

**INCONCLUSIVE ELECTIONS IN NIGERIA:  
A REVIEW OF THE SUPREME COURT JUDGMENT IN HON. FALEKE *VERSUS* INEC\***

**Abstract**

*The 1999 Constitution of the Federal Republic of Nigeria empowers the Independent National Electoral Commission (INEC) to organize, undertake and supervise all elections to the offices of the President and Vice President, Governor and Deputy Governor of a state and to the membership of the Senate, the House of Representatives and the House of Assembly of each state of the Federation. Relying on its power in this regard, INEC came up with Election Manual for the conduct of the 2015 general elections. This Election Manual gives INEC the power to make regulations and guidelines for conduct of elections and to declare election inconclusive and schedule a re-run election. Against this background, this paper examines the constitutional powers of INEC and the legality of INEC's Election Manual 2015. The paper also appraises the Supreme Court judgment on inconclusive election in Honourable James Faleke versus INEC. It argues that the introduction and use of the Election Manual 2015 and declaration of election inconclusive is not against the spirit and tenor of Section 179(2) of the 1999 Constitution.*

**Keywords:** Inconclusive Elections, Nigeria, Supreme Court Judgement, *Hon. Faleke v INEC*

**1. Introduction**

The conduct of free and fair elections is one of the key drivers of durable democracy.<sup>1</sup> This is true because free and fair election engenders smooth transition in government, sustains democracy, promote accountability and transparency in governance.<sup>2</sup> It is for this reason that the issue for determination in this paper is whether INEC has power to declare election inconclusive under the laws. The reason for this is to examine the provisions of the Constitution, the Electoral Act, and the INEC Regulations and Guidelines to see if the Commission can rely only on its Regulations and Guidelines to declare election inconclusive and order a rerun. To do this, the paper adopts doctrinal method of research. It looks at the 1999 Constitution (as amended), the Electoral Act 2010 (as amended) and the INEC's Regulations and Guidelines as well as some other primary and secondary data. The paper is divided into five sections. Section one is the introduction. Section two examines the provisions of the Constitution, Electoral Act and the INEC Regulations and Guidelines, while section three is a discussion on the concept of inconclusive election and the Margin of Win in Election Process. Section four is the analysis of the Supreme Court Judgment on inconclusive election in Hon. James Falake versus INEC. Section five is the conclusion of the paper.

**2. The Constitution, Electoral Act and INEC Regulations and Guidelines**

According to the Constitution of the Federal Republic of Nigeria 'a candidate for an election to the office of governor of a State shall be deemed to have been duly elected where, there being two or more candidates-(a) he has the highest number of votes cast at the election; and (b) he has not less than one-quarter of all the votes cast in each of at least two-thirds of all the local government areas in the State.'<sup>3</sup> What this means under Section 179 (2) of the Constitution is that where a candidate in an election to the office of governor of a State has the highest number of votes cast in the election and wins one-quarter of all the votes cast in each of at least two-thirds of all the local government areas in the State, he will be returned as elected and declared a winner of the election. In this case, the election is conclusive and there would be no rerun election in any part of the State. However, if a candidate in the election has the highest number of votes cast but failed to have less than one-quarter of all the votes cast in each of at least two-third of all the local government areas in the State, the requirement of Section 179 (2) of the Constitution has not been met and in that case another election can be conducted. Section 179 (2) reads: 'A candidate for an election to the office of a governor of a State shall be deemed to have been duly elected where, there being two or more candidates- (a) he has the highest number of votes cast at the election; and (b) he has not less than one-quarter of all the votes cast in each of at least two-thirds of all the local government areas in the State.'

The literal rule of interpretation of Section 179 (2) is that, if a candidate in an election had highest votes cast in election, whether it was one vote or not and he didn't have less than one third of all the votes, he should be declared

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<sup>1</sup> Amadu Kurfi, *Election Contest: Candidate's Companion*, Ibadan, Spectrum Books Ltd, 1989, 1

<sup>2</sup> Harris, P.B., *Foundation of Democracy and Politics*, London, Anchor Press Ltd, 1979, 157

<sup>3</sup> Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 179 (2)

a winner and there would be no need for a re-run. Thus, in the case of *Egbe v Alhaji*,<sup>4</sup> the Supreme Court held that one of the cardinal principles of interpretation is to give the word of a Statute, when clear and unambiguous, their grammatical and ordinary meaning. Also, in *Awolowo v Shagari*,<sup>5</sup> in interpreting section 34 (a) (i) (c) (2) of the Electoral Decree 1977 the Supreme Court held that, the section must be literally construed where the words used in the statute are plain and unambiguous and that application of such words would no create any absurdity or result to an injustice to any person. Section 153(1) (f) of the Constitution established the Independent National Electoral Commission as a statutory body with the power to organize, undertake and supervise elections in Nigeria. Paragraph 15(f) of the Third Schedule (Part 1) of the Constitution also empowers INEC ‘to monitor political campaigns and provide rules and regulations which shall govern the political parties.’ By these clauses, INEC is empowered to regulate presidential, governorship, National and House of Assembly, and elections in FCT. The Electoral Act empowers the INEC to make regulations and produce guidelines for the conduct of elections in Nigeria.<sup>6</sup> Armed with this power, the Commission issued the 2015 General Election Guidelines and the 2019 General Election Guidelines, as a Subsidiary legislation to the Electoral Act.<sup>7</sup> Thus, INEC’s 2019 Regulations and Guidelines in Paragraph 33(b) provides:

Where the total number of registered voters in the affected Polling Units is less than the margin by which the leading candidate is ahead of the second candidate, indicating that the outcome of the election will not be affected by the supplementary election, the returning officer shall announce the result.’ Also the Guidelines in Paragraph 33(e) direct the Returning Officer in the election to declare election inconclusive where the margin of win between the two leading candidates is not in excess of the total number of registered voters of the polling units where elections were cancelled or did not hold, decline to make a return until another poll has taken place in the affected polling units and results incorporated into a new form EC 8d and subsequently recorded in Form EC 8e for declaration.’<sup>8</sup> This Margin of Lead Principle applies wherever necessary in making returns of all elections to which these Regulations and Guidelines apply. Again Section 26(1) of the Electoral Act 2010 (as amended) empowers INEC to postpone election where it considers it necessary in any circumstance to do so.

The INEC’s 2019 General Election Guidelines does not indicate any mischief or witch-hunt against any candidate but a general guideline to ensure all votes credibly count. The Constitution provides for the emergence of the winner of Presidential, Gubernatorial and Area Council elections in Nigeria where the candidate has majority votes of the total votes cast, scores one-quarter of votes cast in each of at least two-third of the votes in all States, Local government Areas and Wards respectively.<sup>9</sup> However, the Fundamental Objectives and Directive Principles of State Policy in Chapter 2 of the Constitution probably, conceptualized the Margin of Lead Principle to complement Section 179(2) of the Constitution. Thus, the Constitution provides in Section 14(1) that: ‘The Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice.’

### **3. Inconclusive Election and the Margin of Win in Election Process**

Prior to 2019, the term ‘inconclusive’ and ‘margin of win’ was not known to the Nigerian electoral process. The Constitution is clear especially section 179 (2) which states how to conduct governorship and presidential election. Margin of win has never constituted any impediment to electoral victory of a winner in Nigeria until the INEC’s Guideline was introduced in 2019 general elections. Incidentally, some elections organized by INEC over the past years have been declared in conclusive, leading to re-runs in several States, including Imo State in 2011 and 2015, Anambra State in 2013, Abia State in 2015, Taraba State in 2015, Kogi State in 2015, and Bayelsa State in 2015. Inconclusiveness of elections occasions electoral uncertainty and lack of predictability in outcomes. Examination of section 26 of the Electoral Act 2010 and the Constitution show that the regime of inconclusiveness is not what was originally anticipated. For instance, section 26 (1) of the Electoral Act reads:

Where a date has been appointed for the holding of an election and there is reason to believe that a serious breach of the peace is likely to occur if the election is proceeded with on that day or it is impossible to conduct the elections as a result of natural disasters or other emergencies, the commission may postpone the election and shall, in respect of the area, or areas concerned appoint another date for the holding of the postponed election.

However, if there are irregularities which marred the election at some polling units or local government areas, including cases of card reader malfunctioning, ballot box snatching and vote buying, among other problems, votes

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<sup>4</sup> (1990) 1 NWLR (Pt. 128), 551

<sup>5</sup> (1979) 69 SC 51

<sup>6</sup> Electoral Act 2010 (as amended) Section 153

<sup>7</sup> INEC Guidelines for the Conduct of General Elections 2015, 2019

<sup>8</sup> INEC Guidelines 2015, Pages 22-23 Paragraph 4, Section N

<sup>9</sup> Constitution of Federal Republic of Nigeria 1999 (as amended) Sections 111, 134, 179

may be cancelled in the affected areas and election declared inconclusive. At this juncture, it is important to examine what the 1999 Constitution says in respect of death of a candidate when election is ongoing. In this respect, the Constitution provides:

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 shall be appointed by the Governor with the approval of a simple majority of the House of Assembly of the State.<sup>10</sup>

Clearly, this provision does not apply to the case of Prince Abubakar Audu because he was not the Governor-Elect before he died. For this reason, therefore, Abiodun Faleke, his running mate was not elected the Deputy-Governor and therefore cannot be sworn in office in line with section 181 (1) of the 1999 Constitution. Does this situation present a legal ground to declare election inconclusive? To address this issue, it is necessary to examine the provision of the Electoral Act 2010 (as amended). The Electoral Act provides:

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.<sup>11</sup>

Again, technically speaking, this section of the Electoral Act 2010 does not seem to apply directly to the situation in Prince Audu Abubakar and Abiodun Afalake because the polls has already commenced, but is yet to be concluded before the candidate died. Until the INEC's Regulations and Guidelines were introduced, courts have invoked Section 179 (2) to validate electoral victory without referring to margin of win. Thus, in *Olusegun Agagu v Olusegun Mimiko*<sup>12</sup>, INEC declared the applicant winner of the governorship election in Ondo State with 349,288 votes whilst the respondent garnered 226, 021 votes. At the trial, the actual votes were found to be 313,355 and 195,030 respectively. Thus, 248,724 were cancelled. In view of the fact that Section 179 (2) of the Constitution had been satisfied, the Court of Appeal affirmed the respondent's return as governor. Also, in *INEC v Oshimole*<sup>13</sup> INEC had earlier declared 329,470 for PDP and 179,472 for Action Congress (AC) i.e. for Oshimole. In setting aside INEC's decision and declaring Oshimole as winner, the Court of Appeal cancelled 200,723 of votes scored by PDP and 30,695 of votes scored by AC (cancelling a total of 231,618 votes). The court did not find any reason to call for rerun because the petitioner satisfied the requirements of Section 179 (2) (a) & (b) of the Constitution. In *Aregbesola v Oyinola*<sup>14</sup> INEC had earlier declared 426,669 votes for Oyiola, and 204,722 for Aregbesola. The margin of win was 185,947 votes. The court however nullified votes in 10 disputed local government areas when 41, 923 were cast for Aregbesola and 253,789 votes were cast for Oyinola. Total cancelled votes were 298,712. In declaring the petitioner as winner of the election, the Court of Appeal referred to Section 179 (2) of the Constitution and held that the appellant satisfied the requirements of the law. The Court of Appeal using the same reason as in the above cases gave the same judgment in the case of *Fayemi v Adebayo Oni*<sup>15</sup> and *INEC v Musa*.<sup>16</sup>

#### 4. Analysis of Supreme Court Judgment in Hon. James Falake versus INEC

It is now a new dawn in our legal jurisprudence as 'inconclusive election' and 'margin of win' has been given judicial recognition by the court. Thus, the Supreme Court of Nigeria in *Hon. Abiodun Adeleke v INEC & Anor*<sup>17</sup> (Per Kekerekun, JSC) held that the 1<sup>st</sup> respondent (i.e. INEC) was correct when it declared the election of 21/11/15 in Kogi State following the death of Prince Audu Abubakar inconclusive on the ground that the margin of win between the two fore-runners at the election was less than the total number of registered voters in 91 affected polling units where elections were cancelled. This Supreme Court judgment is a judicial recognition of INEC's power to declare election inconclusive under its Guidelines. It has been argued in some quarters that INEC's announcement that an election was inconclusive is contrary to the Constitution. In this respect, Section 179(2) (a) (b) of the 1999 Constitution is called for interpretation. Reading the Supreme Court Judgment in *Nyesom Wike v*

<sup>10</sup> Constitution of the Federal Republic of Nigeria 1999 Section 181 (1)

<sup>11</sup> Electoral Act 2010 (as amended) Section 36 (1)

<sup>12</sup> (2009) 7 NWLR (Pt. 1140) 342 at 401

<sup>13</sup> (2009) 4 NWLR (Pt.1132) 607 at 670-671

<sup>14</sup> CA/I/EPT/Gov./02/2010

<sup>15</sup> (2010) LPELR-LA/IL/EPT/Gov./1/10

<sup>16</sup> (2003) 3 NWLR (Pt.106); (2000) FWLR (Pt. 145) 729

<sup>17</sup> SC/648/2016

*Dakuku Peterside*<sup>18</sup> and *Osunbor v Oshimole*<sup>19</sup>, it seems INEC's decision to declare election inconclusive is not anchored on Section 179 (2) (a) (b) of the 1999 Constitution and Electoral Act 2010 (as amended). In this regard, it is argued that the Returning Officer's duty is simply to announce the winner of an election, having declared all the results, and not to usurp the role of the Election Petition Tribunal, by altering the texture and tenor of the outcome, through its order for a rerun.

In the context of the above review, it this paper posits that where INEC Guidelines authorize the Commission to declare inconclusive an election which otherwise ought to be a concluded election under Section 179 (2) (a) and (b) of the 1999 Constitution, it will amount to a direct breach of the same Constitution and Electoral Act. However, in view of the decision of the Supreme Court in *Abiodun Falake v INEC*<sup>20</sup> a reasonable conclusion is that the judgment remains a judicial precedent to be relied on in future. This is so because according to the Court the Constitution confers power on the Commission to conduct and supervise elections in Nigeria using the Constitution, Electoral Act and INEC's Regulations and Guidelines. Therefore, the Supreme Court by upholding the right of INEC to declare elections inconclusive relying on Constitutional provisions, the provisions of Electoral Act, Guideline of INEC including its manual as quoted in the *Falake's* case, has laid to rest the issue of power of INEC to declare election inconclusive. That is to say that if INEC is vested with powers to conduct elections, it should retain incidental powers to follow constitutional provisions and its own established guidelines when declaring election inconclusive.

## **5. Conclusion**

This paper set out to examine the issue of inconclusive election in Nigeria. This it has done by examining the Constitution, electoral laws, INEC's Regulations and Guidelines as well as judicial decisions on the matter. The paper found that Electoral Act empowers INEC to make regulations for conduct of elections. With this power INEC came up with 2019 Guidelines with the Margin of Lead principle and inconclusiveness of elections. However, the root of inconclusive election was the November 2015 gubernatorial election in Kogi State. Since then inconclusive elections has become a recurring decimal thereby challenging the credibility of Nigeria's electoral system. Whether or not a contestant has won an election is Constitutional matter. However, the Constitution must be interpreted along with the INEC Regulations and Guidelines which complement the Constitution on electoral process. Therefore, unless the INEC's Regulations and Guidelines are in conflict with Section 79(2) of the Constitution, they are valid Regulations. For this reason, Section 79(2) of the 1999 Constitution can be interpreted along with Paragraphs 33(b) and (e) of the INEC's 2019 Guidelines. It is a different matter if the Regulations and Guidelines are in conflict with the provisions of the Constitution and if they are, they are void; if they are not, they are valid and enforceable. Even though the Supreme Court in *Hon. Abiodun Falake v INEC & Anor*<sup>21</sup> has lent support to INEC declaring elections inconclusive, this paper argues that INEC's Guidelines and Regulation are administrative laws of a statutory body (INEC). As such they are acceptable enforceable laws as long as they are not inconsistent with the Constitution, the Electoral Act or repugnant to social justice, equity and transparency. Consequently, the INEC's Regulations and Guidelines remain subsidiary legislations to complement the Constitutional provisions for conduct of elections in Nigeria. As the Commission is vested with powers to conduct elections, it retains incidental powers to rely on its guidelines to declare election inconclusive and order a rerun.

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<sup>18</sup> (2016) 7 NWLR (part 1512) 574

<sup>19</sup> (2007) 18 NWLR (part 1065) 32

<sup>20</sup> SC/648/2015

<sup>21</sup> SC/648/2016