "Mass and Elite Perspectives in the Process of Transition to Democracy." in Enrique A. Baloyra (ed.) Comparing New Democracies. Boulder, CO: Westview Press. (1987).

democracy could be government of the people, and for the people, but it could never be government by the people.[64]

In elite theory, small groups of individuals in the state are both powerful and influential, and they rule the state. Scholars have acknowledged the impact of elitism in explaining political behaviour and the outcome in the polity. For some scholars, the existence of elites are required to make democracy work as elites are more committed to democratic values than the rest of the society.[65]

It is argued that the choices of the elite determine democratic stability in transiting political systems.[66] Rovira[67]examined how a group of elites upstages another while attempting to replace an existing system. According to him, the elites conceive democracy to be a two-edged sword that supports as well as is guilty of its success in practice. He submitted that, irrespective of the different approaches, the political setback in a region (country) is traceable to the activities of the elite[68].

Furthermore, Higley[69] argued that democratic transitions and breakdowns can best be understood by studying basic continuities and changes in the internal relations of national elites.

In the African setting, the study of elites within institutional settings can aid understanding the day to-day realities of African politics. The views of scholars on elite in democracy and their hold on political institutions have proved to have influential role in African state politics. An important area of elite power on the African continent has been their

[64] G Mosca,, *The Ruling Class*. New York: McGraw-Hill, (1939) p. 13
[65] R Dahl, On Democracy. New Haven: Yale University Press (2000), p. 23
[66] G O'Donnell & C Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*. Baltimore: Johns Hopkins University Press. (eds.) (1986), p. 46
[67] Róvira, K. C., 'Towards a Historical Analysis of Elites in Latin America'. In *21st WorldCongress of Political Science, Santiago, Chile,* (2009). pp 12–16.
[68] *ibid*
[69] Higley, J and Burton, M, *Elite Foundations of Liberal Democracy*. Lanham: Rowman and Littlefield (2006)

unquestioned and unrivalled role in the policy process. In the discussion on development strategies, among the three main perspectives on the role of elites in the policy process are donor dominance, political dominance over technocracy, and the emergence of non-state (economic and civil society) actors as players in the policy process. On the role of elites in policy processes, by using the prevalence in the Nigeria context, early research of the 1960s on the nature of the elite in Nigeria adopted a Weberian legal-rational approach to political elite change. J I Ibietan[70] opined that successive governing elites in Nigeria assimilated the predatory and exploitative attributes of the colonial administrators and, therefore, fall short of providing democratic dividends through good governance. Despite the fact that it is inconceivable to have democracy without elections, the nation's general elections after six attempts have not yielded needed result. In the Nigerians' Fourth Republic, it is discerned that the inability of the nation's electoral umpire to conduct free, fair and credible elections made it very easy for the political elites to forcefully impose incompetent candidates who now occupy the nation's leadership position. It is appropriate to conclude that this development has marred the country's democracy as well as caused incessant government legitimacy crises.[49] Furthermore, legitimacy crisis has been attributed to the nation's elections which are prone to violence that are easily orchestrated by elite in consolidation of their position in power. That is, instituting and cementing their existence in the nation's electoral system and polity at large in any electoral exercise. This is perhaps why Osaghae argued thus:

> In civilian dispensation, most business personalities join the party in power to gain access to contract and other forms of accumulation… All these explain the desperation and opportunism with which political power is sought and used…

[70] J I Ibietan, & O O Ajayi, 'The Governing Elite and Democratic Consolidation in Nigeria: An Appraisal of the Fourth Republic'(2015) *Journal of Human and Social Science, Vol. 6:1Research*, 14-21. [49] E O Oni, *Op cit.*, p 46

> reliance on patronage networks for retention of political power and legitimacy means that any segment of the elite… which loses control of political power at the federal, state or local level, loses the wherewithal to compete for power. This is the major explanation for the warlike approach to election.[71]

The observations of Osaghae are in order with some of the definitions of politics. David Easton defined politics as the authoritative distribution of resources[72].

Harold Lasswell defined it as who get what, how and when[73]. Similarly, Prof. Okwudiba Nnoli,[74] defined it as the allocation, consolidation and use of state power.

In the study of the electoral violence and the challenge of democratic consolidation in Nigeria, Ashindorbe[75] found out that the division of the elite along ethno-religious and regional lines has led to questionable elections trailed by violence and fatalities, which have frequently threatened democratic consolidation in Nigeria. The implications of this assertion are that the nascent democracy in Nigeria is plagued with myriad of intrigues, discordant opinions and selfish interests of the political class. The reason is not farfetched. Every divide of the political class sees its manifesto and plans of action as the best for the citizenry. They elbow each other in the process of garnering political recognition and vibrancy. Their unhealthy rivalry only heat up the polity and derail the country's democratic consolidation. Some school of thought argue that dissenting voices amongst the political class are necessary

[71] E Osaghae & Suberu, 'A History of Identities, Violence and Stability in Nigeria' (2005), Centre for Research on Inequality, Human Security and Ethnicity, CRISE Working Paper, (No. 6)

[72] *https://www.google.com/search?q=David+Easton+definition+of+politics&oq=David+Easton+definition+of+politics&aqs=chrome..69i57j0i512j0i8i30j69i60j69i61.14778j0j4&client=ms-android-samsung-gs-rev1&sourceid=chrome-mobile&ie=UTF-8#sbfbu=1&pi=David%20Easton%20definition%20of%20politics*

[73] *www.britannica.com/biography/Harold-Lasswell*

[74] Professor Nnoli is a former president of AAPS, and Executive Director of PACREP, Enugu,NigeriaDOI: 10.4314/ajps.v8i2.27352)

[75] Ashindorbe, K., Electoral Violence and the Challenge of Democratic Consolidation in Nigeria. (2018) 74(1):. *India Quarterly: A Journal of International Affairs*, 92-105.

since a democratic process would never be devoid of antagonism and democracy would never thrive on rational consensus. [76]

In a similar vein, it was found out that the politics of godfather-godson of the elites have negatively affected the political development of the state.[77] The study concluded that such role has led to inter-party and intra-party carpet-crossing, decamping and conflicts among the party members.[78] In line with this, an assumption of elite theory that power can only be shared among the elites at the expense of the masses, whether they like it or not, resonates with the Nigerian experience. In fact, the configuration of political power in Nigeria has been distorted as the exclusive preserve of the elite, and not the people.[79] This generally leads to mass apathy. For instance, in Nigeria with a population of over 200 million people with about 45 to 50 percent of eligible voters or more, the general turn out of eligible voters during elections are not up to 50 percent of the eligible voters. There are reasons for this political apathy which G Mosca rightly described in his definition of democracy as the government of the people, and for the people, but it never be government by the people.[80] A good example can be seen in the case of *Amaechi v INEC*[81]where the court declared Amechi the winner of the election that he did not participate in from the campaign to the final declaration of the election result. In that case, Celestine Omehia held the flag of PDP from the primaries till the election result was declared. The court held that the votes where casted for the party and not the candidate. This decision raises a serious question of the utter neglect of the personality of the candidates. By so declaring the political party as the winner, the

[76]Democracy: Its Meaning and Dissenting Opinions of the Political Class in Nigeria: A Philosophical Approach.
[77] A M Ali, *et al*, 'A. Determinant and Impacts of Politics of Godfatherism and Regionalism in the Yobe State' (2019) Journal of Liberty and International Affairs, Vol. 5(1), pp 59-74.
[78]*ibid*
[79] K.O.O. Emecheta, 'Power to the People: An Inverse Role in Nigeria's Politics and Governance' (2016) *International Journal of Area Studies*, Vol. 11(2), 83-102.
[80] G Mosca,, *The Ruling Class*. New York: McGraw-Hill, (1939) p. 13
[81] (2008) LPELR-446(SC)

court made a very hasty generalization that the personality of the candidates is immaterial. This researcher observed that generalization from an inductive reasoning is erroneous. For instance, a loyalist of a particular political party may prefer the candidacy of a rival political party in some certain political position and be poised to cast votes for that person. Similarly, it is the political party that chooses the flag bearer which they present to the general public for election. Most often, political party candidacy revolves around the circle of the elites who had no room for the change of status quo. The current trend in Nigeria where politicians rotate political positions to themselves is a good illustration. We saw the same people who were once governors, senator and so on, alternating the positions after another in that circle. This left the general public with a passive or choiceless (empty) choice since they must choose between the options that are presented by the political parties which are also dominated by the elites.

1.9 Historical background of Electoral Reform in Nigeria with particular reference to the Electoral Act 2010.

Nigeria history of electoral reforms pre-dates her independence. As a matter of fact it is a continuous exercise. It is arguable that electoral reforms, particularly the Electoral Acts, are synonymous with election cycles/transition in Nigeria. Until 1998 when Independent National Electoral Commission (INEC) was established as part of the transition process that ushered in the 4th Republic in 1999 each transition programme was accompanied by electoral reforms. Since 1999, three electoral reform processes have taken place.

Worthy of note is that the transition elections in 1998 that ended with the 1999 state and national elections were conducted within the framework of the transitional decrees issued by the military regime. The power for legislating for the peace, order or good government of the country became vested on the National Assembly. Hence all subsequent Electoral Acts were

enacted by the National Assembly. There was no electoral legislation in place at the time. The 2001 Electoral Act was the first Electoral Act after the commencement of the fourth republic. For obvious reasons the bill was largely driven by the National Assembly and the process became subject of political and legal controversies. The Act was contested in court by Abia State Attorney General on the basis that it had bearing on local government elections which were within the powers of the State Independent Electoral Commissions. The court ruling on the matter led to a repeal of the Act, leading to the drafting of another bill that had inputs from Independent National Electoral Commission, INEC, as opposed to the first process that was driven by the National Assembly. The bill was passed into Law as the 2002 Electoral Act. Once more the new law became subject of legal challenges as INEC contested the powers of the National Assembly to determine the order of elections. Political parties also challenged the Act on the basis that the criteria for registration of political parties as provided in the Act violated the rights and freedoms enshrined in the Constitution[82].

These court cases led to an amendment of the 2002 Electoral Act that was thereafter passed as the 2003 Electoral Act.

After the 2003 elections, INEC undertook a post-election review exercise and conducted stakeholder consultations at the regional and national levels. International organizations were also part of the process[83].It played a key role in the processes that led to the passage of the 2006 Electoral Act.

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[82] <http://www.chr.up.ac.za/index.php/browse-by-subject/413-nigeria-independent-national-electoralcommissionandanother-v-musa-and-others-2003-ahrlr-192-ngsc-2003.html>accessed on 21st January, 2022

[83]<http://aceproject.org/ero-en/regions/africa/NG/ertreport/ that culminated in the drafting and submission of the 2005 Electoral Reform Bill to address the gaps in the previous legislation and the challenges experienced during the 2003 elections> accessed on 21st January, 2022

In the aftermath of the 2007 elections which were regarded as non-compliant with international standards by international observers, Eueom[84]and admitted by President Yar Adua in his inaugural speech,**[85].** Electoral Reform Committee (ERC) was established by the President to make proposals for electoral reforms. The Committee was headed by Justice Uwais, a former Chief Justice of the Federation and comprised of 22 members including amongst others retired electoral commissioners, civil society actors, retired senior police officers. Critical stakeholders including INEC made a submission to the ERC and contributed to its work by providing relevant documentation and clarifications as required. The report of the ERC was submitted to the Executive in December 2008. Furthermore, INEC submitted proposals for amendment of the electoral legislation ahead of the 2011 elections to the National Assembly to harmonise the electoral legislation with the amended constitution and provide more time for voter registration.

After the 2011 elections, INEC conducted post-election review activities including an independent post-election audit that culminated in its submission of proposals for amendment of the electoral Act[86]

1.9.1 The 2001 Electoral Bill

The process of enacting the Electoral Acts usually signals the start of the electioneering process in Nigeria. Public debates over the content of the Act usually take center stage in public discourse as parties and candidates mobilize to ensure that their interests are catered

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[84] Eueom, Nigerian Final Report General Elections April 2012 <http://eeas.europa.eu/eueom/pdf/missions/finalreportnigeria2011_en.pdf> accessed on 21st January, 2022

[85] B Oyekami (2013) 'The Politics of Electoral Reform in Nigeria' Covenant University Journal of Politics and International Affairs (CUJPIA) vol. 1. No.2. pp 258- 259. Also available at http://journals.covenantuniversity.edu.ng/cjpia/published/Babatunde.pdf> accessed on 21st January, 2022

[86](https://tribuneonlineng.com/inec-proliferation-political-parties-case-many-cooks/)

for. The first Electoral Act after the return to democratic rule in 1999 was the 2001 Act. Notably some sections of the Act were mired in controversy because they were perceived to have been smuggled into the document after the Bill had been passed by both chambers of the National Assembly. One of the contentious section of the Electoral Act.[87] which required new political associations seeking registration to secure at least 15 per cent of local council seats in two-thirds of the 36 states of the federation and the FCT before they could be registered as political parties. This action was challenged in many newspaper editorials and by the general public and was interpreted as an attempt by the ruling Peoples Democratic Party to muzzle opposition and to prevent a schism within the party. The 2001 Act also banned governors from standing for a third term of office. It was aimed at governors belonging to the opposition All Nigerian Peoples Party (ANPP) and the Alliance for Democracy[88]

This effort to shrink the political space through legal provisions failed when Gani Fawehinmi, human rights lawyer and presidential candidate of the National Conscience Party (NCP), joined other aspirants of some political parties in seeking a judicial interpretation of Section 222 [89]relating to the registration of political parties. 2001. The Act was repealed before it came into operation and replaced with the 2002 Electoral Act. It was the first legal framework governing the conduct of national, state level and local elections. It was therefore necessary for electoral laws to be passed. The 2001 Electoral Act was passed by the National Assembly.

The 2001 Act was repealed by the 2002 Act. The major changes in the new Act bordered on repeal of sections that referred to the conduct of local government elections by INEC as this

[87]section 80(1)(c) *Electoral Act 2001*
[88] (AD). *(Human Rights Watch, Testing Democracy: Political Violence in Nigeria, 10 April 2003, A1509, available at: https://www.refworld.org/docid/45d2f6992.html)*
[89]1999 Constitution of the Federal Republic of Nigeria

was constitutionally the mandate of the State Independent Electoral Commissions (SIECs). Essentially, their main duty remains that of organizing and conducting elections[90]. Stipulates the powers of INEC follows: to organize, undertake and supervise all elections to the offices of the President and Vice-President, the Governor and Deputy Governor of a State, and to the membership of the Senate, the House of Representatives and House of Assembly of each State of the Federation. The power excludes organizing elections into local government councils in the country. The power is separately granted to (SIECs) by the Constitution[91]the above provisions reveal that SIEC has a sole role of organizing and conducting elections into local government councils. This is unlike INEC that has the responsibility to organize and conduct elections at both federal and state levels.

Predicated, among others, on the controversy that surrounded the number of days required for publication of notice of elections, to reduce number of days required for parties to submit list of nominated candidates[92]. There was the urgent need to guarantee INEC's powers to determine the date and order of elections. Eventually a Bill to amend the 2002 Electoral Act was introduced at the National Assembly.

Electoral Act Amendment Act 2003 was passed[93].As stated earlier in this study the act of electoral reform cum Electoral Act amendment is a continuous one. Pursuant to the lapses observed in the 2003 general elections, the 2005 Electoral Reform Bill followed soon after the said general elections. Prominent among the changes introduced are powers to the Commission to appoint its Secretary, establishment of an

[90]Section 15 of the Third Schedule, (1999 Constitution of the Federal Republic of Nigeria*)*

[91](Section 3 Part II of the Third Schedule of the 1999 Constitution of the Federal Republic of Nigeria) makes provision for the establishment of SIEC.

[92](Act to regulate the conduct of Federal, State and Local Government Elections and to repeal the Electoral Act 2001 and for connected purposes.

[93] <http://resourcedat.com/wp-content/uploads/2013/03/Electoral-Act-Ammendement-Act-2003.pdf> accessed on 21st January, 2022

INEC fund to contribute to the Commission's fiscal independence, provide higher ceilings on campaign expenses, provide stiffer penalties for electoral offences, provide for continuous voter registration, restrained serving government officials from voting as delegates in party primaries, provide time limits to make changes to party nominees, some changes were also introduced to election petition processes. Subsequently, the 2006 Electoral Act was passed into law with some provisions of the 2005 reforms not taken into account[94].

1.9.2 Post 2007 elections

Once more and in keeping with the tradition of electoral reforms consequent upon the observed flaws in the preceding general elections Electoral Reform Committee was set up again after the 2007 general elections. The Report of the 2008 Committee included[95] :

1. Establishment of four different institutions to share the responsibilities of managing elections.
2. Abolish State Independent Electoral Commissions.
3. Judicial Council should be responsible for the appointment of the INEC Chairperson.
4. Appointment of an INEC Deputy Chairperson who should be of a different gender from the Chairperson.
5. Independent candidates should be allowed to run in elections.
6. Prohibit carpet crossing in the National Assembly.
7. New ceilings on individual donations to candidates.

The Committee's report formed the basis for the white paper that included proposals for constitutional reforms.

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[94] AN ACT TO REGULATE THE CONDUCT OF ELECTIONS IN THE FEDERAL, STATE, AND LOCAL GOVERNMENTS,
AND THE REGISTRATION OF VOTERS AND MATTERS CONNECTED THEREWITH, 2006 (HARMONISED).

[95] <https://groups.google.com/forum/#!topic/usaafricadialogue/X8bnWjpNShg>accessed on 21st January, 2022

1.9.3 Post 2007 elections

Constitution Amendment Bills (2009 & 2010)

The outrage and public outcry coupled with condemnation by the international and domestic observers necessitated, in addition to Electoral Act reforms, the alteration of the Constitution. Centrally, the below reforms were suggested:

1. Financial independence of INEC through the national consolidated fund.
2. Members of INEC not to be partisan.
3. INEC not subject to control in its administration and operations.
4. Change in timelines for elections.
5. Powers of National Assembly to make laws that enforce intra-party democracy and INEC to oversee party primaries.
6. New quorum for election tribunals.
7. Avoidance of tenure elongation as a result of re-run elections.

Eventually the 1999 constitution was altered twice before the 2011 elections.

1.9.4 Post 2007 elections

Electoral Act Amendment Bill 2010

The functional complimentary relationship that exists between the Constitution and the Electoral Act suggests that an amendment of one calls for an alteration of the other. True to this proposition the Constitution was altered twice after the 2007 and before the 2011 elections. The areas that received attention are as follows:

1. Provisions to speed up appeal processes by providing time limits for determination of appeals.
2. INEC empowered to de-register dormant political parties.
3. INEC empowered to monitor party primaries which are mandatory.

4. Outcome of party primaries can be appealed before the courts.
5. Proposal to bar political appointees from voting as delegates in party conventions.

1.9.5 Methodology

This research work employs the doctrinal methodology of study in the presentation and analysis of information gathered from primary and secondary source materials such as textbooks, articles and journals, opinion of scholars and internet materials. The choice of this methodology was because it focuses on legal concepts, principles and existing legal texts such as statutes, case laws and other legal sources. It also analyzes legal doctrines, their developments and applications. Also, historical and critical modes of research were employed in the examination of the research topic.

1.9.6 Synopsis of Chapters

This work is divided into five chapters. Chapter one is introductory in nature and comprises the background to the study, the statement of problem and research questions, the aims and objectives of this research work, the scope of the study, the significance of the study, the research methodology employed, the synopsis of chapter and definition of some key terms that are employed in the research and the, review of existing literature and gap in knowledge.

Chapter two undertakes an inquisition into the conceptual framework, historical background of Electoral Act amendments in Nigeria and theoretical framework.

Chapter three deals with the structure, institutions and instruments of election petition in Nigeria. It also looked at the statutory framework for election petition in Nigeria, courts and tribunals with jurisdiction in election petitions in Nigeria, grounds for election petition, filing and determination of election petition in Nigeria.

Chapter four discusses the exercise of judicial discretion powers in election petition cases in Nigeria, reviewed some of the lacunae in the Electoral Acts over the years and particularly the 2010 Act. It reviewed some notable judicial pronouncements which affected the mandate of the people, the chapter also considered how judicial and judicious are the exercise of discretionary powers by election tribunals.

The research work ended in chapter five with summary of findings, conclusions, recommendations and contributions to knowledge.

CHAPTER TWO

CONCEPTUAL FRAMEWORK

2.1. Introduction

Free and fair elections are the cornerstone of every democracy and primary mechanism for exercising the principles of sovereignty of the people.[1] Elections in Nigeria are regulated by regulations and laws especially the Electoral Act which available literature has shown to be replete with Lacunae and Ambiguities. A combination of the overwhelming importance of credible and acceptable elections in a democratic system of government and the fact that courts/tribunals must resolve disputes brought before it one way or another necessitates that they resort to their inherent discretionary powers in the face of lacuna or deficiency in the Electoral laws. For a better appreciation of the relationship between the legal effects of the exercise of judicial discretionary powers in adjudication of electoral disputes and sustenance of the Mandate of the People there is need to conceptualize the clarifications of key elements of the study by scholars, political scientists, law teachers and members of the bar and the bench. Thus, for ease of understanding, this chapter sieves out, clarifies and explains the keywords, terms and phrases that are predominantly used in the work. These include: Elections, Electoral Reform, Electoral Process, Mandate of the People, Legal Effects, Electoral Act 2010, Lacunae and Ambiguities, Discretionary Powers, Election Tribunals.

2.2 Election

Elections in Nigeria are governed principally by the 1999 Constitution of the Federal Republic of Nigeria (as altered), the Electoral Acts, and Independent National Electoral Commission (INEC)

Guidelines. Section 156 of the Electoral Act 2010 defined election thus: “Election means any

[1] Vanguard, February 13, 2009

Election held under this Act and includes a referendum. This circuitous definition of election leaves so much to be desired. Prior to the enactment of the Electoral Act 2010 the Court Nigerian Courts had in several cases pronounced upon the meaning of election. In *Ojukwu v Obasanjo*[2].the Supreme Court defined 'election' as **"...**the process of choosing by popular votes, a candidate for political office in a democratic system of government[3]**"**. The Court of Appeal in ANPP & *Anor V. Osiyi & Ors* held that the word "election" as used in Section 137 (1) (b) of the 1999 Constitution thus: "...the word "election" in Section 137(1)(b) means exercise of adult suffrage, which involves voters, materials for voting and supervision and counting of votes by electoral personnel.[4]".Similarly, in *Buhari v. Obasanjo*[5] the court held that, **"**the word 'Election' in the context in which it is used in Section 137(1) (b) of the 1999 Constitution means, the process of choosing by popular votes a candidate for political office in a democratic system of government."[5] The word "Election" is not restricted to the activities at the polling station on the day of an election. The process in an election starts from the voting by political party members to choose candidates to represent the political party at the ward level and the primaries up to the polling day when these political party candidates are presented by the political party to the electorate. In stressing that an election is not an event rather a process, the Court further held **"**An election covers all the activities in Part IV of the Electoral Act, 2006 from Sections 26 to 77[6]".

[2]*Ojukwu V. Obasanjo & Ors* (2004) LPELR-2400(SC)
[3]*supra*
[4] ANPP &*Anor V. Osiyi & Ors* (2008) LPELR-3781(CA)Per Niki Tobi, JSC (Pp 53 - 53 Paras D - E [5] (2005)2 NWLR (Pt. 910) p. 241
[5]*supra*
[6]*Lemachi & Anor v INEC & Ors* (2019) LPELR-48928(CA) Per Oyebisi Folayemi Omoleye, JCA (Pp 34 - 35 Paras E - A)

In *Amaechi & Anor v INEC*[7], the court stated as follows: "The Appellants, in my considered view, would however appear to be unaware that the meaning to be ascribed to the word "Election", is invariably circumscribed by the facts in dispute in any given case". Also in the case of *Oke v Mimiko*[8] wherein the Supreme Court dwelling on what "election" is, stated thus:

"On this vexed issue, I would want to hang for support on the case of *Abubakar v Yar'Adua*[9] in which "election" was defined thus: "Election is a process spanning a period of time and comprises a series of actions from registration of voters to polling."

Election is further defined as a formal group decision-making process by which a population chooses an individual or multiple individuals to hold public office[10].

It has been the usual mechanism by which modern representative democracy has operated since the 17th century. Elections may be used to fill offices in the Legislature, Executive, Judiciary Regional and Local Governments. This process is also used in many other private and business organizations, from clubs to voluntary associations and corporations.

The universal use of elections as a tool for selecting representatives in modern representative democracies is in contrast with the practice in the democratic archetype, ancient Athens, where the Elections were considered an oligarchic institution and most political offices were filled using sortition, also known as allotment, by which office holders were chosen by lot.

Election facilitates and shapes democracy. Democracy is regarded as the best form of government because its ideology promotes peoples' will. The people have political right to decide who should govern them in a free and fair conduct called 'election'. Therefore,

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[7] supra
[8] (2013) LPELR-21368(SC)
[9] (2008) 19 NWLR (Pt. 1120) 1 at 70 Per Ayobode Olujimi Lokulo-Sodipe, JCA (Pp 20 - 21 Paras D - B
[10]<https://en.m.wikipedia.org/wiki/Election> accessed on 21st January,
2022 [12]*ibid*

elections constitute an essential principle in liberal democracy. Election in a democracy is very important as it is the means through which the expression of the will of the people are shown via legitimacy and leadership succession. Accordingly, election has been defined as a post mortem that investigates the record of office holders whose actual performance may have little to do with promises made when they were previously elected. This is a way of censuring, reposing function in a ruler that is popularly accepted and ejecting an unpopular leader. This method shuns mutiny and chaos in a system hence it reflects peaceful hand-over from one administration to the other so long as the process is devoid of election rigging[11] Sadly, since the return of Nigeria to democracy in 1999, how many times have Nigerians had the opportunity to truly 'choose by popular vote' their candidates for political offices, with all the election manipulation, rigging and malpractice that occur? Out of six elections so far, Nigeria can possibly only boast of two credible Presidential elections, 1999 and 2015 – two of out six – 33.3%. This is not a good score or report. [12]

2.3 Electoral Reform

Electoral Reform describes the process of introducing fair electoral systems where they are not in place, or improving the fairness, effectiveness, credibility or sanctity of existing systems[13].

2.4 Electoral Process

Electoral Process was judicially defined in the case of *NDP v INEC*[14] as "the method by which a person is elected to public office in a democratic society."

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[11]<Journal of Education and Practice www.iiste.orgISSN 2222-1735 (Paper) ISSN 2222-288X Vol.6, No.4, 2015 131> accessed on 21st January, 2022
[12] https://www.thisdaylive.com/index.php/2022/02/08/election-petition-case-for-substantive-justice-in-2023/
[13]<https://en.m.wikipedia.org/wiki/Election > accessed on 21st January, 2022
[14] (2012) LPELR-19722(SC) Per Olukayode Ariwoola, JSC (Pp 24 - 24 Paras E - F) (2014) LPELR-23682(CA)

2.5 Electoral Mandate

The Court of Appeal in the case of *Nwali v Ebsiec & Ors*[16] adopted the meaning given to electoral mandate by "Black's Law Dictionary as, **"**the electorates overwhelming show of approval for a given political candidate or platform".

2.6 Legal Effects

The term 'Legal' is defined as 'of or relating to law; deriving authority from or founded on law- de jure; established by law especially statutory; conforming to or permitted by law or established by rules[15]. Black's Law Dictionary used the term as an adjective meaning falling within the ambit of the law; established, required, or permitted by law[16]. Legal is an adjective which connotes something connected with the law[17] on its own part, "effect" is synonymous with result and it means the result of a particular Influence.[18] According to Oxford Online Dictionary, 'It means a change that somebody/something causes in somebody/something; a result.'[19]

From the foregoing and contextually, it suffices that the legal effect means a legal influence, result or change brought about in this context in exercise of judicial discretion election tribunals on the mandate of the people. This study is of the opinion that the judicial intervention in the Nigerian electoral processes is overbearing and has its negative impacts on the mandate of the people.

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[15] https://www.meriam-webster.com/dictonary/legal <accessed on 7/4/ 2019>
[16]BA Garner, *Blacks' Law Dictionary*, (9th Edn, USA, West Publishing Co. 2004) p.975
[17] AS Hornby, *Oxford Advanced Learner's Dictionary,* (6 Edn, United Kingdom, Oxford University Press, 2000) p.
740.
[18] https://www.dictionary.cambridge.org/dictionary/english/effect<accessed on 26 January, 2022>
[19] https://www.oxfordlearnersdictionaries.com/definition/english/effect_1 <accessed on 26 January, 2022>

2.7 Judicial Discretion

There is no precise definition of the word 'discretion.' It has been employed to mean so many things in different situations. Black's Law Dictionary[20] defines Judicial and legal discretion as follows:

These terms are applied to the discretionary action of a Judge or court, and mean discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained. It is not the indulgence of a judicial whim, but the exercise of judicial judgment, based on facts and guided by law, or the equitable decision of what is just and proper under the circumstances. It is a legal discretion to be exercised in discerning the course prescribed by law and is not to give effect to the will of the judge, but to that of the law. A liberty or privilege to decide and act in accordance with what is fair and equitable under the peculiar circumstances of the particular case, guided by the spirit and principles of the law.

The word "discretion" when applied to judicial officers, is defined in Black Law Dictionary[21], as meaning:

> A power or right conferred upon them by law of acting in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. It connotes action taken in light or reason as applied to all facts and with view to rights of all parties to action while having regard for what is right and equitable under all circumstances and law.

The courts have held discretion to mean "freedom or power to decide what should be done in a particular situation". The general meaning of the word "discretion" includes analysis,

[20] B A Garner, Black's Law Dictionary (9th edn, West Publishing Company 2009)
[21] *Ibid*

appraisal, assessment, choice, consideration, contemplation, designation, determination, discrimination, distinction, election, evaluation, examination, free decision, free will, freedom of choice, liberty of choosing, liberty of judgment, license, option, optionality, permission, pick, power of choosing, review, right of choice, sanction, self-determination suffrage.[22]

Judicial discretion is the power or right to make official decisions using reason and judgment to choose from acceptable alternatives. Judges are charged with exercising judicial discretion in the discharge of judicial functions. All decisions made are subject to some kind of review and are also subject to reversal or modification if there has been an abuse of judicial discretion.[23]Judges as human beings are prone to human weaknesses. Hence, whenever the courts are exercising their judicial discretion on matters before them, the outcome of such actions cannot be totally free from the personal prejudices, whims and caprices of the "judge". No wonder, the law is ultimately a product of what a judge deems right under different situations.[24]

Judicial discretion then is the exercise of judgment by a judge or court based on what is fair under the circumstance and guided by the rules and principles of law. It is a courts power to act or not to act when a litigant is not entitled to demand the act as a matter of right[25]. Every discretion be it judicial and judicious must be based on prudence, rationality, sagacity, astuteness, considerateness and reasonableness and these principles were enumerated in our courts in the following cases *Akinyemi v Odu'a Investment Co Ltd2 supra, University of Lagos v Aigoro* [26] *, Onuorah v Okafor* [27] *, Ekwuno v Ifejika* [28] *and Egbunike v*

[22]*Akinyemi v. Odu"a Investment Coy Ltd* (2012) 17 NWLR pt. 1329, p.609
[23] D C Kenneth, Discretionary Justice: A preliminary inquiry Champaign, Illinois University of Illinois (1971) p. 5.
[24] C E Aduaka,' Judicial Discretion and Its Application under the Nigerian Legal System' (2018) *International Journal Innovative Legal & Political* Studies 6(4):38-49. (1985) 1 NWLR 1 p143
[25] . C E Aduaka,' Judicial Discretion and Its Application under the Nigerian Legal System' (2018) *International Journal Innovative Legal & Political* Studies 6(4):38-49
[26] (1985) 1 NWLR 1 p143 [29] (1983) 2 SCNLR 244.

Muonweokwu.[29]An exercise of discretion is an act or deed on the personal judgment of the person exercising it and in accordance with his conscience and should be free and unfettered from an external influence or suggestions. Judicial discretion means the power exercised by judicial umpires acting in official capacity and in the manner which appears to be just and proper under a given situation. It must not flow from or be bound by a previous decision of another court in which a decision was exercised. It is, in short, an antithesis of the doctrine of *stare decisis*. There is no hard and fast rule as to the exercise of judicial discretion by a court because if it happens then, discretion will become fettered as in the following court decisions: *UBN Plc. v Astra Builders WA Ltd*[30]*, Odusote v Odusote*[31]*, Anyah v African Newspapers of Nigeria Ltd.*[32]

Also, discretion is understood to be a liberty to act at pleasure; the power of making free choices unconstraint by external agencies. By judicial discretion it presupposes that the courts enjoy powers to act at pleasure and without external influences and constraints.[33] The question of discretionary powers of courts is well and long settled, in fact beyond the question of exercise of legislative interpretative powers to the suggestion that, in the last analysis, the decision of judges do not merely expound rules that existed before, but rather themselves create new principles of law.[34] This is because the statement that rules of law as being derived from existing legislation or previous cases is unsatisfying, reason being that legislations will always require first time interpretation by the courts of law to be understood and also for judicial precedent to be formed. So also the courts will have to reach a decision

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[27] (1992) 6 NWLR (pt. 247) p. 317
[28] (1960) SCNR 320
[29] (1962) 1 SCNLR 97
[30] (2010) 5 NWLR (pt. 1186) p 1
[31] (1971) 1 All NLR (pt. 1) p. 219
[32] (1992)LPELR-511(SC)
[33] ibid
[34] *Ibid*

anyway when faced with an issue whether legislation properly covers it or not and whether an earlier task of interpreting the legislation has been carried out or not. By the principle of separation of powers, the basic responsibility of courts as enunciated in all statutes is the interpretation of an existing law: an "unquantifiable" power lies in the judges" hands where the law is silent.[35]

Theoretically, the source of discretion is: express and implied statutory provisions, the form of discretionary power, and royal prerogative. Today, the scope of the concept of discretion tends to narrow down due to the strengthening demands of the Rule of law (Principle of Legality). However, the essential scope of the concept of discretion has always been under the dictates of the law, so that the development of this concept need not be worried much. Discretion is a legal concept; therefore, the law would never have let discretionary powers be out of legal control.[36]

It follows, therefore, that a judicial officer saddled with the responsibility of exercising discretion is required to arrive at the decision in every case or situation based on the facts placed before him in the very case and apply the applicable law. His decision is therefore likely to vary from case to case since the circumstances in each case may vary. The question of stereotype or strict application of the rule of judicial precedent would not be of importance.

The exercise must be based on a sound and sensible judgment with a view to doing justice to the parties. Here, the judge's disposition about life is brought to play and his mindset and view about life as he has to use his discretion prudently in the absence of any guiding principle where the law is silent.[37] Discretion is discretion, whether it wears any of the two qualifying expressions mentioned above (judicious and judicial), only when it is exercised by

[35]*Ibid*
[36] A Soemarm, et al, 'Discretion and Disparity of Judicial Decisions'(2019) *ICIDS,* Bandar Lampung, Indonesia
[37]*Offor v State* (1998) NWLR (pt. 1333) p421

the court according to law and good judgment. Discretion is not discretion if its exercise is based on the court's sentiments or premeditated pet ideas on the matter, completely outside the dictates of either the enabling law or good judgment, as the case may be.[38]

In matters of discretion, no one case can be authority for another; and the court cannot be bound by a previous decision to exercise its discretion in a particular way, because that would, in effect, be putting an end to discretion.[41] Also in *Ali v COP*[39], Anyebe, J held that: 'Granting of bail pending the determination of an appeal before this court is, under Section 34(2) of the Criminal Procedure Code upon which this application is founded, a matter of unfettered discretion of the court bearing in mind that where a judicial discretion is to be exercised, as Reed CJ, put it in *Kehinde v Commissioner of Police*[40] it is to be done according to the rules of reason and justice, not arbitrary, vague and fanciful, but legal and regular.

The court will not fold its arms, and watch injustice happen simply because the law is silent on a subject. Thus, the court will duly exercise its discretion to remedy the situation, the silence of the law notwithstanding. More so, in the celebrated case of *Donoghue v Stevenson,*[41] the court rightly exercised its discretion in holding the defendant liable for negligence thereby expanding the parameters of duty of care to where they had not earlier existed. Furthermore, the court also did justice in *Aliu Bello v. A.G Oyo State*[42] by providing damages where no earlier rule had provided for it on the rule of *ubi jus ibi remedum*- where there is a right, there is a remedy.

[38]*General University of Lagos v. Olaniyan* (1985) 1 NWLR Pt. 1p. 134
[39] (2002) JELR P44479 CA.
[40] (1973) NWLR 182
[41] (1932) UKHL
[42] (1986) 12 S.C.1

2.8 Mandate of the People

According to Cambridge Dictionary, the word "mandate" means the authority given to an elected group or people, such as a government, to perform an action or govern the country.[43] It is an authority to act in a particular way given to a government or person, especially as a result of vote or ruling.[44] Therefore, in the context of this study the mandate of the people implies the expression of the wishes and aspirations of the electorates or voters by voting massively for their preferred candidate in an election. It is determined mostly by majority of votes. In a democratic setting sovereignty resides in the people who by popular votes decide their fate.[45]

It is worthy of note that the Constitution[46]vests sovereignty on the people, prescribes the primary purpose of government and most importantly mandates for participation of the people in the government. It provides as follows:

It is hereby, accordingly, declared that –

(a) Sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority;

(b) The security and welfare of the people shall be the primary purpose of government; and

(c) The participation by the people in their government shall be ensured in accordance with the provisions of this Constitution[47].

[43]https://dictionary.cambridge.org/dictionary/english/mandateaccessed on 26 January, 2022

[44]*Ibid*

[45] The Preamble to the Constitution of Federal Republic of Nigeria 1999 (as amended) makes it clear that sovereignty resides in the people of Federal Republic of Nigeria and the constitution and its structures of were established and operate by the firm and solemn resolve of the people. Also, Section 14 of the Constitution is express on the sovereignty which belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority.

[46] S. 14(2) of the Constitution of the Federal Republic of Nigeria 1999 as amended

[47] S. 14 of the CFRN 1999

This Constitutional provision signifies the overall importance of the participation of the people in their government. Arguably, the cardinal manifestation of the participation of the people in the government is the free and fair exercise their franchise- unfettered right to vote and be voted for.

2.9 Election Petition

The term Election Petition was defined by the Supreme Court in the case of *Okereke v Yar'adua & Ors*[48] as "any election petition under the Act including petition which challenges the validity of election of persons into the office of the President and Vice President of the Federal Republic of Nigeria." An election petition refers to the procedure for challenging the result of a Parliamentary election[49]. An election petition is the only means provided by Section 133(1) of the Electoral Act, by which an election can be questioned or challenged at a Tribunal or Court of Law. In *A.N.P.P. v INEC*[50], the Court of Appeal held inter alia that: "What constitutes an election petition therefore, is a complaint by the Petitioner against an undue election or return of a successful candidate at the election….it is only an election or return of a candidate that can be questioned by an election petition, in which the person elected or returned is joined as a party" – per Mohammed JCA (AHTW).

[48] (2008) LPELR-2446(SC) Per Ibrahim Tanko Muhammad, JSC (Pp 19 - 19 Paras A - A)
[49] <https://en.m.wikipedia.org/wiki/sElection_petition>accessed on 26 January, 2022
[50] (2004) 7 N.W.L.R. Part 871 Page 16 at 55-57,

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORK FOR ELECTIONS IN NIGERIA

INTRODUCTION

Election as the sustaining feature of democracy which in turn is considered the best form of governance is regulated by different laws. In Nigeria, principally, it is governed by the Constitution (as amended) and the Electoral Act. In the instant case the 1999 Constitution and the Electoral Act 2010.

3.1. Legal Framework

The legal frameworks are those laws that govern electoral matters in Nigeria. They are:

3.1.1. The Constitution of the Federal Republic of Nigeria 1999 (as altered)

Issues relating to the establishment, powers and functions of the electoral body, Independent National Electoral Commission, INEC, Electoral Processes, Courts, Tribunals and Political Parties have their foundations in the nation's Constitution[1]. It is an expression of the will or desires of the people who make up the state or country; and it is a social contract between the government as an entity and the people on the one hand. It is a contract between those who hold public offices and the people, and it is also a social contract between and among the various ethnic peoples who make up the state or country.

The Constitution is the supreme and most important law of the country[2]. The Constitution makes it clear that if any other law is inconsistent with the provisions of the Constitution that other law shall be void to the extent of the inconsistency[3] for this reason alone, any law dealing with elections that contradicts the provision of the Constitution will be of no effect.

[1] Constitution of the Federal Republic of Nigeria 1999 (as amended)
[2] *Ibid,* s. 1(1).

The Constitution also says very clearly that the Government of Nigeria or any part thereof shall not be governed or controlled by any person or group of persons except in accordance with the provisions of the Constitution[2]. In other words, no one can occupy elective offices at the local, state or federal level unless the person has been elected in accordance with the provision of the Constitution or any law made in accordance with the Constitution.

The Constitution prescribes certain qualifications that persons vying for electoral offices must meet before they can participate or validly be elected into those offices. In a rather inelegant fashion, in my opinion, the Constitution lists in separate sections what it refers to as disqualifications and qualifications as regard the prescribed eligibility Criteria[3]

With respect to electoral matters, the relevant items of the Second Schedule dealing with legislative powers are items 22 of Part 1. Item 22 of the Exclusive Legislative List is 'election to the offices of President and Vice President or Governor and Deputy Governor and any other office to which a person may be elected under this Constitution, excluding election to a local government council or any office in such council'. Items 11 and 12 of the Concurrent List are respectively as follows:

1. The National Assembly may make laws for the Federation with respect to the registration of voters and the procedure regulating elections to a local government council.

2. Nothing in paragraph 11 hereof shall preclude a House of Assembly from making laws with respect to election to a local government council in addition to but not inconsistent with any law made by the National Assembly[4]

[3]*Ibid,* s. 1(3).
[3] Section 65 and 66 of the 1999 constitution(as amended) 2011
[4]*Ibid,* Items 11 and 12

All issues relating to election process such as the legal and administrative framework on election petitions, and hearing of matters arising from elections have their root in the Constitution. The Constitution is an embodiment of the code of governance of a country, the supreme law. Emphatically, it provides that: … **"**the Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of the Constitution"[5]. As a result, all the actions of the government are governed by the Constitution.[6] The Constitution which is the organic law of the country declares the rights of the people, the power and the limitation of the government, and especially the power of the judiciary. Against this superiority backdrop, it is settled that any law that is not consistent with the provision of the Constitution is of no effect.[7]

The Constitution guaranteed the right to peaceful assembly and association including the right of persons to form a political party or association[8].

With respect to elections, the Constitution empowers the National Assembly to make laws on the registration of voters and the administration of elections. It also envisaged the need for constant review of the laws and rules of the electoral process so as to deal with emerging problems associated with the dynamics of the society by empowering the Nat ional Assembly to make laws to guide the general conduct of elections, in addition to making general provisions that govern electoral competition, electoral structures and political parties. Pursuant to the constitutionally vested powers, the National Assembly usually revises existing Electoral Acts prior to commencement of general elections.

The Constitution also provided for the establishment of Independent National Electoral Commission with the responsibility for organizing, undertaking and supervising elections,

[5]*Ibid,* s. 1(2)
[6]*I.G.P V A.N.P.P* (2007) 18 NWLR (Pt 1066) 457 at 496
[7] S.1(3) of the CFRN 1999
[8]*Ibid,* ss. 40 & 222

registration of political parties, among other functions.[9] It equally provides for the establishment of the election tribunals for each state of the Federation and the Federal Capital Territory to be known as the National and State House of Assembly Election Tribunal as well as the Governorship Election Tribunal with original jurisdiction to hear and determine petition as to whether a person has been validly elected to the office of a governor or deputy-governor of a state. Time is very essential in election petitions. The Constitution stipulates that election petitions must be filed within 21 days of declaration of election result and judgment must be delivered within 180 days of filing the dispute[10] while an appeal from such judgment shall be heard and disposed of within 60 days. Unfortunately, one of the shortcomings of the electoral laws in Nigeria is that there are no adequate provisions for definition of certain words or terms. In spite of the challenges, the provision of the Constitution regarding the limitation of time for commencement of pre-election matters and time frame for its determination is salutary. Section 285 (9) stipulates that: **"Notwithstanding anything to the contrary in the constitution, every pre-election matter shall be filed not less than 14 days from the date of the occurrence of the event, decision or action complained of in the suit"[11].** Non-compliance with this provision has been considered as a statutory bar which has resulted in the dismissal of several matters both at the lower and apex court even where there is a substantial cause of action.[12]

3.1.2. The Electoral Act 2010

Pursuant to the power vested in the National Assembly to make laws for the peace, order, and good government of the federation,[13] the National Assembly had enacted the Electoral Acts that regulates elections in Nigeria. The Electoral Act 2010 repealed the Electoral Act 2006[14].

[9] Item 15 of Part 1 of the Third Schedule of the CFRN 1999.
[10] S. 285(7) of the CFRN 1999
[11] *Ibid,* s. 285 (9)
[12] *Garba v APC* (2020) 2 NWLR (Pt 1708) 345 at 360
[13] Constitution of the Federal Republic of Nigeria 1999 as amended, Item 22, Exclusive Legislative list
[14] The Electoral Act No. 2 of 2006, (in this Act referred to as the Principal Act), is amended as set out below
[17] ss. 226 and 227CFRN 1999

The Electoral Act 2010, drawing on provisions of the Constitution[17], expands the functions of INEC to include: (a) conduct of 'voter and civic education', (b) promotion of 'knowledge of sound democratic election processes', and (c) conduct of 'any referendum required to be conducted pursuant to the provision of the 1999 Constitution or any other law/Act of the National Assembly.

The electoral laws guaranteed INEC's independence by stipulating that the president may only remove members of the Commission if requested to do so by a two-thirds majority of the Senate. In 'exercising its powers to make appointments or to exercise disciplinary control over persons' the Commission is not subject to the direction of any person or authority. The Electoral Act 2010 further gives INEC the power to appoint its own secretary, who is the head of administration[15]. It also makes it impossible for the President to single-handedly remove a Resident Electoral Commissioner in any state. The Act prescribes that a Resident Electoral Commissioner can only be removed by the President if requested to do so by a two-thirds majority of the Senate on the grounds of inability to discharge the functions of his or her office or for misconduct. In the past the president has been able to remove or redeploy these officers at will.

The repeal of the Electoral Act 2006 was prompted by the need for a more comprehensive and all-encompassing legal framework to bring about free, fair and credible elections. But within the current Electoral Act itself are inherent flaws and inadequacies[16].

In an ideal democracy, the authority of government derives from the will of the people as expressed in genuine free and fair elections. Electoral integrity guarantees the effective participation of citizens in democratic processes and in governance, but experience has

[15] section 8(1) of the Elect Act 2010

[16]<https://www.google.com/amp/s/businessday.ng/amp/opinion/article/rebuilding-nigerias-electoral-processesand-institutions-using-the-justice-uwais-report/> accessed on 15 January, 2022

shown that in our clime, these principles are merely illusory[17]. Its provisions made some marginal improvements over and above the 2006 Act, but it was definitely not sufficient enough to bring about an overhaul of the electoral system in the terms recommended by the Uwais panel.

It is against this background that the Electoral Act 2010 (as amended), was passed by the National Assembly, after much deliberation and debate. The key provisions of the Act reflect government's attitude towards the recommendations of the Uwais Committee. Expectedly, the recommendations of the Uwais Committee that were not reflected by the government, including the one on independent candidacy, were not reflected in the Act. Also, some of the seemingly novel provisions of the Act, such as the one on continuous voters registration, the oath of neutrality by election officials, prohibition of double nomination, among others, were merely lifted from the 2006 Act; the provisions of which are same in many material respects as the new Act.

There are uniquely novel provisions however in the Electoral Act 2010. Of note in this regard is the provision which prohibits substitution of candidates by political parties except in cases of death or self-withdrawal.

The bulk of the provisions of the Electoral Act 2010 relates to procedural issues that were already covered by the Electoral Act 2006, which was repealed by the new Act. The current 2010 Act is arranged in nine parts, with 152 sections and three schedules. It re-establishes INEC, an INEC Fund, and guarantees its independence. The functions, powers, revenue base and other matters connected with INEC and its staff remain essentially the same as in the repealed 2006 Act. The provisions of the 2010 Act in respect of the registration of voters, the

[17]<https://guardian.ng/saturday-magazine/cover/uwais-report-remains-roadmap-for-credible-elections-oguche/> accessed on 15 January, 2022

provisions of registration officials and the creation of offences were more or less repetitions of the 2006 Act with some juggling of figures.

As for the procedure for election, the only major change was the prescription of the order of the election in section 25(1) of the 2010 Act. This provision is not only self-seeking as it was designed to serve the interests of the serving members of the National Assembly, it robs INEC of the unfettered power which it had under section 26 of the Electoral Act 2006 to determine the dates of elections. The other novel provision, which is commendable, is the provision of section 33 which bars political parties from substituting candidates after submission. This is to prevent the kind of ugly incident which Alabi[18] observes made it possible for voters not to know the candidates up to the point of voting.

Ironically, the procedure of voter's accreditation before the actual voting commences, for which the INEC was commended in 2011, even though not a novelty in Nigeria's electoral history, is not officially provided for under the Act but was adopted, perhaps, in pursuance of the powers of the Commission to fix the day and hours of polls.

In flagrant disregard for the recommendations of the Uwais Committee, but in line with the provisions of the 1999 Constitution, the Electoral Act 2010 vests the power to register and regulate the activities of political parties in the electoral commission. This was a consequence of the inability of the government to demonstrate sufficient political will to implement those recommendations of the ERC report which it purported to accept as far back as 2009. The same could be said of the refusal to create an Electoral Offences Commission, notwithstanding the creation of several offences in relation to the registration of voters and their conduct of elections. In essence, the Uwais Committee's

[18]M O A Alabi & O T Omololu, (2012), *' Uwais Report, Electoral Act 2010, and the Future of Democratic Elections in Nigeria' in Layonu, A. I. &Adekunbi, A. A. O. (eds.) Reflections on the Nigerian Electoral System, First Law Concept, Ibadan)*

recommendation for unbundling INEC, which the government accepted, was not implemented, years after the recommendation was made and accepted.

The 2010 Act like the repealed 2006 Act, stipulates a continuous voters' registration system. In section 10(2), an applicant for registration under the continuous registration system shall appear in person at the registration venue with proof of identity, age and nationality. Apart from preventing registration by proxy, the innovation helps to establish the true identity of voters and prevent voting by non-human objects as witnessed in the 2007 elections in Ondo State. Other adjustments to the contents of the repealed Act were designed to prevent frustration associated with litigations arising from the conduct of elections, as well as enforcement of internal democracy in selecting party candidates for election. Essentially, these changes were meant to ensure more credibility and reduce acrimonious intra-party crises often associated with the choice of party's flag bearers. Aside from this, the Act imposes stiffer punishments for persons engaged in the buying and selling of voters' cards.

On the whole, while the Electoral Act 2010 contains a number of provisions that seek to enhance the conduct of free and fair elections, these provisions were mostly cosmetic and are not far-reaching enough to bring about the desired reform of the entire electoral system. The Act merely seeks to make some marginal changes within the limits permissible under the existing constitutional framework. Such changes in the texts of the Constitution that are necessary for tackling the ills of the electoral/political system were not made by the National Assembly. It is therefore not surprising that the maladies of the previous years, which had robbed Nigeria of the needed credibility for democratic consolidation, were repealed in various forms and different degree, before, during and after the April 2011 elections.

3.1.3. Electoral Regulatory Framework

Since 1959, when the first general elections took place, elections in Nigeria have been mired with controversies and characterized by court cases over electoral outcomes. Not only have such cases revealed widespread electoral malpractice and fraud which threaten democratic consolidation, the laws governing elections have been identified as critical to the dismal electoral practices[19]. The guiding principles and regulations of general elections in Nigeria are to be found in the 1999 Constitution, Electoral Act 2010, Electoral Guidelines and Judicial Authorities.

3.1.4. Selected Case Laws on Electoral Dispute

From the plethora of electoral disputes and conflicting judgments that emanated from subsequent general elections of 2011, 2015 and 2019 that were premised on the extant Electoral Act indicates that the Act is still replete with flaws and gaps. From records available, after the 2015 general elections over 600 election cases were filed at the different election petition tribunals across the country by losers in the Governorship, Senatorial, House of Representatives and State Houses of Assembly elections[20].

Majority of the said election cases were predicated on the flaws, ambiguities and lacuna in the Electoral Act 2010. Consequent on the deficiencies, election petition tribunals resorted to its discretionary powers which, to a larger extent, were responsible for both conflicting and contradicting judgments.

After the 2015 general elections, the candidates of the People's Democratic Party (PDP) won the three Senatorial seats of Anambra State. The candidates of the All Progressives Grand Alliance (APGA) Dubem Obaze, Ernest C.Ndukwe, Victor Umeh of Anambra North, South

[19] Electoral Laws and the 2007 General Elections in Nigeria., Journal of African Elections.
[20] Compendium of 2015 General Election In Nigeria Petitions © 2017 Nigeria Civil Society Situation Room. All rights are reserved at Part 4 No. 38 - 41.

and Central respectively challenged the result of the election as declared by INEC, among others, on the ground that the candidates of the PDP were not validly nominated by their parties. Although the facts of the cases were similar and the appeals were heard by the same panel, surprisingly and for suspicious reasons the decisions were different. In the case of Anambra Central Senatorial District, the Court of Appeal allowed the appeal and held that the Respondent was not validly nominated by her political party. In the cases of Anambra North and South the appeals were disallowed[21].

The above decision is a typical example of thwarting of the mandate of the people under the umbrage of judicial discretion consequent upon the lack of comprehensive and all encompassing provisions on nomination and sponsorship of candidates by political parties for general elections. The definition section of the Electoral Act 2010 omitted the definition of nomination and sponsorship of a candidate.

The issue of nomination was also the subject matter in Taraba Governorship election between Aisha Jummai Al-Hassan of APC and Darius Dickson Ishaku of PDP. The Court of Appeal, while overruling and reversing the judgment of the Tribunal, held that the petitioner did not have the *locus standi* to question the nomination process of the respondent party. The Supreme Court affirmed the decision of the Court of Appeal[22]. Again in Zamfara Governorship election, the issue of nomination was part of the grounds in the election petition between Shinkafi of PDP and Abdulazeez Abubakar Yari of APC. The Court held that the petitioner did not have the *locus standi* to challenge the nomination of the respondent[26].

Section 31 of the Electoral Act 2010 provides that every political party shall not later than 60 days before the date appointed for the general election, submit to the Commission in the

[21] *ibid*

[22] Compendium of 2015 General Election in Nigeria Petitions © 2017 Nigeria Civil Society Situation Room.
[26] *ibid*

prescribed forms, the list of the candidates the political party proposes to sponsor at the elections, which shall be published within 7 days of receipt, provided the Commission does not disqualify the candidate for any reason. The list of candidates is to be accompanied by an affidavit at the Court, indicating that the candidate has fulfilled all the constitutional requirements for election into that office. This important provision of the Act has precipitated an avalanche of pre and post-election disputes wherein the exercise of judicial discretion in the resolution of the cases had greatly affected the mandate of the people. The phrase "submit to the Commission in the prescribed forms" is deficient or vague in meaning in that it failed to state what constitutes prescribed form on the one hand and on the other hand which officers of the political party will sign the forms. A comparison of the provision of section 31(1) of the Electoral Act 2010 with section 84(3) of the Electoral Act 2010 shows that there is a gap to wit: the appropriate official of the party that should sign the form unlike the subsection 3 of Section 84 [23]which clearly provided that an application for merger shall be signed by the National Chairman, National Secretary and Treasurer of the merging political parties. Expectedly, where this provision is to be applied to an electoral disputes for its resolution by the courts or election tribunal, the decisions will most likely vary irrespective of similarities of the facts of the cases. The basis for this submission is that the different courts or tribunals will resort to its discretionary powers to resolve the disputes presented before it.

In the Supreme Court where Mr. Eyitayo Olayinka Jegede challenged the election of Governor Oluwarotimi Odunayo Akeredolu[24] on the ground that Akeredolu's nomination form was signed by the acting National Chairman of APC who the Plaintiff through his lawyer claimed was not qualified to sign such form. The Plaintiff therefore prayed the court to disqualify the All Progressive Congress and its candidate from the governorship election.

[23] Electoral Act, 2010
[24] (2021) LPELR-55481 (SC)

The majority decision of the court was that the section did not specifically provide that the nomination form must be signed by the National Chairman while the minority decision held otherwise. This is another case where for lacunae in the Electoral Act 2010 the judiciary decided the case not based on legislative provision but on its discretionary powers.

Another defective provision in the 2010 Electoral Act is Section 69[25], which provides for the declaration of result. It states that in an election to the office of the President, Governor whether or not contested or in any contested election to any elective office, the result will be ascertained by counting the votes cast for each candidate, the candidate who receives the highest number of votes will be declared elected. It is submitted with respect that this provision also is imbued with gaps to the extent that where a pre-election matter, mindful that appeals in such matters gets to the Supreme Court, is yet to be concluded as per who the valid candidate of the party is before the general election there is no provision in the Electoral Act that prescribes on what the Electoral Officers should do. The problem is that whatever action they take, if the matter goes to Tribunal, will ultimately be subjected to the discretion of the court.

In some of such cases the Electoral umpire had gone ahead to declare the political party as the winner of the election pending the final determination of the case. Flaws like this in the Electoral Act 2010 had culminated into judicial decisions that overtly contradict the wishes of the citizens at the polls.

A combined reading of the Constitution Section 221 of the 1999 Constitution of the Federal Republic of Nigeria and the pronouncements of the Supreme Court in *Faleke v. INEC*[26]is clear in holding that it is the political party that stands for election, that votes scored in

[25] Ibid
[26] (2016) 18 NWLR (Pt.1543) 61

election belong to the political party and that the candidate nominated to contest at an election by his party acts only as the agent of his party.

The Faleke case has precedence in the *Amaechi v INEC*[27] where the Supreme Court first cleared the air on who contests elections in Nigeria between a political party and the candidate. In the lead judgment delivered in the case in October 2007, Justice George Oguntade JSC (as he then was) while giving reasons for Chibuike Amaechi victory, said without a political party in Nigeria, a candidate cannot contest an election. He held that a good or bad candidate might enhance or diminish the prospect of his party in winning an election but that at the end of the day it is the party that wins or loses an election. The judge noted:

"Without a political party, a candidate cannot contest. The primary method of contest for elective offices is therefore between parties. If as provided in Section 221, it is only a party that canvasses for votes, it follows that it is a party that wins an election. A good or bad candidate may enhance or diminish the prospect of his party in winning but at the end of the day, it is the party that wins or loses an election".

Justice Pius Olayiwola Aderemi JSC (as he then was), while concurring with the verdict, equally referred to the same[28]**,** saying:

"No association other than a political party, shall canvass for votes for any candidate at any election or contribute to the funds of any political party or to the election expenses of any candidate at an election. Flowing from the above provision of the constitution, it is my view that it is the political parties that the electorates do vote for at election time."

Flaws in the Electoral Acts which had prompted amendments in the Electoral laws, in this case the 2006 Electoral Act, cannot be complete without reference to the case of *Amaechi v*

[27] (2008) 5 NWLR (Pt 1080) 227
[28] S. 221 of the CFRN 1999

INEC & Ors[29]. The facts of the case and the decision of the courts therein exposed some of the deficiencies in the Act and the extent to which such judicial decisions undermine the mandate of the people. Prior to the election it was Celestine Omehia that campaigned on the platform of PDP and on the day of the election he was the one on the ballot meaning that the voters cast their votes for him. The introduction of section 141 of the Act, goes to show that the decision is totally anti-people and subversive of the people's sovereign rights. Although the section suffered a temporary setback as it was struck down by Honourable Justice Kolawola in a decided case on the ground that it amounted to an ouster clause. Nonetheless, based on its importance the section has been provided for in section 285(13) of the Fourth Alteration of the Constitution to the extent that, for a person to be declared a winner in an election that person must have participated in all the stages of the elections.

The issue of nomination and sponsorship of candidates by political parties which is regulated by the Act[30] is another provision of the law that has dominated the list of election related issues that are contested in Courts and Tribunals. Primary election of political parties is one of the most controversial activities of the party. To be nominated and sponsored by a political party to fly its flag in a general election is the highest benefit a member can derive from the party.

The Act provides in Sections 85 and 87 of the Electoral Act 2010 as follows:

A registered political party shall give the Commission at least 21 days' notice of any convention, congress, conference or meeting convened for the purpose of electing members of its executive committees, other governing bodies or nominating candidates for any of the elective offices specified under this Act. A political party seeking to nominate candidates for elections under this Act shall hold primaries for aspirants to all elective positions….[32]

[29] Supra
[30] S. 85 and 87 of the Electoral Act 2010

The said Electoral Act in both sections did not prescribe the consequences for breach or neglect of the referenced provisions. Election results have been challenged on the ground that the concerned political party did not give adequate notice to INEC as mandatorily required by law. This was one of the issues raised in the case of *Wike v Dakuku Peterside*[31] the mandatory nature of the provision by the use of the word "shall", the Supreme Court held that noncompliance with the section is not fatal to the case of the Appellant. In another stretch, in the case of *APC v Marafa*[32], the same Supreme Court decided that pursuant to the use of the word "shall" in the Electoral provision that any violation of it will disqualify the candidate of the concerned political party. In the instant case the court removed all the APC candidates for its inability to conduct valid primary election.

It is submitted that these two decisions are exercise of judicial discretion at play which in one way or another affected the mandate of the people. The Act failed to define the meaning of nomination and sponsorship. The void created by this compels or invites tribunals to resolve disputes that borders on the subject matters through discretion. Consequently, courts and tribunals of coordinate jurisdictions have given different decisions on matters that shared similar facts. Such discordant and conflicting judgments have contributed to the already eroded confidence of the masses in the Electoral and judicial systems. Such lack of confidence impacts psychologically on the mind of the citizens who believe that their votes do not really count. This belief fans the embers of voter apathy which consequently constitutes a threat to the nation's democracy.

An article in the Punch Newspaper[33] reviewed the relationship between voters' apathy, legitimacy of government and economic well-being of the country. The article rhetorically asked, "Is voter apathy threatening Nigeria's democracy?" "When is a government

[31](2016) 1 NWLR (PT.1492) SC 71
[32] Unreported SC.377/2019
[33]<https://punchng.com/is-voter-apathy-threatening-nigerias-democracy/> accessed on 25 January, 2022

illegitimate or a representative illegitimate? In answering the question the article made reference to the March 27, 2021 Aba North/Aba South federal constituency by-election conducted recently. The Constituency has 496,628 registered voters but at the end of the election, only 16,017 persons voted out of the 16,335 accredited voters. Effectively, voter turnout was 3.29%, and the winner was elected by only 2.21% of total registered voters in the constituency.

Democracy as the rule of the majority is touted as superior to other forms of government. From the point of elections, the majority decides the outcome and thereby puts a stamp of legitimacy on the elected. But what happens when the majority is only a majority of a minority? Does this in any way dilute the legitimacy of the elected? Does it in any way diminish or threaten the social contract that democracy implies between the elected and the governed? This raises some serious questions that have consistently begged for answers.

The fact of the March 27 bye-election should not shock anyone. It reinforces a pattern of voter apathy that has crept into Nigeria's democratic elections for long. It is the result of the terrible elections superintended by Prof. Maurice Iwu in 2007 and the bad governance we have had since 1999. The 2007 elections were so bad that only an admission of guilt by the winner in that election, the late President Umaru Yar'Adua, could buy peace for the country.

Apathy and legitimacy have connections with economic wellbeing. Democracy since 1999 has left out the majority from its benefits. The majority of rural Nigerians live in darkness. Nigeria is now adjudged as the poverty capital of the world, while inequality remains endemic. Access to water, education, affordable health, good roads, and critical infrastructure continues to elude the majority. And now, insecurity is the capstone. Why won't Nigerians stay away from elections?

Today, voter apathy is visible in our presidential, governorship, and legislative elections. It rears its ugly head both in our off-cycle and regular elections. The situation is even worse off in our local government election. In the 2019 elections, only 28.6 million out of 84 million registered voters (representing 36.66 per cent) voted. Despite his cult popularity back then, the President, Major General Muhammadu Buhari (rtd.), only got elected to office by a "majority of a minority" as 53 million eligible Nigerian voters stayed away from the exercise.

A peep into the pattern of apathy at the state is telling. Only 17.82% of eligible voters in Abia State participated in the 2019 presidential election; a fall from 77.9% in 2011. In Bayelsa, the turnout fell from 85.6% in 2011 to 36.38% in 2019. In Lagos, 5.4 million eligible voters (82%) did not vote in 2019, while 3.5 million and 2.2 million eligible voters played "*siddon look*" in Kano and Kaduna, respectively, in the same year[34].

3.1.5. Case Law/Judicial Authorities

Case law refers to that body of principles and rules of law which, over the years, have been formulated or pronounced upon by the courts and election tribunals as governing specific legal situations. This assertion, *prima face*, seems to run contrary to the general impression that judges do not make laws but only interpret and apply them as and when the need arises. While the primary duty of making laws is constitutionally vested in the legislature, the judges do make laws along the line of carrying out their statutory functions. This is more pronounced where a judge is confronted with a legal problem that does not have established laws in resolving the problem. It is a cardinal maxim of our law that where there is a wrong there must be a remedy, so the Judges are, therefore, encouraged to formulate fresh rules of law or to extend the existing ones to deal with novel cases. By so doing, they add to the

[34]<*https://punchng.com/is-voter-apathy-threatening-nigerias-democracy/*>accessed on 25 January, 2022

corpus of existing laws through their judicial pronouncements. This law making function of the courts is sustained by the operation of the doctrine of judicial precedent.

The doctrine of judicial precedent (otherwise called *stare decisis*) requires all subordinate courts to follow the decisions of superior courts even where these decisions are obviously wrong having been based upon a false premise. This is the foundation on which the consistency of our judicial decision is based[35]. It is the principle of law upon which a particular case is decided that is binding. Such a principle is called *ratio decidendi.* a statement made in passing by a judge that is not necessary to the determination of the case in hand is not a *ratio decidendi* of the case but an *obiter dictum* and it has no binding effect for the purpose of the doctrine of judicial precedent[36].

Constitutionally, the responsibility of the court is to interpret laws and apply them to facts of the case before the court. Decisions reached as a result of the interpretation by superior courts of records have the force of law and sanction like any other law made by the legislature. For example, an interpretation on a point of law by the Supreme Court of this country is law. Such pronouncements of courts of records as contained in our various law reports are laws, which can be referred to and applied, in subsequent cases, if the facts and circumstances are imparimaterial (similar). Case law is a very important source of electoral law. Nigeria now has a fairly developed electoral jurisprudence which has been well documented[37].

3.1.6. Electoral Guidelines

Section 153 of the Electoral Act 2010 gives power to Independent National Electoral Commission (INEC) to issue regulations, guidelines or manuals for the purpose of giving

[35] See *Ngwo v Monye* (1970) 1 All NLR 91 at 100.

[36] See *Dalhatu v. Twiaki & Ors* (2003) LPELR 917;*NAB Ltd v Barri Eng. (Nig) Ltd* (1995) 8 NWLR (pt 413) 257 pp. 289 -290.

[37] AO Popoola, 'Election Petitions and the Challenge of Speedy Dispensation of Justice in Nigeria' being a paper commissioned for presentation at the Induction Course for newly appointed Judges and Kadis of the Sharia Court of Appeal by the National Judicial Institute, Abuja 4-15 June, 2007

effect to the provisions of the Electoral Act and for its administration thereof. Consequently, the Commission usually issues guidelines and regulations for general elections[38] Court of Appeal[39] talking about the purport of the Manual for Election Officials, 2007 made pursuant to section 161 of the Electoral Act, 2006 (now section 153 of the Electoral Act, 2010 as amended) stated as follows:

The Manual for Election officials, 2007 (exhibit AK in the instant case) was published by INEC for the fundamental objective of giving effect to the provisions of the Electoral Act, 2006. The guidelines are undoubtedly meant to be strictly constructed and adhered to by the electoral officials concerned in the process and procedure for election[40].

3.1.7. Some International Legal Framework

There are established principles of political rights and freedoms relating to elections contained in declarations, conventions, protocols and other international instruments adopted by the United Nations, African Union, Economic Community of West African States and the Commonwealth. Some of these instruments shall be briefly considered. These principles bind Nigeria as a member of the United Nations and other committee of nations. They are:

3.1.8 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)

CEDAW requires that appropriate measures be taken to ensure women on equal terms with men without any discrimination. Such rights include:

(a) The right to vote in all elections and be eligible for election to all publicly elected bodies;

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[38] An example of this is Guidelines and Regulations for the 2015 General Elections. Available online at www.inecnigeria.org/wp-content/uploads/2015/01/FINALaccessed on 10 February 2015

[39] *Okechukwu v Onyegbu* (2010) All FWLR (pt. 524) p. 117 at 136-137

[40] *ibid*

(b) The right to vote in all public referenda;

(c) The right to hold public office and to exercise all public functions. Such rights shall be guaranteed by legislation.

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

3.1.9 The Universal Declaration of Human Rights (UDHR)

The rights under UDHR include:

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

In addition to the above,

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access of public service in his country.

(3) The will of the people shall be basis of the authority of government: this will, shall be expressed in period and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent of free voting procedures.

3.1.10 Convention on the Political Rights of Women

Women shall be entitled to vote in all elections on equal terms with men, without any discrimination. Women shall be eligible for election to all publicly elected bodies, established by national law, on equal terms with men, without any discrimination. Women shall be entitled to hold public office and to exercise all public functions, established by national law, on equal terms with men, without any discrimination.

3.1.11 African Commission on Human and Peoples' Rights

(ACHPR) The ACHPR provided for the following rights:

(1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

(2) Every citizen shall have the right of equal access to the public service of the country.

(3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

e. International Covenant on Civil and Political Rights

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

(1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

(2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

(3) Nothing in this article shall authorize States Parties to the International Labour

Organisation of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

3.2. Institutional Framework

The institutional frameworks are those agencies or regulatory bodies that deal on electoral matters. They are:

3.2.1. The Independent Electoral Commission (INEC)

The electoral management body, Independent National Electoral Commission (INEC) was established by the Nigerian Constitution and empowered it to manage elections within the general framework of the law. Section 153 of the 1999 Constitution establishes the Independent National Electoral Commission while Section F Part I of the Third Schedule of the Constitution defines its composition and powers**.** This is the most significant aspects of the electoral laws relates to INEC. The section states that the Commission must be made up of a chairman and 12 other members (Electoral Commissioners) appointed by the President in consultation with the National Council of States and subject to confirmation by the Senate. A Resident Electoral Commissioner must be appointed by the president for each state of the federation.

The Commission is further charged with organizing, undertaking and supervising elections to the offices of president and vice-president, governors and deputy governors of states, and members of the Senate, the House of Representatives and the House of Assembly of each state of the federation[41]. It must register political parties in accordance with the provisions of the Constitution and an Act of the National Assembly; monitor the organization and operation of the political parties, including their finances; and arrange for the annual examination and auditing of the funds and accounts of political parties and publish a report for public information. In addition, the Commission must arrange and conduct voters' registration and prepare, maintain and revise the register of voters for the purpose of any election under the Constitution. INEC monitors political campaigns and establishes the rules governing political parties and ensures that all Electoral Commissioners, electoral and returning officers take and subscribe to the oath of office prescribed by law. It may delegate

[41] third schedule Part 1 section 15 a-I CFRN 1999

any of its powers to any Resident Electoral Commissioner and must carry out such other functions as may be conferred upon it by an Act of the National Assembly.

Nigeria gained independence from Britain in 1960. Like most former British colonies, its elections have been managed by a permanent Electoral Management Board (EMB). Nigeria's political history is characterized by years of military rule and four republics of civil rule[42].

With every transition programme, an election management authority was established. Overall, Nigeria has had five Electoral management Boards: the Electoral Commission of the Federation (ECF) that conducted the 1964 federal elections and 1965 regional elections; the Federal Electoral Commission (FEDECO) that conducted the transitional elections in 1979 and the controversial 1983 elections that ended in a return to military rule; the National Electoral Commission (NEC) that managed the three-year transition programme and ended with the annulled 1993 elections; the National Electoral Commission of Nigeria (NECON) that was established by General Sani Abacha to manage his transition programme, which was aborted after his death in 1998; and the Independent National Electoral Commission (INEC)[43]. It has conducted four elections: the 1999 transition election; the historic 2003 election, which was the first election successfully conducted under civil rule in Nigeria; the critical 2007 elections, which facilitated the first civilian regime change in Nigeria; and the 2011 elections. The mode of appointment of the Commission remains an issue of concern for its independence, as many believe it may be biased toward the appointing authority. The amendment of the 1999 Constitution strengthened the Commission's independence by guaranteeing its financial autonomy. It is funded from the Consolidated Revenue Fund,

[42] An Overview of Disputes Arising from the Failed Electoral Process'. IDASA Conflict Tracking Dossier 7

[43] Political Instability, Conflicts and the 2003 General Elections'. In R Anifowose & T Babawale (eds). General Elections and Democratic Consolidation in Nigeria. Lagos: Friedrich Ebert Foundation

which ensures that it is not hindered in its operations by the many bureaucratic processes of budgeting and disbursement of funds[44].

INEC's Role in Electoral Reform Management

INEC has been very vocal and involved in the national discourse on constitutional and electoral reforms. It is important to mention that the 2004 Electoral Bill was drafted by the Commission and submitted to the National Assembly, and was later passed as the Electoral Act of 2006. This approach was criticized because it was not submitted in line with the prescribed procedure[45]. The Commission also conducts post-election review exercises at which issues for reform are identified.

3.2.2. Electoral Tribunals and Courts

The Electoral Act 2010 provides the rules, regulations and guidelines for the conduct of elections and resolution of post-election disputes[46].

Part IX section 285 of the Constitution is devoted to election petitions and provides for the establishment of electoral tribunals. Specifically, it gives the president of the Court of Appeal, in consultation with the chief judges of states, the presidents of the Customary Court of Appeal of states and the Khadis of the Sharia Court of Appeal the power to establish one or more election tribunals to determine the validity of an election, the term of office of any person, when a seat has become vacant and when a petition presented to court in respect of an election is properly made.

One or more National Assembly electoral tribunal must be established to hear petitions concerning the outcome of elections, the term of office of an individual, and whether the

[44] Jega Attahiru, *Improving Elections in Nigeria: Lessons from 2011 and Looking to 2015 (*London: Chatham House, 2012*).*

[45] The 2004 Electoral Bill was neither a private member bill nor an executive bill.

[46] S. 138(1) of Electoral Act 2010.

proper procedure has been observed in relation to a petition. Governorship and legislative house election tribunals are established at state level for the same purpose.

Appeals against decisions made by election tribunals go to the Court of Appeal, whose decision is final. However, petitions arising from presidential elections go directly to the Court of Appeal[47] and it is the Supreme Court that is the final arbiter in respect of appeals against decisions made by the Appeal Court in these cases. Section 137 [48]sets out those with *locus standi* to present an election petition. They are a candidate in an election or a political party which participated in the election.

According to section 138 of the Electoral Act 2010, an election may only be questioned on the following grounds:

- that a person whose election is questioned was, at the time of the election, not qualified to contest the election;
- that the election was invalid by reason of corrupt practices or noncompliance with the provisions of the Act;
- that the respondent was not duly elected by a majority of lawful votes cast at the election; or
- that the petitioner or its candidate was validly nominated but unlawfully excluded from the election.

Section 140 (1) of the Electoral Act 2010 empowers the tribunal to nullify an election if it determines that an elected candidate was not validly elected. Subsection 2 empowers the tribunal or court to declare as elected another candidate who is determined to have scored the highest number of valid votes cast where the candidate who was returned as elected did not win a majority of valid votes. Section 143 gives 21 days from the date of the decision of an

[47] S. 246(3) of the CFRN 1999
[48] Electoral Act, 2010

election tribunal or court for an appeal against the decision. The rules of procedures for election petitions and appeals are set out in the first schedule of the Electoral Act.

3.2.3. The Police

Elections and security in emerging democracies and in conflict or post-conflict situations is appropriately getting an increasing importance these days and a subject coming across our work more and more often. Indeed, in the last decades, there have been a number of international electoral training initiatives for police and security officers, although these primarily take place in the context of major peacekeeping missions (UN, OSCE, etc), where civilian police personnel to be deployed to polling stations are provided training specifically focusing on key security-related functions they are to perform before, during and immediately after the voting process.

Section 24 of the 2010 Electoral Act directed the Nigeria Police Force to provide security in ensuring smooth conduct of election without any disturbance at polling units/stations, collation centers, counting of ballots, collations and declaration of results.

In precise terms, the police are expected to provide security and order within a political system which is conducive enough to guarantee hitch free and threat-free to people and the entire electoral processes.

In this study, election administration is used to describe the different activities involved in the conduct of elections which entails activities before, during and after the conduct of elections. It encompasses the election management bodies and extant rules and regulations that guide the electoral process. Though the legal instruments for election in Nigeria such as the 1999 Constitution, the 2006 Electoral Act, the Electoral Act 2010 Amendment and the Electoral Amendment Act 2015 entrusted the

task of conducting elections to the INEC, provisions in some of these legal instruments particularly the Electoral Act (Amendment), 2015 equally confer critical role on security agencies in the electoral process. The conventional role of the police is to maintain peace and order in the society for people to have a sense of safety and order as earlier discussed, for people to go about their lawful businesses and other meaningful engagements for progress in all spheres of human endeavor. It is in line with this that Ajayi describes police as the trusted public guardians, the custodians of the public peace, and the guarantors of public safety and order.

It could be a bit too country-specific and somehow outdated, but the paper provides an interesting division of tasks according to the various phases of an election: a pre-election phase, where one of the major focuses will be on fostering co-operation between all the role players; during the election itself the main focus will be on effective policing of the electoral polling booths; and in the post-election phase the focus will be on the provision of visible services, the investigation of crime, provision of man-power, support of policing by means of logistical and financial support, and the maintenance of community relations.

For the avoidance of doubt, section 214 of the 1999 Constitution of Nigeria recognizes the Nigeria Police Force as the lead agency for internal security in the country. It prohibits the existence of a parallel police force in any part of the federation. Section 4 of the Police Act and Regulations reinforces the provision of the Constitution as it specifies the general functions of the police. According to the Act, the police are employed to prevent and detect crime, protect life and property, preserve laws and order, apprehend and prosecute offenders, enforce all laws and

rules as well as performing other military duties within and outside the country as may be directed by the Act of National Assembly or any other relevant authority[49]. With particular regard to an election, the ACE Encyclopedia identify some key elements to be addressed in a training programme for the security forces, such as:

a. human rights issues in relation to security forces' role in the election;
b. security objectives and strategy in relation to the election;
c. the standards of professional, impartial, neutral, and non-intimidating conduct to be upheld by security forces during the election period;
d. contact mechanisms and liaison details between the electoral management body and security forces;
e. an overview of election processes and methods, and security forces' roles in protecting these; details of offences against electoral laws.

3.2.4. Political Parties

Political parties and elections play an important role in the analysis of politics in developing countries, particularly in the analysis of democratization, and specifically the consolidation of democratic political regimes. Among political scientists, the existence of free and fair elections on a regular basis is considered the minimal condition for a democracy[50]. A political party is defined as a political group that is officially recognized as being part of the electoral process and who can support candidates for elections on a regular basis.

Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests:

[49] Police Act 2020.
[50] Democratic Regime Dahl 1971; Diamond 1999.

Provided that the provisions of this section shall not derogate from the powers conferred by this Constitution on the Independent National Electoral Commission with respect to political parties to which that Commission does not accord recognition[51].

Political parties are the major player of the politics in Nigeria. The Constitution recognized that for an individual to contest any elective post in Nigeria, the person must belong to a particular political party and sponsored by such a political party.

Many times in the history of Nigerian politics. The political party determine who to sponsor by conducting primary election, and exercise both quasi-judicial proceeding for any aggrieved aspirant who was disqualified for one reason or the other.

Political parties most time take decisions which affect the mandates of the people by a practice called god-fatherism. Most times where an aspirant approached the court to ventilate his grievance, he will be met with the sad reality that political parties' internal affairs are not justiciable. This has been a clog to the development of politics and fairness in election in Nigeria.

[51] S. 40 of the CFRN 1999

CHAPTER FOUR

DISCRETIONARY POWERS OF THE COURT; ITS EFFECTS ON THE MANDATE OF THE PEOPLE BASED ON DEFICIENCIES IN THE ELECTORAL LAWS.

INTRODUCTION

The institutional Frameworks includes the courts which, constitutionally, are saddled with the duties of dispute resolution. Of particular interest to this study are election related disputes.

The court in most cases are faced with circumstances which are not specifically covered by any law. In such situations the court will then resort to its discretionary powers. The exercise of the said discretionary powers may adversely affect the Mandate of the people.

4.1. Rationale for Judicial Discretion of court

The Constitution charged the court with the responsibility of interpreting laws and adjudicating on matters arising from the rights, duties and obligations of people, body or organization. Section 6 of the Constitution provides for the general powers of courts to determine matters or disputes brought before it[1]. On the other hand section 285 of the same Constitution as amended provides for establishment, powers and functions of Election Petition Tribunals. There shall be established for each State of the Federation and the Federal Capital Territory, one or more election tribunals to be known as the National and State Houses of Assembly Election Tribunals which shall, to the exclusion of any Court or Tribunal, have original jurisdiction to hear and determine petitions as to whether:

a. any person has been validly elected as a member of the National Assembly or

[1]6 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended 2011).

b. any person has been validly elected as member of the House of Assembly of a State.

2. There shall be established in each State of the Federation an election tribunal to be known as the Governorship Election Tribunal which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor of a State[2]. The section further provides that "An election petition shall be filed within 21 days after the date of the declaration of result of the elections"[3]. An election tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition[4]. An appeal from a decision of an election tribunal or Court of Appeal in an election matter shall be heard and disposed of within 60 days from the date of the delivery of judgment of the tribunal or Court of Appeal.[5]

The important take away from the Constitutional alteration above are that:

a. The powers of the tribunals are circumscribed and delimited in that they can only adjudicate on matters that arise in the general elections and not before. That is it clearly distinguished between the forums for pre and post-election issues,
b. An electoral tribunal must render a decision in a case involving dispute over elections within 180 days from the day of filing of the petition,
c. The Court of Appeal must render a decision within 60 days from the date the tribunal handed down its decision.

The basic aim of statutory interpretation is to discover the intentions of the legislature in

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[2]Section 285(1)(a) and (b) of the 1999 Constitution as amended.

[3] Section 285(5) of the Constitution of federal Republic of Nigeria 1999 (as amended)

[4]285(6) of the 1999 Constitution as amended

[5]Section 285(7) of the 1999 Constitution as amended

order to give effect to them. However, the discernment of the intention of the legislature is not an easy exercise. Statutes are usually written in general terms to be applied in specific circumstances. Also, the meaning of words used in a statute may depend on the context, time and place they are used and might change over time[6]. For these reasons and many more, the legislature may ensure that legislations are enacted in general terms, enough to cover unforeseen situations[7]. Vague or ambiguous words used in a statute might be regarded as a compromise from the legislature to the courts to give it the meaning or interpretation that will best suit the intended purpose of the policy priority[8]. Aside these points, public policy and changing realities of the society require that courts be given discretion or liberty in the interpretation of law in other to meet up with the changing or dynamic nature of the state. This underscores the views of the sociological jurisprudence of law who see law as an instrument of social control and social change as law does not make a society but reflects it. Hence, judicial discretion was given to courts to adopt the best possible approach to attaining legislative intentions and purposes by a discreet exercise of discretion, judicially and judiciously.

4.2 Review of the Lacunae in the Electoral Act, 2010 and notable judicial exploit of them.

According to the Supreme Court, **"elections are hardly ever conducted without some irregularities. No matter how well the regulatory authority conducts an election, there**

[6]VC Brannon, Statutory Interpretation*:* Theories, Tools and Trends (Congressional Research Service, 2018) 1.
[7]*ibid*, p. 1 & 2.
[8]*ibid*.

are complaints."[9] There is hardly any election in Nigeria that was not challenged in court. An election petition commences all actions instituted to challenge the result of an election in Nigeria.[10]

The rationale for the enactment of Electoral Act in Nigeria is to regulate elections. Free and fair elections are the bedrock of every functional democracy by ensuring that government authority derives from the will of the people. Hence the need for rules and regulations that would guide the elections to ensure they are free and fair. The electoral laws of Nigeria have gone through series of amendments or alterations. On the return to civil rule in 1999, the first Electoral Act was passed in 2001 and revised in 2002, 2006 and 2010.

There has always been an attempt after every election to amend the Electoral Act to rectify the deficiencies or mischief's noticed during the previous elections. This makes the challenge of improving the electoral process a continuous one. For instance, there have been attempts in the past to improve the electoral process after every general election since 1999 in 2003, 2007, 2011, 2015 and 2019[11].

The Electoral Act 2010 was enacted by the National Assembly of the Federal Republic of Nigeria pursuant to its constitutional powers of law making[12]. The repeal of the Electoral Act 2006 and the enactment of the Electoral Act 2010, among others, was a deliberate attempt to curb the challenges militating against free, fair, credible and acceptable elections in Nigeria[13].

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[9] *Okechukwu vs INEC* (2014) 17 NWLR (Pt. 1436) 259 at 309

[10] Section 133(1), Electoral Act, 2010 (as amended)

[11] <https://guardian.ng/politics/electoral-act-amendment-bill-2021-and-the-way-forward/)> accessed on 20th January, 2022

[12] S. 4 of the CFRN.

[13] <https://www.google.com/amp/s/businessday.ng/amp/opinion/article/rebuilding-nigerias-electoral-processes-and-institutions-using-the-justice-uwais-report/)> accessed on 20th January, 2022

However, the plethora of electoral disputes and conflicting judgments of Election Petition Tribunals and Courts that emanated from subsequent general elections of 2011, 2015, 2019 that were governed by the Electoral Act 2010 indicates that the said Act is still replete with flaws and gaps hence the need for further amendments. Available record indicated that, after the 2015 general elections, over 600 election cases were filed at the different election petition tribunals across the country by losers in the Governorship, Senatorial, House of Representatives and State Houses of Assembly elections[14].

Below are some of the lacunae in the Electoral Act2010 and judicial decisions:

Section 25 (6) of the Electoral Act 2010 provides that elections to the Office of the Presidency shall be held on a date not earlier than 150 days, translating to about five months and not later than 30 days before the expiration of the tenure of the holder of that office. This section is flawed as it is inconsistent with the section 132 (2) of the Constitution which makes reference to a time-frame within which election should be conducted. The inconsistency is that the Constitution proposes a time-frame shorter than what is contained in the Electoral Act. As such, the Electoral Act 2010 is null and void to the extent of the inconsistency as the Constitution prevails[15]. This inconsistency can constitute a reasonable ground for a court or tribunal to cancel an election and by extension invalidate the collective will of the people.

Similarly, section 69 of the Act[16] provides for the declaration of election results. It states that in an election to the office of the President, Governor whether or not contested or in any contested election to any elective office, the result will be ascertained by counting the votes

[14] Compendium of 2015 General Election in Nigeria Petitions (2017 Nigeria Civil Society Situation Room. All rights are reserved.)

[15] S. 1(1) & (2) of the CFRN

[16] Electoral Act

cast for each candidate, the candidate who receives the highest number of votes will be declared elected. The provision did not cover elections to legislative offices. It also failed to provide for what happens where a pre-election matter is yet to be determined concerning the validity of a candidate of the party before the general election. Available case laws show that the electoral umpire, INEC, usually go ahead to declare the political party as the winner of the election pending the final determination of the case. For example, in the recently concluded Council election in the Federal Capital Territory, the electoral commission (INEC) declared the All Progressives Congress (APC) as the winner of the chairmanship election in Abaji Area Council of Abuja in spite of the unsettled issue of who is the valid candidate of the party. According to the Returning Officer, "**We cannot declare a candidate winner in Abaji because the winning party does not have a candidate here, the case is still in court."** Also, he said a winner will be announced after the Supreme Court decision in the coming weeks[17].

Another notable exploitation of the lacuna in the Electoral Act 2010 is with respect to the election of Imo North Senatorial by-election. The Independent National Electoral Commission (INEC), declared the All Progressives Congress (APC) winner of the Dec. 5, 2021 election. Announcing the result, the returning officer, Mr Hakeem Adikum, declared thus: **"I hereby return the All Progressive Congress as the winner of the by-election held in Imo North."** The INEC Resident Electoral Commissioner (REC) in Imo, Prof. Francis Ezeonu, said that the Commission was unable to return a candidate from the APC as

[17]<https://www.premiumtimesng.com/regional/north-central/511391-fctdecides2022-apc-wins-abaji-but-no-candidate-can-be-declared-winner-inec.html> accessed on 20th January, 2022

winner[18].

Flaws like this in the Electoral Act 2010 had culminated into judicial decisions that overtly contradict the wishes of the citizens at the polls.

There is also a lacuna in the Electoral Act 2010 with respect to section 31 of the Act. Section 31 provides that every political party shall not later than 60days before the date appointed for the general election, submit to the Commission in the prescribed forms, the list of the candidates the political party proposes to sponsor at the elections, which shall be published within 7 days of receipt, provided the Commission does not disqualify the candidate for any reason. The list of candidates is to be accompanied by an affidavit at the Court, indicating that the candidate has fulfilled all the constitutional requirements for election into that office. This provision of the Act has precipitated an avalanche of post election disputes wherein the exercises of judicial discretion in the resolution of the cases have greatly affected the mandate of the people. The phrase "submit to the Commission in the prescribed forms" is deficient as it failed to state which officers of the political party will sign the forms. A comparison of section 31(1) with section 84(3) shows that there is a gap to wit: the appropriate official of the party that should sign the form unlike section 84 (3) which clearly provided that an application for merger shall be signed by the National Chairman, National Secretary and Treasurer of the merging political parties. In the Supreme Court where Mr. Eyitayo Olayinka Jegede challenged the election of Governor Oluwarotimi Odunayo Akeredolu on the ground

[18]<https://guardian.ng/news/inec-declares-apc-winner-of-imo-north-senatorial-by-election-without-candidate /> accessed on 20th January, 2022

that Akeredolu's form was signed by an unauthorized person, the majority decision of the court was that section did not specifically provide that the nomination form must be signed by the National Chairman while the minority decision held otherwise. This is another case where for lacunae in the Electoral Act 2010 the judiciary decided the case not based on legislative provision but on its discretionary powers. Curiously, the same Supreme Court has in the case of *Emeka v. Okadigbo*[19] held that it is only the National Chairman and National Secretary of a political party can submit the list of candidates it intends to sponsor in an election.

4.3 The need for drafters to take Cognizance of judicial decisions in enacting Electoral Laws

There is the need for drafters to take cognizance of the rules of statutory interpretation alongside the attitudes of courts in deciding election matters. This will help the Legislature to enact legislations that will communicate its intentions in a clear and unambiguous manner. This will also help to limit the wide exercise of judicial discretion by exploiting obvious lacuna in the electoral system or laws which impacts negatively on the mandate of the people. This is because a lacuna in electoral laws shields some courts who hide behind it to execute or implement their personal, political or economic motives which they disguise as an honest or judicious exercise of discretion.

[19] 2012) 7 SC (Pt. 1) 1, (2012) 18 NWLR (Pt. 1331) 55

CHAPTER FIVE

SUMMARY OF FINDINGS, RECOMMENDATIONS AND CONCLUSION

Introduction

The research examined the legal effects of judicial discretion on the mandate of the people consequent upon the lacunae and other deficiencies in the Electoral Act, 2010 with election petition tribunal decisions as a case study.

5.1 Summary of Findings

The major findings of this work are as follows:

1. It was discovered that the unprecedented challenges of election results in Nigeria were predominantly caused by deficiencies, ambiguities and lacunae in the Electoral Act. These shortfall in the Electoral Act prompted the resort to discretionary powers by the courts.
2. The research found that the different amendments of the Electoral Act were not comprehensive and far reaching enough. To this extent certain keywords/terms were either not defined or were vaguely defined which prompted the approach to court for detailed interpretation and application of the said laws.
3. The work discovered that, as a matter of fact, the discretionary powers of the judiciary cannot be dispensed with as it is impossible for legislation to cover the field. In the same vein the research also found that because of human biases the exercise of judicial discretion were not, in some cases, judicial and judicious which to a larger extent, negatively affected the mandate of the people.
4. The study found that with the current state of the Electoral Act the efficient and effective justice delivery in Nigeria cannot be achieved.

Introduction

This study pursuant to the analysis of the aims and objectives set out in the work made a number of findings consequent upon which the following recommendations are hereby proposed.

5.2 Recommendations

I. Pursuant to the substantial causes of increment in the number of pre and post election disputes and heedful of the fact that exercise of judicial discretionary powers is inevitable which in turn may negatively affect the mandate of the people this study therefore recommends that both legislative and discretionary measures should be put in place to bring the resort to discretionary powers to the barest minimum.

2. Against the deficiencies and gaps found in the Electoral Act this study recommends that a comprehensive amendment of the Electoral Act is urgently needed with particular emphasis on the sections that were ambiguous to close the observed lacunae.

3. Premised on the indispensability of judicial discretionary powers by the judiciary coupled with issues of human biases this work recommends that the doctrine of stare decisis should be strictly enforced to wit: all controversial election related decisions should be reviewed as a matter of procedure. The National Judicial Council, NJC, shall take up the responsibility through a committee established for that purpose.

4. Because of the dynamic nature of the society coupled with the changing meaning of legal terms and words as well as certain locus classicus court decisions this study recommends for frequent periodical amendments of the Electoral Act.

5.3 Contributions to knowledge

The contributions of this work to knowledge are that it helped to examine and understand the impact of judicial discretion as a result of the lacunae and deficiencies in the Electoral Act on

the mandate of the people. It also made useful recommendations that will serve as basis for further research in this field and a stimulus for further the reformation of the Electoral Act.

5.4 Conclusion

This paper having examined the discretionary powers of courts with particular reference to Election Petition Tribunal Decisions as a consequence of deficiencies in the Electoral Acts found that there are instances where the discretionary powers of the courts were abused.

From the analysis and findings of the study, judicial discretion is inevitable in all legal dispute adjudication including election petitions matters. It is a matter of scope and extent and immensely impacted on general election results. The exercise of discretionary powers by election tribunal Justices may be affected by socioeconomic and infrastructural challenges that they are confronted with in the performance of their duties. There may be dearth of reference and research materials in their new area of posting coupled with inelegant and insufficient legislation to guide and guard them. The resort to discretionary powers is not entirely dependent on lacunae and deficiencies in the electoral legal framework rather it is inherent and indispensable. Making recourse to judicial discretion is welcomed provided it is exercised judicially and judiciously. The non-judicial and non-judicious exercise of discretionary powers may lead to thwarting of the voters choice which may result in voters' apathy. Because of the disturbing consequences of wrong exercise of judicial discretion on election petitions cases many scholars, lawyers etc have generated debates on the best way to ensure minimal influence of discretionary powers on post-election matters. Election as the cornerstone of democracy and democracy as the best form of government is and will continue to be a veritable source of material for research.

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