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Calls For Amendment of the 1999 Constitution Over The Death of A Candidate for An Election Preceding Conclusion of Polls in Nigeria: A Critique

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ABSTRACT

The spate of inconclusive elections in Nigeria due to election malpractices and the wanton resort to re-runs as remedy without consideration for legal and economic implications is alarming. The Independent National Electoral Commission's role during the Kogi State gubernatorial election held on the 21st of November, 2015 opened up a number of issues. Principal amongst the issues was the calls for amendment of the 1999 Constitution. The Supreme Court stated that INEC took the most appropriate step in compliance with its Manual despite the affirmation by it that there is no constitutional and electoral provision to address the issue. The article argues that the merit of the step taken by INEC not to continue with the elections was mischievous. If INEC had honed up to its responsibility in conformity with electoral laws, the Kogi State gubernatorial elections would have been concluded without the constitutional gap melodramas. The article concludes that the current constitutional and electoral provisions are adequate to address the conduct of elections in Nigeria. What is needed is strict adherence to provisions of law in the management and conduct of elections as well as arraigns election offences so as to checkmate any anti-democratic tendencies in the electoral process.

1.0 INTRODUCTION

The phenomenon of Constitutional democracy depicts a practice of periodic conduct of elections through which the governed are allowed to freely and fairly select those who are to direct the affairs of governance. Nigeria has had a chequered history of constitutional democracy, fundamentally fraught with diverse degrees of electoral malpractice, fraud and violence. Often times, properties worth millions of naira are wasted. There is hardly any conduct of election that does not record death tolls resulting from violence. Many of those who usually die in the course of elections as a result of electoral

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malpractices and violence are the electorates or the supporters of those vying for elective positions. It is, however, sad to note that several of these deaths are largely unaccounted. Most pathetic is the persistent non-prosecution of election offenders by INEC or the government over the years even though there are clear re-occurring violations of provisions of the Electoral Act by political parties and their supporters. Of course, there are such constitutional and electoral safeguards for persons who may lose property or life in the course of an election. Usually, the problem lies in the lack of adequate remedy or enforcement of relevant provisions of law.

A much bigger problem emerges when either a presidential or a governorship candidate dies or loses life in the course of an election. While there is a clear constitutional remedy for death of a governorship candidate or a governor-elect dying after being duly elected, the death of a candidate occurring before the conclusion of polls does have clear or express constitutional and electoral provisions and remedy in Nigeria.

Furthermore, the issue of right to substitute a dead candidate in an election (inconclusive election) and what amounts to a valid substitute is also unsettled, given the professed absence of constitutional and electoral clear safeguards. This is notwithstanding the clear electoral provision and the number of decided cases which have adequately dealt with the matter. It is quite disturbing to discover lawyers expressed opinions on the matter that the deputy governorship candidate, Faleke should be deemed duly elected because of the insignificance of the re-run election to determine the anticipated outcome of the overall polls.

How about the concepts of cancellation of election, inconclusive and supplementary elections? Are these constitutionally and electorally recognised? Can INEC validly or lawfully cancel an election or declare it inconclusive as it did in Kogi State for the said reasons and thereby conduct re-runs? There are no constitutional or electoral provisions which tend to grant the power of cancellation or declaring elections inconclusive or conduct supplementary elections for culpable under-voting. A proper determination of the questions as raised, therefore, would assist in ascertaining the likely dimensions in which the constitutional gap argument may swing.

The backdrop of these looming controversies in view of the Constitution and the Electoral Act as well as the conflicting barrage of opinions to which the constitutional and electoral provisions have been subjected to by lawyers prompted this research. The legal implications presented by the varied conflicting opinions are not only multidimensional in nature, but are also unclear, capable of misleading and have consequently led to the legal battle between *Faleke* v. *INEC*.[1]

Therefore, this paper evaluates the different shades of opinions expressed over the constitutionality of INEC's activities on the Kogi State governorship election as held on the 21st of November 2015 as well as the constitutional gap debate over the death of a candidate that resulted in an inconclusive poll within the context of the 1999 Constitution (as amended) in relation to the Electoral Act, 2010 (as amended). Assuming but not conceding entirely to the decision of the Supreme Court in *Faleke* v. *INEC*, it is the intent of the article to propose a community consideration of both laws and other connecting factors as a therapy for the seeming constitutional crack over the death of a candidate for an election before the conclusion of poll. In addition, it will be shown in the article that if proper explanations of the variables constituting and associated with the issues were put in their apposite perspectives, perhaps the decision of the Supreme Court would have taken a different swing.

2.0 SPATE OF CANCELLATION AND INCONCLUSIVE ELECTIONS IN NIGERIA

The concepts of inconclusive poll and Supplementary election are not expressly defined in the Constitution and in the Electoral Act 2010 (as amended).[2] They also seem not to have any judicial description or definition. The Black's Law Dictionary defines the word "inconclusive" to mean "(of evidence) not leading to a conclusion or definite result."[3] So far, looking at the concept in the context in which INEC usually uses it, it may not be out of place to say that it is referred to mean a

[1] (2016) 18 NWLR (Pt. 1545) 16.

[2] Except as in the circumstances prescribed under section 53(2) of the Electoral Act 2010 (as amended).

[3] See Garner, Black's Law Dictionary, 8th edn, P. 780.

situation in which elections or polls do not lead to any of the contestants capable of being declared or returned as winner of the election perhaps because of some alleged electoral malpractice or fraud.[4]

Recently, Yakubu, the current INEC chairman was quoted as saying in an exclusive interview that:

> Elections are rendered inconclusive in Nigeria because voters are now given the opportunity to cast their votes….That if you disrupt election anywhere, the people would be ultimately given another opportunity because every vote in Nigeria must count.[5]

It is quite disturbing to imagine how disruption and the need for votes to count become grounds for rendering an election inconclusive. It is also difficult to understand the nature of the role INEC is to play in election processes. Is this so-called "disruption of election and the need for votes to count," is it the statutorily required basis for inconclusiveness of an election? This is thought that disruption of an election ought to be regarded as election fraud or malpractice as expressly stated and defined under the Electoral Act.[6] It should be noted, however, that no election malpractice or fraud defined under the Electoral Act has as a measure or an option for the concept of inconclusive and supplementary election except as provided under section 53(2) of the Electoral Act 2010 (as amended).

Consequently, the act of declaring an election inconclusive, followed always by the conduct of supplementary elections, predominantly in the Kogi State' gubernatorial elections was unconstitutional and amounted to a flagrant violation of the Electoral Act 2010 (as amended). Under the circumstances INEC exceeded its power of postponement of election date for any cogent and verifiable apprehension of impossibility to conduct the elections as a result of

[4] *ibid.* at P. 558 where election fraud is defined as "illegal conduct committed in an election, usually in the form of fraudulent voting."

[5] Fidelis Mac-Leva, "One Year of Inconclusive Polls," available at http://www.dailytrust.com.ng/news. (accessed 31 May, 2016).

[6] See sections 117 to 132 of the Electoral Act 2010 (as amended).

natural disasters or other emergencies before commencement of poll.[7] There is no provision in all of the 320 sections of the Constitution or the 158 sections of the Electoral Act that empowers INEC to nullify or cancel either a concluded election or an inconclusive election. The death of a candidate of a political party does not confer any power on INEC to set aside either a concluded or an inconclusive election. The law has already catered for such eventuality by allowing for the substitution of the deceased candidate in the case of an inconclusive election.[8]

In Kogi State for instance, the reason adduced by INEC for declaring the election inconclusive was because "the differences in the votes scored by two leading candidates in the election was less than votes expected in some areas where election was cancelled.[9] In *Terab v. Lawan*,[10] the court stated that an electoral malpractice can occur in a situation where the votes scored by parties exceeded the number of the accredited votes. This is referred to as over-voting under the Electoral Act.[11] It may be useful to reproduce the section to attain some clarity of purpose. Section 53(1) (2) states as follows:

> (1) No voter shall vote for more than one candidate or record more than one vote in favour of any candidate at anyone election. (2) where the votes cast at an election in any polling unit exceed the number of registered voters in that polling unit, the result of the election for that polling unit shall be declared void by the commission and another election may be conducted at a date to be fixed by the commission where the result at the polling unit may affect the overall result in the Constituency.

[7] See section 26 of the Electoral Act 2010 (as amended).

[8] Inibehe Effiong, "Legal Implication of Death of Kogi State APC Governorship Candidate," available at http://thewillnigeria.com/news, (accessed 15 April, 2016).

[9] See Vanguard 23rd November, 2015.

[10] (1992) 3 NWLR (Pt 231) 569,587.

[11] See section 53.

From the foregoing provisions of the Electoral Act, it is clear that INEC, for obvious grounds of culpable over-voting can render an election result null, and thereby conduct another election, but, not for the disruption of the election and wanting votes to count as popularly claimed by the INEC chair. Even so, the question which should be begging for an answer is: who should have been responsible for ensuring that only duly registered and accredited voters are allowed to vote? Who should have secured a conducive atmosphere for the conduct of a free and fair election and for such votes to count? What role do security agents play on such election days? How much has always been budgeted for ensuring smooth electioneering processes? Surely INEC has a lot of explanation to give, and it is time INEC was put on stage to defend the roles it plays in elections with tax payers' money. If it is INEC's duty to ensure that voting is done appropriately, why then the latitude of re-conducting another election by the same INEC when it had *a fortiori* failed in its statutory duty? Rather than giving INEC an opportunity to conduct supplementary elections in the event of any suspected over-voting, usually at the expense of tax-payers' money, it is contested that INEC should be blamed and prosecuted for wasting tax-payers' money and under the circumstances, the outcome of such malpractice should be in favour of the candidate that has benefited from the INEC's dereliction of duty.

Giving that INEC has power to cancel the result of an election for culpable over-voting, can the reason adduced by INEC for the cancellation of the Kogi State gubernatorial election be situated within the context of Section 53(2) of the Electoral Act? Putting it perhaps in a more appropriate manner, was the 21st of November, 2015 gubernatorial election of Kogi State a situation of over- voting? If the reason given by INEC was the true representation in view of the Kogi State election, then it was not a sufficient ground for the "inconclusiveness" of the election as under-voting does not obviously constitute as a reason for cancellation of any election under the Electoral Act 2010 (as amended).

In other democracies, Turkey for instance, "inconclusiveness" of an election has been employed to mean the inability of a given political party to gain majority seats in parliament after the conclusion of

polls.[12] Such inconclusiveness usually necessitates the formation of a coalition government to forestall any likelihood of political impasse suspected of adversely affecting viable economic decisions for rapid growth and development, particularly the ruling parties' drive to deliver its ideologies or campaign promises to the electorates.[13] Even in Italy, the concept of inconclusive election bears the same meaning as in Turkey, that is, failure to achieve overall majority in an election. Thus, while evaluating the economic implications[14] of inconclusive election in Italy, Jeffrey said: "the inconclusive result has pushed ten-year Italian government bond yields up 50 basis points to 4.8%; equity prices have tumbled both in Italy and further afield".[15]

Regrettably, the economic burdens of inconclusive and supplementary elections are disregarded in Nigeria, and this has accounted for the frivolous manner with which INEC has in recent times rendered various elections inconclusive for every form of election fraud or malpractice irrespective of such clear statutory guidelines and who perhaps committed it.

Again, still on the issue of cancellation of elections: is declaring an election inconclusive amount to cancellation of that election? Can INEC cancel an on-going election for an alleged under voting as it did in regards to the Kogi State scenario, violence in Bayelsa State, Rivers

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[12] See Jacob Ekholdt Christensen, "Turkey: Another Election, Another Inconclusive Outcome," available at www.danskeresearch.com, (accessed 30 April, 2016).

[13] *ibid.*

[14] It is sad to note how really under-developed Nigeria is as a country. Since the emergence of the inconclusive election regime in the Nigerian political landscape, the debate has been centered on constitutional amendment to take care of death of a candidate during an election instead of focusing on the cost implications the introduction of the concept poses to the dwindling economic fortunes of the country as done in other democracies. Again, there is equally scarcity or no argument at all as to whether the concept is lawfully employed by INEC into the polity. It is certain that the concept is a borrowed one, usually used by INEC to distort the conduct of elections rather than allowing the law to have its full course on fraudulent electoral practices as prescribed by the Electoral Act 2010 (as amended).

[15] See Jeffrey Anderson, "Italy: Inconclusive Election Intensifies Uncertainty," (2013) *Institute of International Financ*e, Inc, p. 1.

State and several other elections? Is it a constitutional right or a power guaranteed under the Electoral Act? According to section 36(1) of the Electoral Act 2010 (as amended):

> if after the time for the delivery of nomination paper and before the commencement of the poll, a nominated candidate dies, the Chief National Electoral Commissioner or the Resident Electoral Commissioner shall, being satisfied of the fact of the death, countermand the poll in which the deceased candidate was to participate and the Commission shall appoint some other convenient date for the election within 14 days.

Clearly from the above provision, INEC has very limited or restricted power to cancel election, specifically on grounds of an alleged over-voting; postponement of the date slated for the commencement of an election due to death of a nominated candidate for that election and not otherwise. It can also postpone the date for the conduct of an election for such cogent and verifiable suspicion of the election being disturbed or the conduct of the election being made impossible owing to an occurrence of a natural disaster or for other reasonable emergencies. [16] In *Labour Party* v. *Independent National Electoral Commission*,[17] the Supreme Court made this point when it said:

> where a general election has been held and there is a false start, for example, a candidate who ought to have been part of the election was unlawfully excluded or there was no level playing ground for all the candidates and that election is subsequently either cancelled by the regulating authority like INEC or nullified by an order of a court or tribunal, and a re-run or re-start is ordered…the re-start or re-run refers to that general election cancelled or nullified and not a bye-election.[18]

Curiously, if an election is falsely started or a candidate is unlawfully excluded, is it not an act of electoral fraud or malpractice defined

[16] See section 26 of the Electoral Act 2010 (as amended).

[17] (2009) 1-2 SC 43.

[18] *ibid.*

under Part VII[19] of the Electoral Act? And who ought to have been responsible for starting an election rightly or wrongly or including and excluding a party in an election? Is it not the duty of INEC? Talking of an unlawful exclusion of a candidate for an election, is it not a pre-election matter? Should such exclusion be treated as sufficient ground for cancelling an election? Does INEC have such power of cancellation under the Electoral Act? It is argued that the power of cancellation as guaranteed by the Electoral Act has only to do with a situation of suspected over voting. Often times, INEC has over-stressed its discretionary power, thereby rendering elections inconclusive for every manner of reasons. Small wonder, the Supreme Court was fantastically right when it aptly stated in *Brig. General Mohammed Buba Marwa (RTD) & Anor.* v. *Admiral Murtala Nyako (RTD) & 9 Ors*[20] that:

> the Constitution does not make provision for a re-run election neither does it envisage that a person whose election was nullified following an allegation of election malpractices will be re-elected after a fresh or re-run election. These are the root causes of the perplexities we are now faced with….[21]

It is on this note that one tends to lose sleep over the increasing spate of cancelled and inconclusive elections as well as their accompanying supplementary elections or re-runs in the Nigerian polity for any of the flimsy reasons which INEC had always given other than as clearly and expressly provided and for the purposes stipulated in sections 26, 36 and 53 of the Electoral Act 2010 (as amended). The concepts of inconclusive and supplementary elections are therefore frivolous orchestrations or devices of INEC to insulate electoral fraud or malpractices either committed or aided and abetted by it. This is even more so given the fact of how violently elections are being conducted, leading to several deaths without prosecution of the alleged perpetrators. Since the emergence of democratic rule, there had not

[19] This is where all acts constituting either fraud or malpractice and which are defined and prescribed as election offence with such appropriate sanctions are provided for.

[20] (2012) 1 SC (Pt III) 44.

[21] *ibid.*

been any law report on any convicted election offender. What a pathetic situation![22]

3.0 THE CONSTITUTIONAL GAP DEBATE OVER THE DEATH OF A CANDIDATE FOR AN ELECTION

The Kogi State gubernatorial election in which the election was rendered "inconclusive" and in which death thereby occurred to the leading APC candidate, the overwhelming contention has been that the Constitution should be amended. Even so, while there may be sufficient provisions of laws to tackle such violent or fraudulent situations, the death of a presidential or governorship candidate in the course of an election seems not to have a clear constitutional answer. Accordingly, by section 181(1) of the 1999 Constitution (as amended):

> If a person duly elected as Governor dies before taking and subscribing the Oath of Allegiance and Oath of office, or is unable for any reason whatsoever to be sworn in, the person elected with him as Deputy Governor shall be sworn in as Governor and he shall nominate a new Deputy-Governor who

[22] This is despite the provisions of section 1 (a) (b) of the Electoral Act 2010 (as amended) guaranteeing INEC as a corporate body, having power to sue and be sued. It is sad to note, nevertheless, that rather than INEC making arrest and prosecuting alleged election offenders, it is such perceived wronged candidates and political parties that bring actions against INEC for one misdeed or the other. There is hardly any election petition that that does not include INEC as a party. This perpetual inclusion of INEC is not only because it is the election management body, but more often than not because, it is seen as either abetting or aiding the breach of election laws. Even in situations in which INEC had been indicted by Tribunals, no serious legal actions have been taken against it other than a ruling or a directive to conduct fresh elections or declaring a candidate winner whenever deemed necessary. The economic implications of supplementary or re-runs are never considered in the decision of courts or tribunals. It is, therefore, no wonder that the Nigerian economy is melting down the drains and salaries of workers are no longer payable by many State governors. If INEC were to be a private limited company, incorporated to conduct and manage elections to yield returns, one wonders how long it would have to remain in business by cancelling, supplementing and re-running elections just to produce candidates that would become economic burdens to Nigeria, and thorns on the flesh to the electorates to whom sovereignty belongs according to section 14 of the 1999 Constitution (as amended).

> shall be appointed by the Governor with the approval of a simple majority of the House of Assembly of the State.

The above provision of the Constitution relates fundamentally to a situation where the dead governorship candidate must have been duly elected. In the circumstances, the Constitution validates the succession by the Deputy-Governor-elect. Anyway, there is no clear constitutional provision at present for a governorship candidate who dies before being duly elected. It, however, means that where the governorship candidate has not been duly elected, the deputy governorship candidate cannot validly succeed him/her. Section 181 (1) of the Constitution does not contemplate a situation of death of a candidate in the course of the election, especially as relating to the Kogi State saga under review- hence the purported constitutional gap debate. Yet the underlying purport of this provision has been given different interpretations vis-à-vis the Kogi State gubernatorial saga.

The view has been expressed that "since the governor and his deputy are elected on a single ticket, the death of the governorship candidate before he assumed office should create a vacuum which can be filled only through a process of another election, as the former election would have become a nullity."[23] Braithwaite, who shares this opinion said that "the demise of Prince Abubakar Audu calls for a fresh governorship election in Kogi State."[24] Supporting the same view is Bisi Adegbuyi, a stalwart of the Afenifere Renewal Group who said "there is nothing other [than] holding another election; APC should be allowed to present another candidate since the election has not been concluded, the deputy governorship candidate cannot take his place; he is not the candidate."[25]

Okoi Obono-Obia, after citing some perceived-to-be relevant sections of the Electoral Act 2010 (as amended), [26] and having

[23] Jadesola O. Akande, *Akande: Introduction to the Constitution of the Federal Republic of Nigeria 1999*, (MIJ Professional Publishers Limited, Lagos, 2000), 236 and 296. This view was also canvassed by Olisa Agbakoba and Prof. Itse Sagay. See their argument below.

[24] Tunji Braithwaite, "Kogi State: Constitutional Crisis as Audu's Death Divides Lawyerss, Vanguard, 23rd November, 2015.

[25] *ibid.*

[26] Sections 33 and 36 of the Electoral Act 2010 (as amended)

compared the Kogi State saga with that of Adamawa gubernatorial election in 1999 in which the PDP governor-elect, Atiku Abubakar was nominated as the presidential candidate by Chief Obasanjo, concluded that "all in all, the legal consequences of the unfortunate death of Prince Abubakar of the APC is that INEC has to hold a fresh election in respect of the office of the governor of Kogi State of Nigeria."[27]

According to Morris Quaker:

> That the Nigerian Constitution did not envisage what has happened makes it tricky and dicey. In my thinking, if you read sections 36, 39 and 40 of the Electoral Act…[INEC] will have to conduct elections…what the party that was affected needs to do is to allow the deputy governorship candidate run as its governorship candidate while a new deputy governorship candidate is picked.[28]

A critical examination of the cited sections of the Electoral Act by Morris, most especially, section 36 thereof, which has to do with death of a candidate nominated for an election, is concerned with the death of a candidate occurring before the commencement of the polls. The section, further, enjoins INEC, on the satisfaction of such death occurring to extend the elections to allow the dead candidate to be replaced. It is somewhat difficult to position the Kogi State saga into any of the quoted sections of the Electoral Act as opined. On the whole, however, it may be safer to stress that, all of these crop of persons who express the view of either calling for fresh elections or that the deputy governorship candidate of the Kogi State saga cannot be the governor in the circumstances are invariably concluding that section 181(1) of the Constitution does not apply. They, of course, agree to some extent that there exists a seeming constitutional gap.

Perhaps the crux of the debate calling for the conduct of fresh polls by INEC is hinged on the premise that the death of Abubakar Audu has invalidated the APC ticket.[29] Those lawyers, who share this view,

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[27] Okoi Obono-bia, "The Legal Consequences of Audu's Death and the Guber Election in Kogi State" Vanguard, 23rd November, 2015.

[28] *ibid.*

[29] Tajudeen Suleiman, "Kogi State: A Test for INEC" TELL, 7th December, 2015, P. 16.

are Olisa Agbakoba and Itse Sagay respectively. They argued that "one needs to have a candidate and a party to complete the ticket, and since the candidate died before the election was concluded, a fresh process would have to be initiated."[30] It was further maintained by the duo that:

> Although section 181(1) of the Constitution says it is the party that can be voted for, the amended Electoral Act required the name and the party of the candidate to be published on the ballot, a development that now means that the candidate supersedes the party on the platform of which he or she is contesting. The National Assembly made the amendment to the Electoral Act in 2010 after the Supreme Court's ruling in [Rt. Hon]. *Chubuike Amaechi* v. *Celestine Omehia & the People's Democratic Party*, PDP in 2007 in which the court declared Amaechi winner despite the fact that his name was not on the ballot paper.[31]

It is pertinent to point out that as seemingly convincing as the argument presents, section 181(1) of the Constitution and the supposed provision of the Electoral Act being relied upon may not have answered the Kogi State gubernatorial election melodrama. More so, even in the Amaechi's case, going by the facts presented, Celestine did not participate in the Primary Election. It was Amaechi. But he was unduly replaced or substituted by the party. Hence, the relevance of section 33 of the Electoral Act in an attempt at prohibiting unjustifiable substitution of candidates nominated for an election by parties except in the event of death or withdrawal of which the Kogi State gubernatorial election saga might be properly situated.

Anayochukwu, while commenting on the real battle of who becomes the rightful governor of Kogi State on the caption, "Kogi State: Not Yet Uhuru" stated as follows:

> [That] the death of Audu before the conclusion of the Kogi State governorship election has shown that the Electoral Act is not robust enough to capture that eventuality. Lawyers are of the view that the conflict will run the full course to the Supreme Court before the real winner of the Kogi State

[30] *ibid.*

[31] *ibid.*

> election will be determined because the Electoral Act did not capture a situation where a candidate in an election dies before the conclusion of the election.[32]

Yet, in the view of Wole Olanipekun, counsel to Faleke:

> Faleke is governor elect. He argued that INEC's supplementary election in 91 polling units in the State and its directive to APC to replace Audu was misconceived because by section 181(1) of the Constitution, Faleke had become the governor elect. Our client, who was the deputy governorship candidate or associate of Prince Abubakar Audu at the already concluded election, constitutionally and automatically becomes the governor elect.[33]

Closely related and supportive of the opinion of Olanipekun is the standpoint of Festus Okoye, lawyer and Executive Director, Human Rights Monitoring. Citing section 36 of the Electoral Act 2010 (as amended) as the basis for his argument, Festus declared "that APC could no longer replace its governorship candidate since the time the law allowed had passed." [34] Stressing this point further, Festus maintained that "the operative provision should be section 181(1) of the 1999 Constitution."[35] He, therefore, concluded that James Faleke Abiodun, who was Audu's running mate, should be the governorship candidate and not anyone else.

Another writer whose view seems to support the candidature of James Faleke Abiodun in the Kogi State gubernatorial election saga is Festus Keyamo. Expressing his opinion on the matter to the Sahara Reporters, Keyamo has been quoted to have concluded as follow:

> My simple position is that the Kogi State situation fits more into section 181(1) of the 1999 Constitution (as amended) and as such James Abiodun Faleke automatically becomes the governorship candidate of the APC. This is because even

[32] Anayochukwu Agbo, "Kogi State: Not Yet Uhuru" Tell Magazine, 14th December, 2015. P. 32.

[33] *ibid.*

[34] Tajudeen Suleiman, op. cit. n. 29.

[35] *ibid.*

> though the election is inconclusive, votes have been counted and allocated to Parties and candidates. As a result the joint ticket of Audu/ Faleke has acquired some votes already. James Abiodun Faleke is as much entitled to those votes already counted as much as the late Abubakar Audu. He has a right to cling to those votes going into the supplementary election. There is only one problem, though. Who nominates Faleke's Deputy? Unlike section 181(1) of the 1999 Constitution, he cannot approach the House of Assembly of the State to approve a nomination by him of a Deputy. This is because, in reality, he is not duly elected yet. Therefore it is only reasonable to conclude that it is APC (Faleke's political party) that should submit the name of a fresh Deputy Governorship candidate to INEC for the supplementary election. This is the only position in this situation that accords with reason and good sense.[36]

Grippingly, those on the side of the divide supporting the candidature of Faleke do not seem to see any constitutional gap to be filled. While accepting that section 181(1) of the Constitution does not directly address the Kogi State saga, however, conceded that it is similar or closer to it, particularly because the outcome of the re-run under that election could not alter the APC's victory and argued that Faleke should be declared a deputy governor-elect to be accommodated by the provisions of section 181(1) of the Constitution. This line of argument, with all intent and purposes tilts towards more of answering the "ought" question in law. They have not been able to state in categorical terms as to whether what happened in the Kogi State gubernatorial race can be put squarely in the context of any express and cogent constitutional or electoral provision.

Contrary to the overwhelming weight of opinions apparently canvassing a hold-up for the candidature of James Faleke Abiodun in the Kogi State gubernatorial re-run elections, the APC, Faleke's Party

[36] Sahara Reporters, New York, 23rd November, 2015. As plausible as this argument appears, it may not be out of place to point out that the learned Senior Advocate of Nigeria may not have averted his mind to the Supreme Court decision on Amaechi where it was held that it is the party who earns the votes and not the candidate who is nominated as a flag bearer for the party. If the decision in Amaechi is anything to go by, then the votes earned are not Faleke's exclusively.

refused to follow or join in the band-wagon of the choice of Faleke as its governorship candidate. The APC had been advised that within the provisions of section 33 of the Electoral Act 2010 (as amended) and section 221 of the 1999 Constitution, it can validly substitute its dead candidate, Abubakar Audu. So the choice of Yahaya Bello who came second in the party's primary election as the candidate and the subsequent conduct of the re-run by INEC against the clarion calls for fresh polls of which Yahaya Bellow was declared winner and eventually sworn-in as the purportedly duly elected governor of Kogi State has further heightened the controversies.

Curiously, the choice of Yahaya Bello as replacement for Audu Abubakar tends to accord with the position maintained by Kennedy Emetulu. In yielding that the APC has right to substitute its dead candidate, based on the provisions of section 33 of the Electoral Act, Kennedy, nonetheless opined that Audu's replacement is certainly not James Faleke, the surviving deputy governorship candidate.[37] He, however, concluded that section 33 of Electoral Act must be applied purposively.[38] Audu would be deemed to have died before the commencement of the poll as "the Chief National Electoral Commissioner or the Resident Electoral Commissioner shall, being satisfied of the fact of the death, countermand the poll" in which the deceased candidate was to participate.[39] A "countermanding" of the election on account of death is simply the fair outcome. Once this is done, the fairness and objectivity of the process cannot be questioned.[40]

While the reasoning of Kennedy somewhat follows, it is quite disturbing and difficult to attempt any cogent and verifiable reasons as to why it should be deemed that the death of Audu occurred before the poll. What about the issue of countermanding the poll by INEC? If indeed INEC were to countermand the poll, the question is: which

[37] Kennedy Emetulu, "Death, Inconclusive Election and the Law." Sahara Reporters, available at http://saharareporters.com/2015, Retrieved 4th May, 2016.

[38] *ibid.*

[39] Kennedy Emetulu, op. cit. n. 37.

[40] *ibid.*

poll or election? Was it the election in which the dead Audu had participated and which was declared inconclusive by INEC or the re-run? Certainly, this standpoint cannot be categorised as a clear representation of the true purport of section 33 of the Electoral Act. Deeming Audu to have died before the election commenced is glaringly sentimental and fallacious, and seems not to reasonably reflect what the legislature may have intended on the issue.

The reasons advanced by INEC for not completing the polls did not give it a right to cancel the election. It is an occurrence of over voting-under section 53(2) that confer on INEC a right or power to cancel an election. Beyond this state of affairs, every other act of electoral malpractice or fraud is as specifically and consequently defined and prescribed as election offence in sections 117 through to 131 by the Electoral Act 2010 (as amended). So, if INEC had wrongly rendered the Kogi State gubernatorial election inconclusive, then the conduct of the supplementary election was unlawful. This implies of course that the argument that Faleke should be considered as deputy governor-elect in these circumstances in accordance with section 181 of the Constitution accords with reason and common sense. But the Supreme Court held that INEC validly rendered the Kogi State Gubernatorial Election of 21st of November, 2015 inconclusive by reference to its Manual for Electoral Officers.[41]

The Supreme Court has finally laid to rest the controversy as to whether there exists any statutory and constitutional vacuum addressing the issue of death of a candidate for an election preceding the conclusion of polls when it held in *Wada v. Bello*,[42] as to what INEC will do as an Electoral Umpire where a candidate dies after commencement of poll that:

> Neither the Electoral Act, 2010 (as amended) nor the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provide for what to do in the event of the death of a candidate after the commencement of the poll as in the instant case. The death of the original candidate of the 2nd respondents after the commencement of the poll in the November 21st election in Kogi State left a yawning gap in the

[41] See paragraph 4.2 for detail discussion on the issue.

[42] (2016) 17 NWLR (Pt. 1542) 374.

> Nation's electoral process without any provision for filling the gap. In the situation such as this, it amounts to abdication of duty for the Electoral Umpire and the tribunal and court to fold their hands and bemoan the fact that the legislature failed to do the impossible- providing for all exigencies both in the present and the future in their legislative duties….[43]

It is, however, curious to find that despite the professed constitutional and statutory gap, the Supreme Court still regarded the role of INEC and APC in the circumstances as expedient or appropriate. What was the basis for the appropriateness of substituting Abubakar with Bello when there is no law permitting the substitution at the time? Why was it not right for Faleke to substitute Abubakar in the "lawless" circumstance seeing that the votes scored already were substantial enough and the supplementary election was as a result needless to determine the outcome of the election? It is contended that the role of INEC in the Kogi State gubernatorial election held on the 21st November, and 5th December, 2016 did not have the support of law and was thereby baseless as well as occasioned a miscarriage of injustice. This is notwithstanding the decision of the Supreme Court most recently in *Salah* v. *Abah*[44] where it stated *inter alia* that "the Supreme Court is not only a court of law but also of public policy."[45] It is argued that public policy is not law and cannot, therefore, form the basis for a decision of the Supreme Court or any other court of law in Nigeria. Lines 12 -14 of the Judicial Oath[46] sworn to by all Judicial Officers states that:

> I will discharge my duties, and perform my functions honestly, for the best of my ability and faithfully in accordance with the Constitution of the Federal Republic of Nigeria and the law….

All courts of superior record, by the dictate of the Constitution are courts of law and decisions of courts must be reached in compliance with the law. It follows from this that the idea to do the needful by

[43] *Ibid* at P. 427.

[44] (2017) 12 NWLR (Pt. 1578) 100,

[45] *ibid.* at P. 133.

[46] Seventh Schedule to Constitution of the Federal Republic of Nigeria 1999 (as amended).

INEC and APC in the Faleke's case was not based on law, and it was erroneous on the part of the Supreme Court to uphold it as being appropriate because the said actions were not covered by the Constitution and the Electoral Act. The purported actions with all intent and purposes lacked merit and were cleverly calculated to feed on the perceived constitutional and statutory *lacunas*.

4.0 A CRITIQUE OF *FALEKE* v. *INEC*[47]

Yahaya Bello as choice to substitute Audu Abubakar by APC, and subsequent conduct of a supplementary election that ushered him as substantive governor of Kogi State, is a step which rendered Faleke terribly short-changed by his party and INEC. This led to Faleke decline not only being as running mate to Bello but he also proceeded to the Tribunal to question the legality of Bello as governor of Kogi State. Reasoning that the supplementary election was completely unnecessary and illegal, the simple question Faleke wanted the Tribunal to answer was whether INEC was right in declaring the Kogi State gubernatorial election inconclusive. Rather than answering that question, the Tribunal threw out Faleke's case for want of merit. It was the verdict of the Tribunal that Faleke lacked the *locus standi* to challenge the outcome of the election because he did not participate in every stage of the election. Thus, the Tribunal declined the jurisdiction to question the party's internal process that led to the nomination for Audu's replacement. The Tribunal added that Yahaya Bello did not contest the 5th December 2015 Kogi State supplementary poll without a running mate. It is believed that these unaddressed issues by the tribunal, which are not without some very pertinent legal implications worthy of analysis, informed an appeal by Faleke to the Court of Appeal.

4.1 Affirmation of the Tribunal's Verdict by the Court of Appeal

The petition to the Court of Appeal by Wada and Faleke did not yield any improved outcome except for the dissenting judgement by Justice Ita George Mbaba which seemed to raise some measure of hope for Faleke at the Supreme Court. The Court of Appeal, while confirming

[47] (2016) 18 NWLR (Pt 1545) 61.

the decision of the Tribunal, unanimously held that the appeal of Faleke lacked merit.[48] Reacting to the judgement, Faleke's legal team, was of the opinion that the Court of Appeal fell into "serious error by relying on an isolated provision of INEC's Manual of Electoral Officers (Updated Version), 2015 to affirm the Tribunal's judgement. [49] Consequently, Faleke craved the Supreme Court to either hold up or differ with the Court of Appeal's position that Bello could "appropriate" the votes cast for Audu/Faleke, having regards for the provisions of sections 179, 181 and 187 of the 1999 Constitution (as amended).

Yet, in relation to the dissenting opinion, which might have ostensibly stirred up Faleke's hope of exposition of all of the issues in the petition by the Supreme Court to finally determine who should be the governor of Kogi State, the outcome was never encouraging. In his dissenting judgement, Justice Mbaba was of the standpoint that the Certificate of Return that was issued to Yahaya Bello as the duly elected governor of Kogi State by INEC was unlawful, and hence disagreed with the declaration of Yahaya Bello as the duly elected governor, saying there was no evidence that he participated in all stages of the gubernatorial election that was held in 2015. Justice Mbaba took the position that INEC acted in breach of section 141 of the Electoral Act by declaring Yahaya Bello, who only participated in the Supplementary Election of 6th December, 2015 as duly elected governor of Kogi State.

The position of Justice Mbaba coheres with logical analysis of the lopsidedness of the Tribunal's finding that James Faleke did not participate in all stages of the election to acquire a right of action to question the outcome of the election. The question which has continued to beg for answer is: if Faleke did not participate in all the stages of the election, did Yahaya Bello? It was the verdict of the Tribunal that Faleke lacked the *locus standi* to challenge the outcome of the election because he did not participate in every stage of the election. Thus, the Tribunal declined the jurisdiction to question the party's internal process that led to the nomination for Audu's replacement. The Tribunal added that Yahaya Bello did not contest

[48] *James Abiodun Faleke* v. *INEC & O*rs CA/A/EPT/357/2016 (Unreported).

[49] Shola Oyeyipo, "As Kogi Waits on the Supreme Court" available at http://www.nigerianbar.com, Retrieved 7th September, 2016.

the 5th December 2015 Kogi State supplementary poll without a running mate. Strangely, the Court of Appeal agreed with the decision of the Tribunal without adopting the two tests to which a question of *locus standi* to initiate an action is usually subjected, namely (a) the action must be justiceable; and (b) there must be a dispute between the contending parties.[50] Is not the instant case standing up to the requirement of this litmus test? It is grossly unimaginable, therefore, for the Court of Appeal to concur without adequately addressing the touching issues connected with the matter thereof by holding that Faleke had no justiceable action and has no dispute to contend with Bello.[51]

One would have thought that the unaddressed and conflicting issues by the Tribunal and the Court of Appeal would be jurisprudentially settled by the Supreme Court, but quite shockingly, it is somewhat difficult to situate or contextualise the verdict of the Supreme Court in view of the circumstances. In spite of the birthed legal ramifications of the Supreme Court's verdict, it may not be out of place to examine some of the issues for proper direction and development of the law of election in Nigeria. Yet, the warning of the Supreme Court on dispensing with a perverse finding of a court of law cannot be sweepingly dismissed. In *Chukwu* v. *INEC & Ors*[52] the Supreme Court, while relying on the cases of *Awudo* v. *David*[53] and *Okonkwo* v. *Ngige*[54], said *inter alia* that "this Court shall not hesitate to set aside the

[50] *NUC* v. *Alli supra*. See also the case of *Bewaji* v. *Obasanjo* (2008) 9 NWLR (Pt. 1093) 540.

[51] See the case of *Adesanya* v. *President, F.R.N.* (1981) 2 NCLR 358 where the Supreme Court noted that a party can invoke the judicial powers of the court when his civil rights are in issue.

[52] (2014) 233 LRCN 92, 128 -129, Per Muntaka-Coomassie, JSC while addressing the issue as to whether the law on *locus standi* is not static said "that the law on *locus standi* is not static and that the circumstances of each case are to be considered. Hence, what constitutes a legal right, sufficient or special interest adversely affected will, of course, depend on the facts of each case. And in *Bala* v. *Dikko* (2013) 4 NWLR (Pt. 1343) 52, 63, the Supreme Court held that "only a person whose interest has been directly and not obliquely affected by a decision that can validly seek leave to appeal as an interested party".

[53] (2003) 2 NWLR (Pt. 909) 199.

[54] (2006) 8 NWLR (Pt 981) 119.

perverse findings in the circumstances." Sadly, this was not the finding of the Supreme Court in the case under review even though all the indices appeared to tilt towards the direction of perverseness. It is believed that a critical examination at some of the main issues will go a long way in helping to properly situate the verdict of the Supreme Court in the developing efforts of the law of election in Nigeria.

4.2 INEC's Manual of Electoral Officers (Updated Version), 2015

The decision of the Supreme Court required that INEC's resort to its Manual for Electoral Officers in rendering the Kogi State Gubernatorial Election held on the 21st November, 2015 inconclusive "did not amount to a flagrant disregard of the supremacy of the constitutional provision contained in section 179(2) of the 1999 Constitution."[55] Chapter 3, Paragraph 3.11, Step 14 of the INEC Manual for Electoral Officers (updated version), 2015 states as follow:

> Where the margin of win between the two leading candidates is not in excess of the total number of registered voters of the polling unit(s) where elections were cancelled or not held, decline to make a return until another poll has taken place in the affected polling unit(s) and the results incorporated into a new form EC 8D and subsequently recorded into a new form EC 8E for declaration and return.

The Supreme Court, while establishing the constitutionality of the said INEC's Manual further held that the Independent National Electoral Commission has power to regulate its own procedure as follow:

> Pursuant to section 160(1) of the 1999 Constitution, INEC has the power, by rules or otherwise, to regulate its own procedure or confer powers and impose duties on any officer or authority for the purpose of discharging its functions.[56]

While the constitutionality of the INEC Manual for Electoral Officers and its right to regulate its own proceedings is not disputed, the issue is the necessity of cancelling and rendering the said election

[55] *Falake v. INEC supra*, PP. 120-121. The Supreme Court relied on its earlier decision in *C. P. C.* v. *INEC* (2011) 18 NWLR Pt. 1279, 493.

[56] *ibid.* at p. 118, para. E.

inconclusive as at the time it was so done. Again, is not the malpractice an electoral offence defined under the Electoral Act?[57] The contention is that the reasons for the inconclusiveness of the Kogi State Governorship Election held on the 21st November, 2015 were not germane and unfounded in law. There are relevant provisions under the Electoral Act provided expressly to address electoral malpractice. Thus it is argued that the INEC Manual for Electoral Officers is no less a piece of instrument for INEC to derelict duty, commit wrongs and *suo motu* decide to correct such wrongs without due regard to economic and legal implications. It is further contended that the cancellation of the Kogi State governorship election held on the 21st November, 2015 defeats the import and essence of section 160 (1) of the 1999 Constitution (as amended) and section 73 of the Electoral Act, 2010. Contrary to the verdict of the Supreme Court, the INEC Manual for electoral officers ought not to be used as a corrective measure. The Supreme Court, with due respect went rather too far when it held that:

> In the instant case, having discovered electoral malpractices in 91 polling unit in the State, it was proper for the 1st respondent (INEC) to consult and apply the provisions of its Manual to determine the next course of action in the circumstances. Resort to its manual in the circumstances did not amount to a flagrant disregard of the supremacy of the Constitutional provisions contained in section 179(2) of the Constitution.[58]

It may not also be out of place to stress that the constitutional and statutory allowance of INEC to regulate its own proceedings is not to override the constitutional and statutory provisions. Most importantly the line should be drawn between doing an act in the interest of justice and recognition of status of a rule of law to do justice. If by the dictates of the INEC's Manual for Electoral Officers, statutory provisions[59] are negated, sidelined and suspended, the jurisprudence that upholds that line of reasoning with all due respect is questionable and should be disregarded as an ember of the development of the electoral law in

[57] See sections 117 to 131 of the Electoral Act, 2010.

[58] *Faleke* v. *INEC supra* at pp. 120-121, paras. D-G,

[59] That is the provisions of sections 117 to 133 of the Electoral Act, 2010

Nigeria. The question is: if the INEC's Manual is a subsidiary piece of legislation[60] and there are provisions in the electoral Act addressing electoral malpractice, why was reference made to the Manual rather than the Act? INEC chose to solve a problem it either created or was largely responsible by itself regardless of any possible legal implication. Yet, every agency of government creates rules to correct its wrong without regard to rule of law and regardless of who may have suffered a wrong from its actions, where then do we place the relevance of statutory provisions and court adjudication of rights for the common man as well as the rule of law. It is appalling to find that the Supreme Court did not consider or recognise any of the above questions. In the circumstances, it is maintained that the INEC's Manual for Electoral Officers is no less than a piece of rule created to defeat legislative presumptions, particularly the provisions of sections 117 to 132 of the Electoral Act.

Furthermore, going by the tenor of Chapter 3, paragraph 3.11, step 14 of the INEC's Manual for Electoral Officers (updated version), 2015, it is too unclear whether the import of the manual is in tandem with section 53 of the Electoral Act, 2010 which provides for over-voting as a legal ground for the nullification of an election result. Section 53(2) of the Electoral Act provides as follow:

> Where the votes cast at an election in any polling unit exceed the number of registered voters in that polling unit, the result of the election for that polling unit shall be declared null and void by the Commission and another election may be conducted at a date to be fixed by the Commission where the result at that polling unit may affect the overall result in the Constituency.

From the foregoing provision, it is doubted whether chapter 3, Paragraph 3.11, Step 14 of the INEC's Manual for Electoral Officers which states that "the margin of win between the two leading candidates is not in excess of the total number of registered voters of the polling unit(s) where elections were cancelled or not held, decline to make a return until another poll has taken place in the affected

[60] See *Faleke* v. *INEC* at P. 157, paras B-E & F. where the Supreme Court stated so in reliance upon the cases of *Yusufu* v. *Obasanjo* (2003) 16 NWLR (Pt. 847) 554 and *Adene* v. *Dantubu* (1994) 2 NWLR (Pt. 328) 509.

polling unit(s) and the results incorporated into a new Form EC8D and subsequently recorded into a new form EC8E for Declaration and Return"[61] bears the same meaning with section 53(2) of the Electoral Act, 2010 (as amended). It is argued that the said INEC's rule and section 53(2) of the Electoral Act, 2010 are mutually inclusive and of one import. Unfortunately, the verdict of the Supreme Court did not point to this direction. In determining the status of INEC's Manual for Electoral Officers in the proper conduct of elections, the Supreme Court stated *inter alia* that "by virtue of section 160(1) of the 1999 Constitution, INEC has the constitutional power to regulate its own procedure or confer powers and impose duties on its officers for the purpose of discharging its functions…."[62] This notwithstanding, the contention is that such constitutional and statutory powers conferred on INEC officers to discharge any duty whatsoever ought to be on all fours with the spirit and letter of the enabling act or law. But it appears the reason adduced by INEC for the cancellation of the election falls squarely within the provisions of the Electoral Act.[63] Thus, the reliance on the INEC Manual as against the Electoral Act to render the Kogi State Gubernatorial Election inconclusive amounts to choosing a subsidiary legislation over a principal enactment.

4.3 Transferability of Votes of a Dead Candidate in an Inconclusive Election

It is the decision of the Supreme Court that votes cast for a deceased candidate is transferable to another candidate of the same party.[64]

> It went further to hold that the All Progressives Congress, being the party that canvassed for votes in consonance with section 221 of the Constitution had a legal interest in the votes cast on 21/11/2015 and its nominated and sponsored

[61] Chapter 3, Paragraph 3.11, Step 14 of the INEC's Manual for Electoral Officers (Updated Version), 2015.

[62] They also made reference to sections 73 and153 of the Electoral Act, 2010 (as amended) which make similar provisions in view of the said status of the manual.

[63] See sections 117 to 132.

[64] *Faleke* v. *Bello* at P. 158.

> candidate was entitled to the benefit of those votes at the conclusion of the election process on 5th December 2015.[65]

In view of the above, the point of emphasis on transferability of votes on the premises of section 221 of the Constitution which provides that: "no association other than a political party shall canvass for votes for any candidate at any election" is not too apt. Does this provision mean that the votes when canvassed and earned are for the party? But how can this be reconciled with the case of *Rt. Hon. Rotimi Chibuike Amaechi* v. *Independent National Electoral Commission, Celestine Omehia and Peoples Democratic Party*[66] where the Supreme Court ruled that votes canvassed and scored in an election are for the political party that sponsored the candidate, most particularly for the reasons it adduced and the dire need to do justice in the circumstances of the matter?

In that case, Ameachi, who did not participate in the governorship election of Rivers State held in 2007 was later declared winner and returned as governor.[67] His exclusion from the election by the PDP

[65] *ibid.* See also *Agbeje* v. *INEC* (2016) 4 NWLR (Pt. 1501) 157 and *Agbakoba* v. *INEC* (2008) 18 NWLR (Pt. 1119) 489 as well as *Gwede* v. *INEC* (2014) 18 NWLR (Pt. 1438) 56 where similar decisions were reached by the Supreme Court.

[66] (2008) 6 WRN 1.

[67] It should be noted that by section 137(1) (a)(b) of the Electoral Act 2010 (as amended) "an election petition may be presented by a candidate in an election and a political party which participated in the election. But under section 141 of the Electoral Act, it is specifically provided that an election tribunal or court shall not under any circumstance declare any person a winner at an election in which such a person has not fully participated in all the stages of the said election." This clause was no doubt inserted in the Electoral Act, 2010 as an amendment to the 2006 Electoral Act under which Amaechi was declared winner and returned by the Supreme Court despite the fact that he did not participate in all the stages of the 2007 Rivers State Gubernatorial Election. The question then is: what if a candidate is unlawfully excluded from an election as Amaechi was by his party? And what if the non-participation was aided and abetted by the election management body? Thus, it is only proper that since circumstances may be such as to make it impossible for a candidate to be able to participate in all stages of the election, the section should have made some reservations, especially where the candidate is alleged to have been unlawfully excluded by the party or whenever INEC is accused of being instrumental to the non-participation, such candidate should be allowed to challenge the outcome of the election.

having been duly nominated as flag bearer of the party was held unlawful. Above all, his emergence as governor even though he did not participate in the election was premised on the position that the votes scored at the election were for the party and not the candidate. Oguntade JSC, in giving the reason for allowing the appeal and dismissing the decisions of the lower courts concluded as follow:

> …there can be no doubt that there is a plenitude of power available to this Court to do which the justice of the case deserves. It enables a court to grant consequential reliefs in the interest of justice even where such have not been specifically claimed. Having held as I did that the name of Amaechi was not substituted as provided by law, the consequence is that he was the candidate of the P.D.P. for whom the party campaigned in the April 2007 elections not Omehia and since P.D.P. was declared to have won the said elections, Amaechi must be deemed the candidate that won the election for the P.D.P. In the eyes of the law, Omehia was never a candidate in the election much less the winner. It is for this reason that I on 25/10/2007 allowed Amaechi's appeal and dismissed the cross-appeals. I accordingly declared Amaechi the person entitled to be the Governor of Rivers State. I did not nullify the election of 14/04/2007 as I never had cause to do so for the reasons earlier given in this judgment.[68]

A curious evaluation of the *Amaechi's* case in all ramifications would seem that, the ratio or the basis for the decision was an imperative to give substantial justice in view of the circumstances[69] as against the melodrama that played out in the *Faleke's* case. Thus, Katsina-Alu, JSC, while reading the lead judgement of the Supreme Court, particularly noted that:

> The claim of the appellant… is declaratory and injunctive. He brought the claims so that he would not be substituted…. In

[68] In the circumstances, it is somewhat difficult to conclude whether this ruling of the Supreme Court is within the contemplation of section 221 of the Constitution or an exercise of judicial activism.

[69] Hence, relying on the cases of *Attorney General of Bendel State* v. *Attorney General of the Federation & Others* (1982) 3 NCLR 1 and *Patrick Magit* v. *University of Agriculture Makurdi & Others* (2005) 24 NSCQR 143 stated that in matters of this nature, this court will not allow technicalities to prevent it from substantial justice.

> the eye of the law he remains the candidate and this court must treat him as such. We [therefore] cannot make orders which do not address the grievances of a party before the court. The only way to accord the appellant the recognition of his rights unlawfully trampled upon is to declare that it is he and not the 2nd respondent who must be deemed to have won the April 14 governorship election.[70]

Similarly, if the concept of inconclusive election should be regarded as unconstitutional, and more so as was particularly held in the Ameachi's case that votes scored in an election belongs to the political party which sponsored the candidate, it may perhaps be correct to state that with or without death of a candidate for an election, the election ought to be concluded, most especially when such election has been substantially concluded and whichever party that emerges winner at the end can then replace such a death candidate as the case may be. Again, since reasons usually adduced for inconclusive or incomplete elections are for such electoral fraud or malpractices which invariably constitute as election offences, instead of discontinuing the election, the perpetrators should be arrested and prosecuted in accordance with the provisions of the Electoral Act.

Moreover, if votes scored in an election are for a political party and the candidate thus merely plays the role of an agent,[71] the death, therefore, of the agent and his subsequent replacement should be within the discretion of the principal (that is, the political party). But then, how can the provisions of sections 181 and 221 of the Constitution as well as sections 33, 35 and 36 of the Electoral Act 2010 (as amended) be reconciled with the decision of the Supreme Court in the Faleke, Wada and Amaechi's cases? The point being made here is that, if according to section 221 of the Constitution and as

[70] It should be remembered however that effects created by the Amaechi's case would have yielded very different results and implications if there were no attempts to stalemate the matter and the appropriate ruling was delivered before the commencement of the polls.

[71] See *Wada* v. *Bello supra* at P. 432. In this case, the Supreme Court held that "a candidate contests election for the party that nominated him. He scores votes for that party there being no independent candidate as of now in Nigeria. The relationship between a party and its candidate is like that between an agent and his disclosed principal".

ruled by the Supreme Court in the Faleke and Amaechi's cases respectively, votes scored in an election are for a political party, how is it that it is the candidate and not the political party that is declared winner, returned and sworn in? If it is the party that has legal interest, what interest has the candidate?

5.0 CONCLUSION

Legal or constitutional burdens that are capable of arising from the death of a candidate for an election are largely avoidable. There are sufficient constitutional and electoral provisions addressing almost every bit of the electoral process. The factors which usually create such seeming constitutional and electoral gaps are rather creations of those saddled with the responsibility of sustaining the democracy. If the election management body is legally guided and laws are enforced irrespective of who may be in breach, the challenges bedeviling the electoral process will be reduced to the barest minimum. At present, there may be no emergency requiring an amendment of the 1999 Constitution of the Federal Republic of Nigeria. The Death of the APC candidate shortly after the election was rendered inconclusive by INEC and all the melodramas that followed were carefully orchestrated to avoid the realities of law. It is, therefore, most disheartening and quite shocking for the Supreme Court to uphold the verdict of the Tribunal.

Nigeria has had a chequered history of elections, which more often than not has been characterised with violence, massive rigging, lack of intra-party democracy and deaths. It is disheartening to find that elections in Nigeria are conducted as though the democratic structure is defective. The laws governing the conduct of elections are usually violated by participants at elections and yet such crimes pathetically roll away with the passage of the election. The perpetual inability of INEC and the Police to prosecute election offenders has continued to raise questions of integrity on those who are statutorily saddled with the responsibility of combing the election process of all foreseeable irregularities. Sometimes, the rules of the game are accused of being defective or inadequate to guarantee desired outcomes of the election process. A case in point was the death of the APC candidate, Prince Abubakar Audu during the November 2015 Kogi State gubernatorial election in which the 1999 Constitution was blamed and an amendment sued.

The fulcrum of the article has been to maintain the proposition that the death of a candidate before the conclusion of poll does not warrant or necessitate an amendment of the 1999 Constitution. This is notwithstanding the seeming absence of clear provision in the Constitution and in the Electoral Act. It has been shown that neither the Constitution nor the Electoral Act 2010 (as amended) expressly or by implication guarantees cancellation of election, inconclusiveness of poll or the conduct of supplementary election by INEC under the state of affairs as relating particularly to the November 2015 Kogi State gubernatorial election in which the APC candidate, Abubakar Audu died in the process.

Of course, the vices of election violence, fraud, disenfranchisement of voters, and a host of several other malpractices during elections, which have been the bane for several of the cancelled, inconclusive and supplementary elections are prescribed and defined with such appropriate penalties as election offences under the Electoral Act 2010 (as amended). [72] Sadly, cancellation, inconclusive and supplementary elections are not the prescribed remedies by law for such electoral fraud or malpractice. It follows, therefore, that the Kogi State gubernatorial election in which the APC candidate died before the election was concluded, was largely a making of INEC[73] as under-voting certainly is not a ground for cancellation of election results under the Electoral Act 2010 (as amended), but over-voting.

Be that as it may, for the chequered Nigerian democratic history to be strengthened and sustained, it is imperative for elections to be managed and conducted strictly within the confines of laid down rules. All acts of electoral fraud and malpractice clearly prescribed and defined under the Electoral Act should be prosecuted accordingly. It is ultimately important for INEC to play the role of an umpire so as to guarantee a level playing ground for all the political parties in an election. In addition, political parties, which are the threshold of a democratic dispensation, need to be ideologically oriented and internally democratic. Therefore, an understanding of the tenets of

[72] See from sections 117 to 131 of the Electoral Act 2010 (as amended) for the various acts constituting as election offences.

[73] Perhaps if INEC had not cancelled the polls and had not declared the election inconclusive, the APC candidate, Prince Audu Abubakar would not have died; and the melodrama would have been avoided.

democracy and adhering to such democratic practices of international standard in the handling of party affairs, especially during party conventions and primaries for the nomination of party leaders and candidates for election into public offices would be veritable tools at consolidating democracy in Nigeria. In view of these findings, the followings are hereby recommended:

a. That cancellation and conduct of supplementary elections have severe adverse legal, political and economic implications; and giving that INEC has limited or restricted power to so do under the Electoral Act, this discretionary power ought to be exercised with utmost caution without prejudice with genuine consideration for such probable adverse implications before it is exercised.
b. That INEC should not be given the power to cancel an election result for culpable over-voting since it is in a much vantage position to have check-mated and prevented such election malpractice. This is even more so desired given that it will amount to INEC being a judge on its own cause. Section 53(2) of the Electoral Act 2010 should, therefore, be revisited.
c. That once an election is being conducted against the backdrop of any cogently and verifiably foreseeable and apprehensible electoral fraud or malpractice, it should be concluded, and where the said malpractice or fraud tends to render the continuance of the election practicably impossible, and the said elections have been substantially conducted, the party and the candidate with the highest number of votes cast be returned and sworn-in as elected under the circumstances irrespective of any alleged over voting or malpractice. That the INEC's Manual for Electoral Officers should be used as a corrective tool for election malpractice perpetrated by INEC under such circumstances
d. That whenever there exist any cogent and verifiable evidence of electoral fraud and malpractice in an electoral process perpetrated by INEC, and or any person, the identified perpetrator (s) be investigated and prosecuted accordingly. For this reason, Election Tribunals usually set up after elections should create Criminal Divisions to try election offences and punish those found culpable thereto. It is believed that this will go a long way to reduce re-occurring violations of the Electoral Act and other election guidelines in the Nigerian polity.