



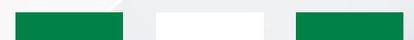
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# Insecurity in Nigeria

**An analysis of the consequences and impact of  
continued insecurity on the 2023 election process**

EU Support to Democratic Governance in Nigeria (EU-SDGN)  
Programme Publication Series Nr. 4



# ➤ Foreword

DAI with the support of the European Union, through the EU-SDGN programme has developed this publication on the current insecurity in Nigeria and its potential legal and political consequences this could have on the 2023 electoral process. The possibility of elections not being held in parts of the country due to insecurity, or it leading to many cancelled or inconclusive elections is real and if not properly dealt with may lead to a constitutional crisis.

This paper provides critical and analytic information for the Independent National Electoral Commission (INEC), Election Observer Groups, political parties, the security agencies, the international community, civil society groups, the Nigerian government and the population at-large. It seeks to examine how the legal framework addresses the insecurity issues, the likely consequences and the possible impact of continued insecurity on the process. Further, it suggests ways and means by which INEC and other stakeholders may ameliorate or considerably reduce these effects, such that the credibility and fairness of the elections may not be jeopardised or compromised.

DAI wants to thank the European Union for its support to create, print and disseminate this important publication and Barrister Oluwole Uzzi who researched and authored this document.

Respectfully,



Rudolf Elbling  
Team Leader, DAI-EU-SDGN

# ➤ Introduction

General elections are scheduled to be held in Nigeria on 25 February 2023 for presidential and National Assembly races while elections for governorship and State Houses of Assembly will be held a fortnight later on 11 March. This is the seventh set of polls held consecutively since the end of military rule in 1999.

The elections will hold against a backdrop of rising insecurity and violence across the nation, as witnessed by various acts of violence against citizens, infrastructure, and INEC offices in several states. While insecurity has always been an issue of concern in elections in Nigeria, it is of even greater concern in 2023 due to how pervasive and widespread it is, affecting all geo-political zones, with swathes of the country under the control of non-state actors. A further complication is its diverse and multifaceted nature; varying from insurrection, terrorism, separatist agitations, banditry and farmer/herdsmen clashes, to ethnic and religious tensions, kidnapping for ransom, assassinations, attacks by 'unknown gunmen' and arson on targeting public

institutions and facilities.

The spectre of elections not being held in many parts of the country due to insecurity or leading to many cancelled or inconclusive elections is real and if not properly dealt with may lead to constitutional crisis that could present a clear danger to Nigeria's democracy especially given its history of flawed or questionable elections. Therefore, the escalation of violence and insecurity poses a serious threat not only to the smooth conduct of the elections and the electoral process, but to Nigerian governance more widely.

This paper seeks to examine how the legal framework addresses the insecurity issue, the likely consequences, and the possible impact of continued insecurity on the process in the next cycle of elections. It also suggests ways and means by which the Independent National Electoral Commission (INEC) and other stakeholders may ameliorate or considerably reduce the effect, such that the credibility and fairness of the elections may not be jeopardised or compro-

**📌 While insecurity has always been an issue of concern in elections in Nigeria, it is of even greater concern in 2023 due to how pervasive and widespread it is**



# ➤ Insecurity and Election Postpostments

Insecurity has been cited as the reason for postponements of elections several times in Nigeria either before the commencement of polls or during the conduct of the elections, but before conclusion. Insecurity and violence have also led to the cancellation of results in some polling units or areas and even to the suspension of the collation of results process.

The 2015 general elections were postponed following advice provided by the National Security Adviser to INEC, citing insecurity in the north-east. Similarly, the Department of State Services (DSS) and the Nigeria Police Force requested that INEC postpone the 2016 off-cycle governorship election in Edo state a few days before the scheduled date, citing “credible intelligence of plans by insurgent/extremist elements to attack vulnerable communities and soft targets with high population”.

The election had to be postponed to 'enable the Security agencies deal decisively with envisaged terrorist threats'.<sup>1</sup>

Similarly, INEC postponed the Mjibir constituency by-election of Kano State in 2016 following violence, attacks on personnel, theft and destruction of election materials mid-way through the election. In March 2019, INEC was also compelled to suspend the Rivers state governorship and State House of Assembly elections due to disruption of the elections in some polling units, areas and collation centres.

The legal framework recognises and permits postponement under certain circumstances. However, in practice the justification is often fraught with controversy and is nearly always challenged.

<sup>1</sup>ThisDay newspaper Sept 8, 2016



# ➤ Insecurity and the Legal Framework

## The Voting System

Nigeria operates a dual system of voting. For the national and state assemblies, a candidate is successful and will be declared the winner of the election if he or she receives the majority of lawful votes cast in the election.

The Constitution prescribes that each Senatorial District/Constituency of the National Assembly and the State House of Assembly shall return one member who

*"shall be directly elected .... in such manner as may be prescribed by an Act of the National Assembly."*<sup>2</sup>

**Section 66** of the Electoral Act makes the provision for declaration of result as envisaged in Sections 77 and 117 of the Constitution as outlined above. While it states expressly that it is subject to **Sections 133, 134 and 179** of the Constitution (which deal with election into offices of President and Governors respectively) it goes on to note that

*"...in any other elective office, the result shall be ascertained by counting the votes cast for each candidate and .... the candidate that receives the highest number of votes shall be declared elected..."*

Elections for the presidency and governorships however have an additional layer or condition. They require more than just a simple majority of votes cast at the election before a return can be made. According to Section 134 of the Constitution, the candidate must have:

- i) The majority of votes cast at the election; and
- ii) ... not less than one-quarter of the votes cast at the election in each of at least two-thirds of all States in the Federation and the Federal Capital Territory, Abuja.

If the person with the highest number of votes does not achieve this spread, then the candidate must compete in a run-off election.

<sup>2</sup> See Section 77 for the National Assembly and Section 117 for State House of Assembly (1999 Constitution of the Federal Republic of Nigeria as Amended)



## War and the Lifespan of Elected Offices/Legislative Houses

The law envisages that all Nigerians who are eligible to vote should have the opportunity to do so. However, this may not always be the case. This is because the legal framework recognises the fact that sometimes, the conduct of elections is infeasible due to exigencies, and thus makes contingency arrangements where such occur.

The only exigency recognised by the Constitution is when the country is at war. **Sections 64 and 105** of the Constitution are dealing with tenure of the National and State Assemblies, respectively, in such an instance. Whilst normally the Houses stand dissolved on the expiration of four years after their first or inaugural sitting, the following applies

*"If the Federation is at war in which the territory of Nigeria is physically involved and the President considers that it is not practicable to hold elections, the National Assembly may by resolution extend the period of four years mentioned in Subsection (1) of this section from time to time but not beyond a period of six months at any one time"*

Similar provisions apply to the State House Assembly<sup>3</sup> as well as the office of the President.<sup>4</sup>

The President's power to extend the lifespan is circumscribed by the requirement of "the sanction of the resolution of the National Assembly sitting in a joint session."<sup>5</sup> A resolution of both Houses of the National Assembly passed in a joint session is also a prerequisite for the President to declare a state of war between Nigeria and another country by virtue of Section 5(4)(a) of the Constitution.

Although some regard the prevalent insecurity consisting mainly of insurgency, insurrection, banditry and strife in some parts of the country as akin to war against the Nigerian state, military action to protect the sovereignty and territorial integrity of the nation will not require the approval of the National Assembly as the perpetrators do not constitute another country.

## State of Emergency

The President also has power to proclaim a state of emergency in the federation or in any part thereof by "instrument published in the official gazette," a power conferred under Section 305 of the Constitution. The proclamation is however subject to the

<sup>3</sup>Section 105(2), President CFRN 1999

<sup>5</sup>Section 135 and 108, Governor, CFRN 1999

<sup>4</sup>Section 5(4) 305(1), and 305 (3) CFRN



approval of the National Assembly and the President's power may be exercised only under the following conditions:

The Federation is at war if:

- a) The Federation is in imminent danger of invasion or involvement in a state of war.
- b) There is actual breakdown of law and order and public safety.
- c) There is a clear and present danger of actual breakdown of public order and public safety.
- d) Any disaster or calamity occurs or poses an imminent; or poses an imminent danger or;
- e) There is any other "public danger which clearly constitutes a threat to the existence of the Federation".

The President can use these powers to declare states of emergency in response to natural disasters, medical pandemics or epidemics, civil unrest, armed conflict or insurrection constituting an existential threat to Nigeria.

A state of emergency was declared for the first time in the post independence period in 1962 in the defunct Western Region. A ban was placed on all the public gatherings/meetings and several opposition leaders were charged and some convicted of treasonable felony. In the post 1999 era, a state of emergency on a state-

wide scale was first declared in Plateau in 2004, a consequence of which was the 'suspension' of the elected governor and the Plateau State House of Assembly for six months in the wake of weeks of fighting and violence between, rival religious/ethnic groups. An administrator was appointed to govern the state for the period. President Obasanjo repeated this again two years later when he declared a state of emergency in Ekiti on 18 October 2006. He removed the governor and suspended the State House of Assembly and appointed a retired army officer as sole administrator.

President Jonathan also declared a state of emergency in some local governments in Plateau and Borno states in 2011 and this was extended to the whole of Borno, Adamawa and Yobe states in May 2013 to more effectively deal with Boko Haram more effectively and other insurgency threats. However, during this time, elected officials remained in their respective positions unlike in Plateau and Ekiti.

A state of emergency declaration empowers authorities to introduce special measures including giving military authorities and security agencies increased power to deal with unrest, civil disorder, or insurrection. It can lead to the suspension or curtailment of some civil rights or liberties of



citizens, including curfews or restriction of movement. Examples, The declaration of a state of emergency can - and in the Plateau and Ekiti examples, did lead to the dissolution or dismantling of democratic structures and the appointment of other authority in place in place of elected representatives.

But questions as to the legality of suspending elected officials has arisen. There is no express or implied backing for such in the laws including in the 1999 Constitution, which empowers the president or National Assembly to suspend the Governor, the Deputy Governor or the State House of Assembly. Governors may be removed only by impeachment for gross misconduct under Section 188 of the Constitution while the power of the National Assembly to take over the functions of a State Assembly are limited to times of war under Section 11(3) or where the State Assembly cannot function as outlined in Section 11(4). The proviso to this latter sub-section is quite explicit and instructive. It states that power to remove the Governor or Deputy Governor of the State from Office'. It states that

*"nothing in this section shall be construed as conferring on the National Assembly power to remove the Governor or Deputy Governor of the State from*

*Office'.*

International law and best practices also do not support such suspensions. For example, while Article 4 of the International Covenant on Civil and Political Rights (ICCPR) of 1966 empowers state parties to declare a state of emergency subject to certain conditions permitting derogation from some ICCPR guaranteed rights, this does not include dismantling democratic structures or suspending elected officials

A further escalation of the insecurity presently being experienced in the country, or a reoccurrence of Covid 19 or similar pandemic or medical emergency, could lead to the declaration of a state of emergency with far reaching repercussions for the electoral process. But whether the declaration of a state of emergency can lead to a suspension of scheduled elections is debatable, as the Constitution does not expressly state so. The Constitution gives the power to suspend elections when war has been declared and the territory of Nigeria is involved. Section 24(2) of the Electoral Act 2022, however empowers INEC to postpone elections where a serious breach of the peace is likely to occur or in case of natural disaster or another emergency.

Discretion regarding whether to postpone an election under the Act is



held by the Commission and not the President who declares the state of emergency or the National Assembly which approves it. may not be ideal, and may even seem counterintuitive, to conduct elections under the cloud of uncertainty associated with a state of emergency.

A further issue of concern, although never used since 1999, is that this power to declare a state of emergency may be subject to abuse and may become politicised or exercised

capriciously and used against real or perceived opponents, with a compliant National Assembly not offering any check as envisaged by the framers of the Constitution. The courts have stated that it is for the House to decide whether there is justification or not – **Williams V Majekodunmi (No 2)(1962) LPELR-25044 (SC)** and **Adegbenro v. Attorney General of the Federation (1962) All NLR 328 @ 336**. The challenge of the declaration in Plateau State reported as **Plateau State v. A-G Federation (2006) 3NWLR (Pt 967) 346** was struck down by the Supreme Court on technical grounds without going into the merits

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# ➤ Voting by Displaced Persons

One of the fallouts of insecurity is the internal displacement of citizens seeking safer places. The Electoral Act 2022 has made provision to ensure that as much as is possible, such persons are accommodated in the process. Section 24(1) enjoins the Commission to ensure 'as far as practicable' that persons displaced as a result of emergency affecting an election are not disenfranchised, pursuant to which the Commission has developed The IDFP framework, which can be found on the INEC website and [www.eusdgn.com](http://www.eusdgn.com), to ensure compliance to enable Internally Displaced Person (IDPs) to vote.<sup>6</sup> This provision, although not

limited to displacement by insecurity alone, is an acknowledgement by the legislature of the disruptive influence that insecurity can have on elections and the law's attempt to limit its impact.

As a result of a similar provision in an amendment to the 2010 Electoral Act, many IDPs in camps were able to vote in the 2019 elections due to the initiative of INEC in developing an initial framework. With the large number of displaced persons now, it is essential that a revised framework be optimised and made operational nationwide wherever IDPs may be found to meet the letter, spirit, and intend of the Act.

 **The Electoral Act 2022 has made provision to ensure that as much as is possible, such persons are accommodated in the process.**

<sup>6</sup>It is estimated that there are up to 3 million IDPs likely to participate in the 2023 elections according to the INEC Chairman, Professor Mahmood Yakubu who said this at the validation of the revised Framework and Regulation for voting by IDPs in September 2022



# ➤ Postponement of Elections

The spectre of insecurity portends is that elections in several places may have to be postponed if the risk of conducting them is too high. The law does not expect citizens to be exposed to harm in the exercise of their civil rights or in the performance of their obligation to vote; hence it provides for postponement of elections in times of emergency. But postponement has potentially far reaching consequences. The power to postpone elections has been vested in INEC as per **Section 24** of the Electoral Act, 2022. Postponement can occur before the commencement of polls or thereafter (but before the declaration of result). This right has been recognized and upheld by the courts in a number of cases. See for example **Dantiye v. Kanya (2008) LPELR – 4021 (CA)**, and **Dibiagwu v. INEC (2012) LPELR – 9831 (CA)**.

## Postponement Before Commencement of Polls

**Section 24(2)** of the Electoral Act provides as follows:-

"Where a date has been appointed for the holding of an

election, and there is reason to believe that serious breach of the peace is likely to occur if the election is proceeded with on that date or it is impossible to conduct the election as a result of natural disaster or other emergency, the commission may postpone the election and shall in respect of the area, or areas concerned, appoint another date for holding the postponed election, provided that such reason for the postponement is cogent and verifiable."

The provision is straightforward enough and deals with a situation in which polls are yet to open

## Postponement After Commencement of Polls

The wordings of sub-section (3) of **Section 24** similar to that of sub section (2), the only difference being that the former deals with situations in which there is a breach of the peace or the likelihood of its occurrence **after** the commencement of polls ;. Further, while the permissive word "**may**" is used in sub-section (2), the



mandatory word “*shall*” is used in sub-section (3). Under Section 24(2) the reason for postponement shall be ‘cogent and verifiable’ but this is not the case in sub-section (3).

**There shall be no return if elections are postponed under sub section (2) or (3).** However if the election is postponed after the commencement of polls pursuant to Section 23(3), the Commission may make a return of a winner if the subsequent election will not be affected by new voting in the areas where election did not take place.<sup>7</sup>

The law leaves INEC with the discretion to decide whether to proceed with the election or not in the affected area ‘if the commission is satisfied’ although its decision can be challenged ‘at a court or tribunal of competent jurisdiction’.<sup>8</sup>

### **INEC Regulations and Guidelines: Margin of Lead Principle**

The framework to guide the Commission in deciding whether to make a return or conduct new polls in the affected units or areas has been developed and can be found in the **INEC Regulations and Guidelines for the Conduct of Elections 2022**. The principle applicable in such an instance has now become known as “**the margin of lead principle**” and its application is enshrined in **paragraphs 59 and 62 of the Regulations**

### **and Guidelines.**

Paragraph 59 provides the following:

*‘Where an election is postponed as a result of serious breach of the peace or natural disaster or other emergencies in line with Section 24 of the Electoral Act 2022, and it is ascertained that the total number of voters who collected their Permanent Voters’ Cards (PVCs) in the Polling Units affected by the postponement is less than the margin by which the leading candidate is ahead of the second candidate in the election, indicating that the result of the election will not be affected by the outcome of polls in the polling units affected by the postponement, the Returning Officer shall make a return for the election in the constituency.’*

While Subsequently paragraph 62 defines the principle:’

*‘Where the margin of lead between the two leading candidate in an election is NOT in excess of the total number of voters who collected their Permanent Voters’ Cards (PVCs) in the Polling Units where the elections are postponed, voided or not held in line with Section 24(2&3), 47(3) and 51(2) of the Electoral Act 2022, the Returning Officers shall decline to make a return for the constituency until*

<sup>7</sup>Section 25(4) Electoral Act, 2022

<sup>8</sup>Section 24(4) Electoral Act, 2022



polls have been conducted in the affected Polling Units and the results collated into relevant forms for Declaration and Return. This is the Margin of Lead Principle and shall apply wherever necessary in making returns for all elections in accordance with these Regulation and Guidelines”.

The Margin of Lead Principle is the yardstick deployed by INEC in exercising its discretion as to whether the result of the election will be affected by voting in the area(s) for which substitute dates have been appointed. It also provides the standard for whether to proceed and make a declaration or to order elections in the affected area(s).

### Challenging the Commissions’ decision

The decision of the Commission under Section 24(4) appointing a substituted date on which to proceed with the election in the affected area(s), can be challenged “by any of the contestants at a court or tribunal of competent jurisdiction and on such challenge **the decision shall be suspended until the matter is determined**”<sup>9</sup>

The bold phrase above has grave impact and may constitute a great substantial challenge to the Commission and indeed to the coun-

try. It may present a problem not simply because the decision of the Commission can be challenged but that the result of the election may be in abeyance pending the resolution of the dispute arising out of the challenge. As a result, Nigeria may face a constitutional crisis as the term fixed for all offices and seats are circumscribed by the constitution when the country is at war and the territory of Nigeria is physically involved. The intention of the legislature here must be to ensure that the court's decision is not rendered nugatory and non-effective if successful. But what effect does this have on the process?

If the Commission is not to make a return and appoints another date for the holding of the election (under Section 24(2)) or the continuation of the election under Section 24(3), then no election or continuation can take place in the affected area(s) until the resolution of the dispute challenging this decision by virtue of Section 24(6). Conversely, if the Commission's decision that a return can be made, it may be argued that a challenge shall, by virtue of Section (24(6)), mean that a return cannot or should not be made, and if made, the Commission should not give effect to it, following the provision in Section 65(1). It would be contrary to law for example to give a Certificate of Return to the declared candidate pursuant to section 72 of the Act if there is such a challenge,<sup>10</sup> as a returned candidate cannot take a

<sup>9</sup>Section 24 (6) Electoral Act, 2022

see Section 135 (3) of the constitution for President

<sup>10</sup>A sealed certificate of the return is issued to every successful candidate within 14 days of his /her return – Section 72(1), Electoral Act, 2022



seat in the Assembly until the resolution of the challenge.

A counter to this position will be reliance on Section 65 of the Act, particularly sub-section 2 which contends that once a declaration has been made by the returning officer and reviewed and approved by the Commission, it becomes a post-election matter for the appropriate election tribunal or Court of Appeal (if a complaint relates to a presidential election.) The issue of a suspension of further action under Section 24(5) will therefore not arise as it will now be a Section 130 proceeding, which states that 'no **election and return** at an election under this Act shall be questioned in any manner other than by a petition complaining of an undue election or **undue return....**' (authors emphasis). This latter interpretation accords more with a proper reading and construction of the provision, especially when juxtaposed with the other provisions of the Act.

While the business of the legislature can still proceed in the absence of some members if its quorum is met, a more complex challenge arises for those returned as elected for the executive offices of Governor or President, as they cannot be sworn into office and cannot occupy the position until the challenge is determined. If a determination is not made tenure of the incumbent expires, this can lead to an incumbent overstaying

in office or to the lack of leadership at the helm.

Taking the office of the President as our example, Section 135 (1)(a) of the Constitution provides that an incumbent; "shall hold the office of President until –

*"(a) when his successor in office takes the oath of office"*

**Section 135 (2)** stipulates, however, that the President shall vacate his office at the expiration of a period of four years commencing from the date, when;

(a) in the case of a person first elected as President...

*"he took the Oath of Allegiance and the Oath of office."*

It may be noted that **Section 135 (2)** is made subject to the provision of **Section 135(1)**. This being so, it must be interpreted to mean (taking a literal interpretation) that the incumbent President shall remain in and hold office "until when his successor in office takes the oath of office" which if there is a challenge to the return may not happen until after the challenge of the INEC decision is resolved.

While the issue of using the judiciary to try to stop the inauguration of a President or Governor Elect has been considered on several occasions, there



has been no instance or reported case in which the Court of Appeal or Supreme Court was asked to interpret or give effect to section 24(6) of the Electoral Act or its equivalent.

In the case of **Buhari v. Obasanjo**<sup>11</sup> in which petitioners sought to restrain the swearing in of the declared winner of the Presidential election pending the determination of the petition on the election and return, the Supreme Court declined the petition on the grounds that the swearing in had taken place and was therefore a completed act.

The court stated the following:

*"The constitution should never be read to say what it has not provided even though it should be liberally construed to giving meaning and effectiveness so as not to have embarrassing anomaly that can result in vacuum of any office or cause serious crisis in the polity. The Constitution, I must point out, is a general statement of how Nigerians wish to be governed and the real way of governing will be found in all the laws, body of laws, that comply with the Constitution".*

The application in this case was not bought pursuant to section 24(6) nor was the interpretation of the section

considered.

The Court regarded the dictum of **Obaseki J.S.C** on which the Applicants relied on in **Obih v. Mbakwe** to the effect that:-

*The office of governor is an elective office and that where an election or return is questioned in the competent High Court, the person declared duly elected or returned cannot take office until the completion of the hearing and determination of the question whether any person has been really elected to the office as an obiter dictum and therefore not binding, more so as it was not the leading judgment and none of the six other Justices of the Supreme Court who sat to hear the Appeal expressed similar views.*

**Section 138(1)** of the Electoral Act also operates as a statutory 'Stay of Execution' in that it states that where an election is nullified by the Court or Tribunal and Notice of Appeal is given against the decision within the prescribed time, the following applies:

*"The elected candidate shall notwithstanding the contrary decision of the court, remain in office and enjoy all the benefits that accrue to the office, pending the determination of the appeal".*

Following this pathway created by the Electoral Act, all declared winners who

<sup>11</sup>(2003) 17 NWLR PT(850) 587 (2003) LPELR-SC 133/2003 per Belgore J.S.C as he then was



have lost their petitions in the tribunals and courts have remained in their positions during the time their appeals were pending.

In the realisation of the impact, challenges and crises that may result from postponements, the Commission must be circumspect and weigh its decision very carefully regarding whether to make a return or

not, guided by a well-articulated policy and implementation framework. However, the general insecurity, agitations and threats, and attacks on INEC facilities, deployment may become haphazard in many places and both pre and post poll postponements may become more common place in this cycle than in any previous one.

 **If a determination is not made tenure of the incumbent expires, this can lead to an incumbent overstaying in office or to the lack of leadership at the helm.**

# ➤ General Effects of Insecurity on the Process

In response to recent attacks INEC Chairman Mahmood Yakubu stated that 'from the pattern and frequency of the most recent attacks, they appear to be targeted at future elections. The intention is to incapacitate the Commission, undermine the nation's democracy and precipitate a national crisis'. This is an admission that insecurity constitute a clear and present danger, not only to the conduct of the polls in many areas and to their turnout, but also to the legitimacy and credibility of their outcomes and ultimately, the stability and cohesion of the nation.

Amongst the likely adverse effects of insecurity on our electoral process are the following:

- Reduced voter turnout.
- Reduced participation by vulnerable groups.
- Unwillingness of many to participate as poll personnel.
- Adverse effect on the logistics and general deployment by the Commission.
- Increase in the overall budget and cost of elections.
- Negative perception and doubt regarding the overall credibility and integrity of the process and acceptability and legitimacy of its outcome.
- Uncertainty regarding electoral outcomes and a higher number of 'suspended' or 'inconclusive' elections.
- More cases requiring judicial intervention.



# ➤ Conclusion and Recommendations

Insecurity and violence portend grave danger and constitute a threat and a major challenge to the preparation and conduct of the 2023 elections. They are impactful and adversely affect electoral integrity generally as envisaged in the Constitution, the Electoral Act, the Regulation and Guidelines and regional and international instruments with effects that go beyond election day.

## Legal options for INEC

**For extension of tenure and declaration of a State of Emergency.** INEC has little or no legal role to play in the possible but unlikely event of extension of tenure pursuant to the declaration of a state of war by the President acting on a resolution of the National Assembly. While this has not been done in the history of Nigerian elections, it is vital that the Commission notes the existence of these Constitutional provisions and makes plans to prepare for this scenario.

While not so expressly stated, and thus not prescribed in any way or manner in the letter of the law, it would be good practice to consult

the Commission before any such major decision which has a fundamental bearing and impact on the electoral process is made, and in accordance with international best practices.

**For the postponement of elections.** INEC's decision to postpone elections is as circumscribed in the Electoral Act. While its decision to postpone before the commencement of polls is straightforward enough, postponement in some areas after the commencement may be complicated by consequences. Dissatisfied candidates or parties are likely to mount a judicial challenge to this exercise of discretion and the Commission should be prepared for this and plan accordingly.

The Regulations generally, but with particular emphasis on the margin of lead principle, should be widely disseminated and there should be special enlightenment sessions with the stakeholders, especially political parties, candidates and the media to increase awareness and acceptance. Knowledge sharing, transparency and consultation build trust and it falls on INEC to drive and lead these practices.



**The Judiciary.** The legal system plays a critical role in the determining of the likely consequences of insecurity as it has the ultimate duty to interpret laws. It has until now generally taken a conservative approach to this role, often exercising self-restraint. Many petitions have failed and no presidential challenge in the country has ever succeeded. Several factors can partially explain this, including the high standard of proof (beyond reasonable doubt), the application of the doctrine of substantial compliance with the Electoral Act (in line with Section 135 which stipulates that no election shall be invalidated if 'it appears to the tribunal or Court' that it was 'conducted substantially in accordance with the principles of the Act, author's emphasis'), and the fact that winners are sworn in before conclusion of petitions or that invalidation may lead to instability, .

It would be remiss to discountenance the fact that expediency and policy considerations play in judicial reasoning and decisions.

In **Buhari v. Obasanjo (2008) 13 NWLR (Pt. 941) 1**, the Supreme Court held that the case failed due to '*the difficulty in satisfactorily proving nationwide spread of ineptitude, violence, intimidation and other acts of terrorization...*' but expressed some serious concern about at this. Also, in **National Assembly v. President (2003) 9 NWLR (Pt. 824) 104**, the Court of Appeal, per Oguntade JCA

(as he then was), stated unequivocally that the court would have wholly struck down the Electoral Act, 2002 for the erroneous manner in which the National Assembly passed it in overriding the President's veto, if not for public policy considerations as to the likely disruptive consequences of so doing, seeing that some elections had been conducted using the Act.

Cooperation, knowledge sharing and exchanges between INEC and the judiciary are welcome and, as much as is possible, should be enhanced. Improved mutual understanding enhances electoral justice. Both institutions should always take a purposive approach to handling matters dealing with the electoral legal framework and ensure that it is the votes of citizens that determine all electoral outcomes as is the intention of the law and the ethos of all democratic societies.

### INEC Itself

The dilemma faced by INEC is that it is not responsible for securing the process but is considered accountable for the legitimacy of the outcome. This being the case, it is our recommendation that the Commission, as the main electoral management body, should take the following steps:

- 1) Acting in conjunction with all stakeholders especially the security agencies, pursue all necessary measures to curtail and



- contain insecurity and violence.
- 2) Upgrade on a continuous basis, its risk mapping and risk assessment capabilities and tools and deploy staff in identified areas and those prone to attacks and insecurity before deciding on whether to proceed or postpone any election.
  - 3) Enhance and further strengthen the coordinating role of the Inter Agency Consultative Committee on Election Security with closer cooperation in intelligence gathering and information sharing, maximising assets, and resources for optimal and effective implementation of plans and strategies. Ensure deployment of effective technology as well as manual predictive management and implementation tools. Require the security agencies to conduct regular and periodic security and intelligence briefings of the Commission by the security agencies through the aegis of the Office of the National Security Adviser and National Security Council in the build up to the election.
  - 4) Increase engagement with critical stakeholders, such as political parties to make them more responsive to the voluntary Code of Conduct to which they have agreed to adhere to<sup>12</sup>
  - 5) Further explore, strengthen, and deploy community level advocacy and alternate dispute resolution mechanisms in partnership with CSOs, CBOs, FBOs and community leaders at local government levels.
  - 6) Push for the speedy establishment of the Electoral Offences Commission to hasten the prosecution of offenders and their sponsors and stem the tide of impunity. The lack of punishment and sanction is responsible for the continued spate of political violence.
  - 7) Gather a team of experts from within and outside the Commission to further examine the impact of insecurity and violence on INEC's operations and the desirability or otherwise of proposing changes in, or reforms of the legal and operational framework.
  - 8) Ensure proper training of Collation and Returning Officers to acquaint them with the circumstances and consequences of result cancellations and the limits of their delegated powers.
- Unless insecurity and violence are fundamentally addressed and remedial measures are put in place, they will remain a threat to the fabric and cohesion of our society and electoral process, and ultimately to Nigerian democracy.

<sup>12</sup> The Inspector General of Police met with the leadership of political parties on 17th November 2022 to discuss security and political violence. He identified 3 forms of Political violence, Viz-attacks on INEC Offices, inter party violence and political intolerance resulting in the deployment of thugs and sub-national Security outfits to disrupt activities of Political Opponents. He stated that 52 incidents of intra and inter party violence have been recorded across 22 states since the commencement of campaigns.





# About the EU-SDGN Programme

The European Union Support to Democratic Governance in Nigeria (EU-SDGN) is the EU's flagship democracy support programme in Nigeria. The programme is designed to complement the efforts of the Nigerian government to improve and strengthen democracy.

