

**INTERROGATING THE LEGALITY OF THE
MILITARY'S ROLE IN NIGERIAN ELECTIONS:
REFERENCING THE POSSE COMITATUS ACT**

John Ambi

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INTERROGATING THE LEGALITY OF THE MILITARY'S ROLE IN NIGERIAN ELECTIONS: REFERENCING THE POSSE COMITATUS ACT

By John Ambi*

By highlighting the experience of the United States in curtailing the powers of the Armed Forces in performing civil law enforcement duties through a named legal instrument, this article sought to look at whether the Armed Forces of Nigeria, which performs law enforcement duties during general elections does so in contravention of extant laws of the land. Few instances of allegations of impropriety by the military during elections in Nigeria were highlighted; and a succinct overview of the legal framework of the Armed Forces of Nigeria and the United States of America was undertaken to determine what they are empowered to do and from whom such power flows. The history and workings of the Posse Comitatus Act was highlighted, as well as judicial pronouncements on the legality of the military participation in election duties in Nigeria were spotlighted alongside relevant constitutional provisions and legislations of the National Assembly.

Key words: Armed Forces, Constitution, Election, Legality, Judicial and Military

1.0. INTRODUCTION

Shortly after the 2019 general elections, series of allegations and counter-allegations by and amongst contestants and their respective political parties pervaded the Nigerian national political space. These allegations ranged from ballot box snatching, vote buying, and collusion of electoral officials with party officials to complicity of security agents in aiding and perpetrating electoral violence and others. In Rivers State, Governor Nyesom Wike raised an alarm of an impending plan by the ruling party to use the military to secure unearned victory in the election.¹ Subsequently, the Nigerian Army was accused of partisanship and indulging in acts inimical to the smooth, safe, and fair conduct of the elections in particular local government areas in the

* Email: jambi0312@gmail.com.

¹ K. Ebiri and S. Olaniyi, "Wike Alleges Plot to Bomb Electoral Body's Offices in Rivers", available at <https://guardian.ng/news/wike-alleges-plot-to-bomb-electoral-bodys-office-in-rivers/> (accessed 5 March 2019). While addressing Journalists at the Government House in Port Harcourt, the Governor alleged that the 6th Division of the Nigerian Army had concluded plans to disrupt the 9 March 2019 Governorship and State Assembly elections in the State.

state.² The out-cry over the military's alleged ignoble role in the polls, resulted in the Nigerian House of Representatives setting up an *ad hoc* committee to investigate these allegations.³

Before the 2015 elections in Nigeria, two divisions of the Federal High Court sitting in Sokoto and Lagos pronounced that the Nigerian military was precluded from participating in the election process, the Court of Appeal also took a similar position.⁴

In the United States of America (US) there is in force a legislation,⁵ which restricts the participation of the American military in civil processes like elections. Except during certain national emergencies, the military shall not be deployed to engage in civil law enforcement duties. This article therefore seeks to examine the legal framework regulating the Nigerian military, with reference to their extra-regimental duties during elections. Using as a reference point the American legislation called the *Posse Comitatus Act (PCA)*⁶ (which

² Some political parties in Rivers State under the platform of the Inter-Party Advisory called for the restraint of the Nigerian Army from further participation in the Governorship and House of Assembly elections held on 9 March in the State. The Advisory berated the conduct of the Army in the Presidential and National Assembly elections held on 28 February and posited that the Army's further involvement in the elections constituted a threat to the survival of democracy in Rivers State. The Advisory then stated that the police be allowed to perform its constitutional functions. The European Union's Election Observation Mission for Nigeria's 2019 General Elections in its Press Release dated 11 March 2019, indicted the Nigerian military and other security agents for obstructing election observers in Rivers State by denying them access to collation Centres.

³ O. Ozibo, "Reps to Probe Militarization of 2019 Polls", available at <https://www.pressreader.com/nigeria/daily-trust/20190320/281736975787185> (accessed 1 May 2022).

⁴ A member of the House of Representative, Femi Gbajabiamila (currently the Speaker, House of Representatives) had sued the President and all Service Chiefs seeking the court to restrain them from deploying the military during elections. The Federal High Court agreed with the contention of Gbajabiamila and consequently restrained the military from participating in the 2015 elections; a Federal High Court sitting in Sokoto had earlier given a similar order. The Court of Appeal sitting over the Ekiti Governorship Election Appeal also held that the President had no powers to call on the Nigerian Armed Forces for deployment when lawful citizens were about to exercise their franchise.

⁵ Posse Comitatus Act 1878.

⁶ The term "Posse Comitatus" is of Latin origin, meaning "power or force of the companions" and adapted in England from the late 16th century to mean a group of citizens assembled by authorities to deal with emergencies (such as suppressing a riot or pursuing felons). The term was also used to refer to any

regulates the involvement of the military in civil law enforcement duties), the article shall establish whether the deployment of the military during general elections is in contrariety to extant laws in Nigeria.

It is imperative to state here that the participation of the military in the context of this paper denotes the provision of security for electoral officials, safeguarding electoral materials, maintaining law and order during the conduct of elections and providing logistics to the electoral body for effective delivery of electoral materials.⁷ As citizens of the country, members of the Armed Forces are equally entitled to the right to exercise their franchise, however, this right is only exercisable by members who are not involved in regimental duties enumerated earlier.

1.1. An Overview of the Legal Framework of the Armed Forces of Nigeria

The Nigerian Military as presently constituted is modelled in the fashion of the British Royal Military of which the Nigerian Army is a progenitor. The Nigerian Military has a tripod structure, with the Nigerian Army having the largest membership followed by the Nigerian Navy, while the Nigerian Air Force stands at the bottom of the table with lesser numerical strength.

The three arms of the military owe their existence to the provisions of Nigeria's Constitution, which provides that:

There shall be an armed forces for the Federation which shall consist of an Army, a Navy, an Air Force, and such other branches of the armed forces of the

force or band, especially with hostile intent. In common law, it is associated with the mobilization of a group of people by a Sherriff of a county to suppress lawlessness or defend the county.

⁷ The Nigerian Air Force in a press statement issued on 11 February 2019 by its Director of Public Relations and Information, Air Commodore Ibikunle Daramola stated that it commenced day and night flights with its Hercules C-130 aircraft from the Nnamdi Azikwe International Airport, Abuja for the purpose of delivering both sensitive and non-sensitive electoral materials. Full details available at <https://punchng.com/naf-airlifts-electoral-materials-for-inec> (accessed 21 March 2019).

Federation as may be established by an Act of the National Assembly.⁸

The Constitution further provides the general functions of the Armed Forces as follows:

The Federation shall, subject to an Act of the National Assembly made in that behalf, equip, and maintain the armed forces as may be considered adequate and effective for the purpose of-

- (a) Defending Nigeria from external aggression;
- (b) Maintaining its territorial integrity and securing its borders from violations on land, sea or air;
- (c) Suppressing insurrection and acting in aid of civil authorities to restore order when called upon to do so by the President, but subject to such conditions as may be prescribed by an Act of the National Assembly; and
- (d) Performing such other functions as may be prescribed by an Act of the National Assembly⁹

The Armed Forces Act¹⁰ re-echoes the constitutional provision above, by providing that:

(1) There is hereby established for the Federation an Armed Forces, which shall be maintained and administered as, set out in this Act, and comprise the Nigerian Army, the Nigerian Navy and the Nigerian Air Force...

(2) The Armed Forces shall consist of such ---

- (a) Establishments and number of equipment;
- (b) Officers and non-commissioned officers; and
- (c) Soldiers, ratings, and aircraftmen, as the case may be, as the President may, in consultation with the National Assembly¹¹ determine.

The Armed Forces shall be charged with the defence of the Federal Republic of Nigeria by land, sea, and air

⁸ Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended), section 217(1).

⁹ *Ibid*, at section (2)(a) and (d).

¹⁰ Armed Forces Act 2004, Cap. A20, Laws of the Federation of Nigeria, 2004, section 1(1) and (3).

¹¹ Underline supplied for emphasis.

and with such other duties as the National Assembly may from time to time prescribe or direct by an Act¹²

1.2. An Overview of the Legal Framework of the Armed Forces of the United States of America

The President of the US has the ultimate authority over the Armed Forces as its Commander-in-Chief. This authority is derived from Article II, section 2 of the US Constitution, while Article I, section 8 reserves in the US Congress the exclusive powers to declare war on any foe of the US. This dual medium of the exercise of power and control over the Armed Forces was enshrined in the US Constitution by its founding fathers as a means of separating power, with the main aim of subjecting the Armed Forces to civilian restraint, towards ensuring a free and democratic society.¹³

A bundle called Title 10 United States Code Armed Forces contains the organic law governing the Armed Forces of the United States of America. It equally provides for the Department of Defence, including the respective military departments and the reserve components. The Code has five sub-titles, which contain different laws: sub-title A contains provisions on general military law; sub-title B contains provisions with regards to the Army; sub-title C relates to the Navy and Marine Corps; and sub-titles D and E cover the US Air Force and Reserve Components, respectively.¹⁴ Every fiscal year, the US Congress enacts a National Defence Authorization Act, a Federal law that provides for the annual budget and expenditures of the US Department of Defence.¹⁵ Another very important legislation in the body of US military laws is the Uniform Code of Military Justice. The

¹² Underline supplied for emphasis.

¹³ Substance Abuse and Mental Health Services Administration, "Understanding the Military: The Institution, the Culture and the People", available at https://www.samhsa.gov/sites/default/files/military_white_paper_final.pdf (accessed 28 August 2021).

¹⁴ Office of the Law Revision Counsel, "United States Code", available at <https://uscode.house.gov/browse/prelim@title10&edition=prelim> (accessed 16 May 2021).

¹⁵ H.R. 6395(116th): National Defense Authorization Act for Fiscal Year 2021, available at <https://www.govtrack.us/congress/bills/116/hr6395> (accessed 16 May 2021).

Code criminalises certain acts by service personnel and prescribes punishments accordingly.¹⁶

The US Military currently has five branches namely: the Army, Navy, Marine Corps, Air Force, and Coast Guard. These branches are supervised by three military departments – the Department of the Army, the Department of the Navy, and the Department of the Air Force. The Marine Corps is under the supervision of the Department of the Navy, while the Coast Guard falls under the supervision of the Department of the Navy in wartime and under the Department of Homeland Security in times of peace.¹⁷

2.0. ORIGIN AND WORKINGS OF POSSE COMITATUS ACT (PCA)

The practice of *Posse Comitatus*, which empowers public officials to summon non-military citizens to take up arms in aid of constituted authority towards maintaining law and order (in line with their civic duties), is traceable to the reign of King Alfred, who ruled Wessex (a Saxon Kingdom in South-Western England) from 871 – 899.¹⁸ The practice, which eventually spread in the whole of England, saw Sheriffs utilizing Posse for the suppression of riots, enforcement of civil processes like Writs of Execution, and Precepts of Restitution. Posse were also used to apprehend criminals evading justice. However, by the late 19th century, the practice was discarded in England.¹⁹

In the early stages of its transition from colonial rule after the war of independence, the US enacted a constitution. This Constitution was silent on the use of the US Army for civil law enforcement duties. Therefore, the US Army became a regular invitee as a Posse in aid of civil authorities.²² As a matter of fact, the US Congress, through the Judiciary Act of 1789, empowered US Marshalls to call the US Army

¹⁶ “The Uniform Code of US Military Justice”, available at <https://militarybenefits.info/uniform-code-of-military-justice/> (accessed 16 May 2021).

¹⁷ *Supra* n 15.

¹⁸ Britannica, “Alfred: King of Wessex”, available at <https://www.britannica.com/biography/Alfred-king-of-Wessex> (accessed 26 May 2021).

¹⁹ D.B. Kopel, “The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement” (2014) 104 *Journal of Criminal Law and Criminology*.

to its aid whenever it became imperative in the exercise of its mandate. One of such renowned times was when the US Marshalls used the army to enforce civil rights laws that protected freed slaves.²⁰

This practice, however, came to a climax in 1876, when the Southern States accused the US Army of meddling in the Presidential elections. To allay their fears, the US Congress passed into law the *Posse Comitatus* Act in 1878, which limited the use of the Army for domestic law enforcement purposes.²¹ The Act, known as Title 18, USCS 1385, was signed on 18 June 1878 by President Rutherford B. Hayes. It was updated in 1956 and 1981. At the time of its enactment, it was only applicable to the US Army but in 1956, its application was extended to the US Air Force. Though the Act does not expressly mention the US Navy and US Marine Corp, by regulations issued by the Department of Defence, the Act is now equally applicable to the two arms.

The Army National Guard and Air Force National Guard are, however, not prevented from being called by Governors of their State of domicile or adjacent State from acting as *Posse*.²²

Over time, the US courts have had cause to pronounce on whether certain acts of the Armed Forces violated the PCA. The courts have consequently established three perimeters that should be used in determining whether the conduct of the Armed Forces violates the PCA.²³ The first test would be to determine whether the action of the

²⁰ J.K. Mahon, "The Domestic Use of Armed Force: A Summary" in R. Higham (ed.), *Bayonets in the Streets: The Use of Troops in Civil Disturbances* 2nd ed. (Sunflower University Press: 1989).

²¹ G. Felicetti and J. Luce, "The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding before More Damage is Done" (2003) 175 *Military Law Review*.

²² J.K. Elsea, "The Posse Comitatus Act and Related Matters: The Use of Military to Execute Civilian Law" (2018) *Congressional Research Service*.

²³ The three tests for determining whether the military violated the PCA arose out of the cases addressing the military's involvement in law enforcement activities during the 1973 Wounded Knee Uprising. See *United States v Jaramilo* 380. F. Supp 1375 (D.Neb.1974); *United States v McArthur* 419 F.Supp.186 (D.N.D 1976), all cited in L.L. Boschee, "The Posse Comitatus Act as an Exclusionary Rule: Is the Criminal to Go Free Because the Soldier Has Blundered" [1985] 61(1) *North Dakota Law Review*. Available at <https://commons.und.edu/ndlr/vol61/iss1/4> (accessed 27 May 2021).

military personnel was active or passive.²⁴ An act considered as passive, does not violate the PCA, but active involvement would be considered a violation.²⁵ The second test determines whether the use of the Armed Forces pervaded the activities of civilian law enforcement officials. This test rests on the imputation and legal presumption that the Armed Forces lack the jurisdiction to perform civilian law enforcement duties.²⁶

The third test determines whether military personnel subjected citizens to the exercise of regulatory, proscriptive, or compulsory military power. It is outside the remit of the Armed Forces to carry out acts atypical of civilian law enforcement – acts like property and body search. Therefore, where the Armed Forces is found to have done so, the PCA would be said to have been violated.²⁷

3.0. NIGERIAN MILITARY AND ELECTION DUTIES: ARE THESE DUTIES PREMISED ON ANY LEGAL PEDESTAL?

Without sounding repetitive, it bears great significance to reiterate the fact that, members of the Armed Forces are not precluded by any law from exercising the right to vote.

Therefore, the context of the article goes beyond expounding on their right to exercise democratic franchise. It should also be noted that, though the Nigerian Constitution specifies the main functions of the

²⁴ A. Gillman and W. Johnson, “Operational Law Handbook”, (The Judge Advocate General’s Legal Center and School, 2012).

²⁵ An instance of active involvement would be the direct use of an active duty US Air Force Helicopter and crew in hot pursuit of a fugitive on the run. However, where the active duty US Air Force Helicopter was only loaned to civilian law enforcement officials, it would be qualified as passive involvement. See *Wrynn v United States* (200) F. Supp.457 (EDNY) (1961) cited by Craig E. Merutka, *Use of The Armed Forces For Domestic Law Enforcement* (Being a manuscript submitted in partial fulfilment of the Master of Strategic Studies Degree of the United States Army War College 2013).

²⁶ The armed forces may only be involved in such engagements where a military personnel or installation is involved. C.E. Merutka and United States Army War College, *Ibid*.

²⁷ In *State v Danko* 219 Kan.490, 548, P.2d 819(1976) the court held that the Posse Comitatus Act was violated when a military policeman assisted a civilian policeman in the search of the defendant’s car.

Armed Forces to include defending the country from external aggression, maintenance of territorial integrity, and suppression of insurrection, the Nigerian military has over time been engaged in roles which are detached from the customary military roles i.e., deployment of lethal force. For instance, the Nigerian Air Force is statutorily involved in disaster management under the auspices of the National Emergency Management Agency (NEMA).²⁸ Besides the provision of logistics to the electoral body for effective delivery of electoral materials, the functions of providing security to electoral officials, safeguarding electoral materials, and general maintenance of law and order during the conduct of elections, are within the statutory purview of the Nigerian Police Force as enshrined in the Police Act.²⁹ So this begs the question: are the law enforcement duties performed by the Nigerian military during elections backed by any legal instrument?

The relevant provision of the Nigerian Constitution earlier cited expressly stipulates the core functions of the Armed Forces. In addition, section 1(4) of the Armed Forces Act mandates the Nigerian Navy and Air Force with specific responsibilities. Neither of these extant laws sanctioned the involvement of the military in such law enforcement duties during elections.

Thus, analogizing from the perspective of the maxim *expressio unius exclusio alterius*, it can be inferred that since Nigeria's grundnorm and the extant legislation on the military did not explicitly accord them the legal footing, then their involvement in such theatres is *ultra vires*. The appellate court's decision in *Buhari v Obasanjo*³⁰ supports this position. Here, Ayo Salami, J.C.A (as he then was) frowned at the deployment of the military during elections and held: "...It is up to the police to protect our nascent democracy and not the military, otherwise the democracy might be wittingly or unwittingly militarized"

²⁸ Taking into cognisance the importance of the role of the military in times of natural disaster; Section 2(1) (i) of the National Emergency Management Agency (Establishment) Act mandatorily provides for a representative of the Nigerian military in the Agency's governing council.

²⁹ Nigeria Police Act, section 4.

³⁰ (2005) 18 NWLR (Part 956) 96.

In a related instance, the Ekiti Division of the Court of Appeal, while making its pronouncement on the gubernatorial election appeal of the *All-Progressive Congress v Peoples Democratic Party & 4 Ors*³¹ equally deprecated the deployment of the military for law enforcement duties in the election in question.

The Court, per Abdu Aboki, J.C.A (as he then was), held inter alia:

It must be stated by way of emphasis that the Armed Forces (the Military) has no role in the conduct of elections and must not be involved, except perhaps in the areas of logistic services to the agencies of Government in the preparation for elections in the name of security, as that would militarize the process and create an atmosphere of military siege, fear, and intimidation of the public... The state is obligated to confine the Military to their very demanding assignments especially in these times of insurgencies and encroachment into the country's territories, by keeping them out of elections... We think whoever unleashed soldiers on Ekiti State to disturb the peace of the elections on 21/6/2014, acted in flagrant breach of the Constitution and flouted the provisions of the Electoral Act, which requires only the Police and other civil authorities to provide the required enabling environment of law and order for the performance of the civil duties of Election...

While the pronouncement of these two divisions of the Court of Appeal were only ancillary to the main issues in the appeals cited above, the issue of the legality of the military's involvement was the main crux before the Federal High Court sitting in Sokoto. This is what the court had to say:

Any purported engagement of the Nigerian Armed Forces in the security supervision of the Election in the Federal Republic of Nigeria by any person holding the office of the President of the Federal Republic of Nigeria without an act of the National Assembly shall be unconstitutional...in view of the combined provisions of sections 217(2) and 218(1) and (4) of the

³¹ (2015) LPELR-24349 (CA).

Constitution of the Federal Republic of Nigeria (as altered).³²

Some opponents of the military's involvement in law enforcement duties during elections, while justifying and applauding these judicial pronouncements, argued that aside from the unconstitutionality of such functions, whenever there is the deployment of the military in election theatres, it leaves a trail of human rights violation, like the restriction on the right to freedom of movement.³³

To cure the lacunae in the extant laws, which saw to the courts declaring the military as *personae non-grata* during elections, the National Assembly quickly amended the Electoral Act in March 2015, by inserting a provision, which purportedly permits deployment of the military during election. The Act provided as follows:

Notwithstanding the provisions of any law and for purposes of securing the vote, the Commission shall be responsible for requesting for the deployment of relevant security personnel necessary for elections or registration of voters and shall assign them in the manner determined by the Commission in consultation with the relevant security agencies.³⁴

(Emphasis added)

PROVIDED that the Commission shall only request for the deployment of the Nigerian Armed Forces only for the purposes of securing the distribution and delivery of election materials and protection of election officials.³⁵ (Emphasis added)

Respectfully, it is submitted that this amendment is inchoate. The proviso underlined above seeks to create a pedestal upon which such military intervention would be legally permissible. Sections 218 and 8 of the Nigerian Constitution and the Armed Forces Act respectively

³² *Honourable Bello Mohammed Goronyo & Anor v The Attorney-General of the Federation & Anor* (FHC/S/CS/29/2014).

³³ S.A. Akanibo and N.A. Duson, "Militarization of Electoral Process in Nigeria: Changing the Increasingly Significant Quagmire" (2021) 9(1) *International Journal of Innovative Legal and Political Studies*.

³⁴ *Honourable Bello Mohammed Goronyo & Anor v The Attorney-General of the Federation & Anor* (FHC/S/CS/29/2014); *Infra* n 35.

³⁵ Electoral (Amendment) Act 2015, section 7. The Act added subsection (3) to section 29 of the 2010 Act, underline supplied for emphasis.

provide that the President as the Commander-in-Chief of the Armed Forces shall determine the operational use of the Armed Forces. Subsection (4) of section 218, however, empowers the National Assembly to make laws for the regulation of the powers exercisable by the President of the Armed Forces. It is posited that section 7 of the Electoral (Amendment Act) rehashed above does not fit the description envisaged in subsection (4) of section 218 of the Constitution. While it allows the Electoral Commission to request for the deployment of the military to protect electoral officials and secure election materials, it is silent on the specific authority to which such a request would be made. Is it to the President and Commander-in-Chief or to any superior military officer without needing any form of authorization from the President?

The spirit and letters of the 1999 Constitution unequivocally gives the power of determining the deployment of the Armed Forces for operational purposes to the President. However, the exercise of such power shall be subject to any law, made by the National Assembly to regulate the exercise of such powers. If section 7 was enacted by an exercise of the National Assembly's powers of regulation, it is submitted that it has not cured any mischief inherent in the previous extant laws. Only an amendment of the Armed Forces Act would have cured this lacuna, since it is the extant law that states the functions and duties of the Armed Forces. In *Fidelity Bank Plc v Monye*,³⁶ the Supreme Court held that to effectively use the mischief rule, a court, in determining what mischief a law sought to cure, should trace the defect in the old law that the current law seeks to remedy.

The long title to the Electoral Act provides as follows: "An Act to repeal the Electoral Act 2006 and re-enact the Independent National Electoral Commission, regulate the conduct of federal, state and area council elections and for related matters." This title clearly reveals the legislature's intent i.e., for the legislation to cater for elections and matters ancillary to elections alone. The Armed Forces Act on the other hand provides thus: "An Act to provide for the command, maintenance, and administration of the Armed Forces of the Federation".

³⁶ (2012) All FWLR (Part 631) 1412.

In view of the express provisions rehashed above, it is safe to assume that the Electoral (Amendment) Act 2015 did not change the extant position of the law(s) on the legality of the Armed Forces performing law enforcement functions during elections.

Notably, there is the argument in some quarters justifying the deployment of the armed forces during elections as being legally permissible and acceptable on certain theoretical grounds. Arguing this position, Inegbedion contended thus:

It is noteworthy that the academic and judicial views considered above, as weighty as they are did not consider the legal implication of the phrase, “operational use” as employed in Section 218(1) of the Constitution of the Federal Republic of Nigeria 1999. The Constitution failed to define the phrase and so, resort must be had to other related statutes in order to discover the meaning of the phrase. This is more so, in the light of Section 218(1) and (4). While Subsection (1) empowers the President and Commander in Chief of the Armed Forces to determine the operational use of the Armed Forces, subsection (4) subjects the exercise of that power to regulations made by the National Assembly.

For example, Section 8(3) of the Armed Forces Act define “operational use of the Armed Forces” to include operational use for the purpose of securing and maintaining public safety and public order. While this provision may not expressly or directly justify the use of the Armed Forces on election duties, it does at least provide the legal setting for such deployment.

In the light of the definition of “operational use of the Armed Forces” in the Armed Forces Act, which is an Act of the National Assembly as envisaged by Section 218 of the Constitution of the Federal Republic of Nigeria 1999, there are legal and theoretical grounds to support the view that the President, as Commander in Chief of the Armed Forces may deploy the Armed Forces on election security if the President perceives a threat to public safety and public order. Such deployment is acceptable if it is to secure the ballot

against the breach of such public safety and public order.³⁷

From the above excerpt that the author appears to justify the necessity of deploying of the armed forces in election theatres, if and only when, there is a threat to public safety and public order.

4.0. POSSE COMITATUS ACT AND THE NIGERIA'S INCHOATE LEGAL POSITION

The PCA clearly prevents the US Armed Forces from engaging in domestic law enforcement activities except under the express authority of the appropriate constitutional authority or an applicable statute, which serves as an exception to the PCA.³⁸ This 143-year-old statute continues to guide the US military in its operations and interface with civil law enforcement agencies.

In view of the evolving national security challenges the US continues to face, the Armed Forces is increasingly getting involved in engagements, which border on law enforcement.³⁹ However, established legal doctrines and case laws are available to guide the armed forces in such engagements, lest it strays into civil law enforcement realm contrary to the spirit and letters of the PCA. In contrast, while there is a stark divide in the constitutional functions of the military and police in Nigeria, the military continues to undertake law enforcement duties, which ought to be the exclusive preserve of the Nigerian Police. Perhaps the structural and institutional deficiency of the Nigeria Police characterized by poor training, inadequate personnel, and lack of equipment, continues to necessitate the involvement of the military in such law enforcement duties. Most

³⁷ N.A. Inegbedion, "Safeguarding the Electoral Process: The Role of Security Agencies during Elections" in D.C.J. Dakas, A.S. Shaakaa, and A.O. Alubo (eds.), *Beyond Shenanigans: Jos Book of Readings on Critical Legal Issues* (Innovative Communications: 2015).

³⁸ C.E. Merutka, *supra* n 25.

³⁹ G. Gentile, M.E. Linick, and M. Shurkin, *The Evolution of US Military Policy from the Constitution to the Present* (Rand Corporation: 2017); N. Canestaro, "Homeland Defense: A Nail in the Coffin for Posse Comitatus" (2003) 12 *Washington University Journal of Law and Policy*. Available at http://openscholarship.wustl.edu/law_journal_law_policy/vol12/iss1/7 (accessed 6 June 2021).

worrisome however, is the fact that the legal position of the military's involvement in law enforcement functions remains incoherent.

5.0. RECOMMENDATIONS

Considering the outcry that always trail the involvement of officers and men of the Nigerian Armed Forces during general elections, and drawing lessons from the existence of the PCA in the US, the following recommendations are hereby offered as solutions to the problem that come with the deployment of members of the Armed Forces for law enforcement duties during elections:

- a. In exercise of its powers enshrined in section 217(2)(d) of the Constitution, the National Assembly may amend the Armed Forces Act, to empower the military to perform restricted roles during general elections. Such roles should be limited to the protection of election officials and electoral materials.
- b. In the alternative, the National Assembly may enact a subsidiary legislation to the Armed Forces Act, which would provide strictly for the operational deployment of the Armed Forces for law enforcement duties during general elections in Nigeria. Such legislation would clearly set conditions precedent to the deployment of the Armed Forces in such events and limit the law enforcement powers they can exercise.
- c. There should also be a Code of Conduct for officers and men of the Armed Forces deployed for law enforcement duties' during elections.

6.0. CONCLUSION

Since its enactment in 1878, the PCA has served as a lever of legal control over any attempts by members of the Armed Forces of the US to exercise civil law enforcement powers or undertake law enforcement duties. Nigeria continues to conduct general elections at quadrennial intervals since the return of civilian rule in 1999. Prior to and after the conduct of such elections, the Armed Forces always stand accused of conduct(s) antithetical to their constitutional mandate. Such accusations would have been avoidable, if the Armed

Forces were not deployed in aid of the Nigerian Police Force – which is handicapped (on several fronts) to solely perform its constitutional functions. The deployment in these theatres has equally been a subject of legal contestations in courts. However, the law remains inchoate as to the legal capacity of the Armed Forces to play policing roles in such times. Thus, we have argued that despite the hazy position of the law on this issue, the pronouncements of the Court of Appeal and the Federal High Court remain good law. The century-long existence of the PCA and its efficacy in setting boundaries for the Armed Forces of the US remains a guide adaptive to Nigeria. Consequently, amendment to extant laws or the enactment of a new law is advocated, to enable the Nigerian Armed Forces perform law enforcement during elections albeit under certain strict legal perimeters.