

Framework for Legislative Oversight of the Electoral Process

During Public Health
Emergencies



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Table of Content

Introduction	1
What is a Pandemic?	3
A Brief on Methodology	5
Why Legislative Oversight of Elections in the Context of Pandemic Matters	6
Pandemics and Elections: Lessons from Elections Held During COVID-19	10
Existing Legislative Oversight Framework	16
Data Analysis and Findings	18
Towards a Legislative Oversight Framework	19
Beyond Legislative Oversight Framework	25
Conclusion	25



1. Introduction

Policy and Legal Advocacy Centre (PLAC) commissioned this study for the purpose of developing a framework for legislative oversight of elections during pandemics and related public health emergencies in Nigeria. The proposed framework recognizes that despite the constraints imposed by pandemics and related public health emergencies, there is need to ensure safe voting while holding elections that substantially reflect and approximate the will of the people. The proposed legislative oversight framework envisages the need for the Legislature to adopt pandemic-sensitive legislation, guidelines and procedures that make the electoral process safe, participatory, and inclusive. The framework also envisages how legislative oversight can go on unimpeded by the conditions created by public health emergencies. The development of this framework therefore recognizes the strategic importance of the National Assembly as an elected representative body, with the task of promoting horizontal and vertical accountability, and to serve as a bulwark against the overbearing power of the executive which could be foisted by pandemic conditions.

The impact of COVID-19 on elections in many countries already gives indications of risks faced by democracies in the context of conducting elections that are participatory and elicit public trust and integrity. The threat of a pandemic to elections can be gleaned from the number of rescheduled or poorly conducted elections in 2020 due to the health risks associated with COVID-19. Where elections have been conducted, low voter turnout has raised issues of political legitimacy, while postponements, especially in situations of constitutional limitations for transferring power, have triggered political crisis.

In Nigeria, the impact of COVID-19 on the electoral process draws attention to the need to review the existing legislative framework for elections and ensure effective legislative oversight as well as the need to adopt operational measures and protocols that adequately respond to situations of health emergencies and pandemics. For example, the Independent National Electoral Commission (INEC) found it difficult to resume the Continuous Voter Registration (CVR) exercise in the aftermath of the outbreak of COVID-19. The health risks associated with the coronavirus also necessitated the postponement of bye-elections for state and federal legislative houses in twelve states.

While preparing for the governorship elections in Edo and Ondo states on 19 September

2020 and on 10 October 2020, respectively, INEC in collaboration with the Presidential Task Force on COVID-19 and the Centre for Disease Control (CDC), put in place detailed protocols and guidelines to ensure safe voting. These protocols and guidelines, which have been included in INEC Voters Code of Conduct and other election guidelines, were used in subsequent elections. Based on the revised guidelines, INEC has adjusted voting time, mandated creation of two queues in each polling unit, introduced social distancing, and made available infrared thermometer at the polling units to check temperatures of prospective voters.

In addition to the ongoing experience with COVID-19, the recent experience with Ebola should serve as a reminder of the regular occurrences of health emergencies. Besides, for a country like Nigeria, the numerous cases of communal violence and insurgency woven around identity and governance issues already raise important issues of local health security. The Boko Haram insurgency, for example, has displaced over 2 million people in northeastern Nigeria with severe damage to the existing health infrastructure. According to the World Health Organization, more than half of the health infrastructure in Borno state has become dysfunctional. In addition, cases of wild polio reported in Borno state and Lassa fever reported in Bauchi, Gombe, Plateau and Rivers States continue to add pressure on the existing health infrastructure.

Against the backdrop of threats of emerging and re-emerging diseases, it has become imperative to plan for public health emergencies in the electoral cycles. While the risk of health emergencies draw attention to the need for strong public health institutions and better emergency responses, integration of public health emergency planning in the election cycles provides a way to respond to the health risks and challenges that come with conducting electoral activities in the context of pandemics. In this regard, public health emergency planning provides a mechanism for adaptation, innovation and resilience building in the country's electoral process.

Election stakeholders in Nigeria, informed by the experience with COVID-19, agree that an effective framework for legislative oversight of elections is required especially under conditions of a public health emergency. This study, therefore, seeks to mainstream public health emergency planning into the country's electoral process and to ensure effective legislative oversight that promotes the accountability of institutions/authorities involved in the maintenance of public safety and elections as well as communities and citizens during public health emergencies.

This study is divided into ten sections as follows: Section 2 which follows the introduction discusses the nature of pandemics as a global health emergency, while Section 3 provides a brief on the methodology of the study. Section 4 underscores the importance of a legislative oversight of elections in the context of pandemics and related public health emergencies. It is followed by Section 5 which discusses the outlook of elections conducted since the outbreak of COVID-19 in order to provide broad indications of the challenges of conducting elections during public health emergencies. Section 6 provides an overview of the existing legislative framework for the oversight of Nigeria's electoral process, while Section 7 presents the qualitative data generated in the study. Sections 8 and 9 present the proposed legislative oversight framework and issues to address beyond the proposed framework, respectively. Finally, Section 10 presents the conclusion of the report.

2. What is a Pandemic?

A pandemic is defined as an epidemic occurring worldwide or over very wide area, crossing international boundaries and usually affecting a large number of people¹. Pandemics are known to be infectious diseases that greatly increase morbidity and mortality over a wide geographic area, causing significant economic, social, and political disruptions. The history of mankind is replete with pandemics. The Plague of Justinian in the mid-6th century, the Black Death of the mid-14th century, the sixth cholera pandemic which lasted almost two decades of the early 20th century, and the present COVID-19 pandemic, among others, draw attention to the massive disruptions public health emergencies can cause to lives, livelihood and institutions. It is estimated that the Spanish flu alone accounted for between 20-40 million deaths².

However, what appears more worrying about the global threats posed to humanity by pandemics is the high risk of occurrence and accompanying devastating impact over the past century because of increased global travel and migration, urbanization, changes in land use and greater exploitation of the natural environment. It is therefore not surprising that the WHO has warned that COVID-19 will not be the last global

1 Last JM, ed. A dictionary of epidemiology, 4th edition. New York: Oxford University Press; 2001.

2 Roert J. Ursano, Carol S Fullerton, Lars Weisaeth and Beverly Raphael, 2017, Textbook of Disaster Psychiatry. Cambridge University Press, 2nd Edition.

health emergency and could be a harbinger of future global health emergencies³. The threats of pandemics will therefore remain in the absence of the political and financial investments to prevent or contain pandemics⁴.

Since the first quarter of 2020, the world has been grappling with the disruptive impact of the Coronavirus pandemic, popularly referred to as COVID-19. The outbreak first occurred in November 2019 in Wuhan, the capital of China's Wuibei Province which is the most populous city in Central China and the 9th largest city in the country. By January 2020, the World Health Organization (WHO) declared it a public health emergency of international concern, and eventually a pandemic on March 11, 2020. WHO and other infectious diseases experts have informed the world that the virus is responsible for the new infectious disease, which spreads primarily through droplets of saliva or discharge from the nose of an infected person. The common symptoms of the disease include sneezing; coughing; shortness of breathing; muscle aches; fever; sore throat; unexplained loss of taste and smell; diarrhea; and head ache.⁵

COVID-19 which has spread across over 200 countries and territories provides a glimpse of the havoc associated with pandemics and similar public health emergencies. Although projections by experts indicate that the rate of the infection of the virus is yet to attain its peak, it has already infected over 54 million, leading to 1.2 million deaths, while about 34 million people are estimated to have recovered⁶. In Nigeria, the infection rate which remains far below the projections is a total of over 154,000 cases,

3 Peter Kenny, Virus will not be the last epidemic or health crisis (<https://www.aa.com.tr/en/health/virus-will-not-be-last-pandemic-or-health-crisis-who/1973281>)

4 'Virus will not the last pandemic or Health Crisis – WHO (<https://www.aa.com.tr/en/health/virus-will-not-be-last-pandemic-or-health-crisis-who/1973281>)

5 (<https://www.hopkinsmedicine.org/health/conditions-nd-diseases/coronavirus>. Downloaded on Tuesday, 05/05/2020 at 01.40 Hours.

6 https://www.google.com/search?q=covid-19+casualties&rlz=1C1RLNS_enNG848NG848&oq=COVID-19+casualties&aqs=chrome.0.0i457j0l5j0i22i30.18934j0j4&sourceid=chrome&ie=UTF-8

Available data from the World Bank has pointed to an anemic state of health care in the African sub-region which has experienced outbreaks of different kinds of epidemics. In fact, it has been established that most of the reported epidemics, disasters and other potential public health emergencies appear to have occurred in the same countries—a few countries have the highest number of epidemics and most of them are in the Central, West and the East African regions.⁸ These countries are more often than not categorized as the epicenters of epidemics.

3. A Brief on Methodology

7 https://www.google.com/search?source=hp&ei=0Lo4YPe9J-el1fAPz9m8oA4&iflsig=AINFCb-YAAAAAYDj4GMEXKWt9VWVgJieuR-c0YpqhgOw&q=covid+19+infection+rate+in+nigeria&oq=-COVID+19+infect&gs_lcp=Cgnd3Mtd2l6EAEYBTICCAyBQgAEMkDMgIIADICCAyAggAMgIIADICCAyAggAMgIIADICCA6CAgAELEDEIMBOgUILhCxAzofCAAQsQM6CAguELEDEIMBOgglABCxAxDJAzoFCAAQkgNQ4hdYyHtg76MBaABwAHgAgAHCBYgBvzWSAQkzLTUuNi4zLjGYAQCGAQGqAQdnd3Mtd2l6&sclient=gws-wiz

9 Guidelines for Pandemic Emergency Preparedness Planning: A Road Map for Courts; Bureau of Justice
Assistance, 2020 (<https://www.txcourts.gov/media/1353181/PandemicRoadMapFINAL-031407.pdf>)

held with identified representatives of civil society organisations across the country to enrich the perspectives on the legislative framework for oversight of elections during pandemics.

The qualitative data generated from the interviews and the virtual consultations held on Tuesday, August 17, 2020 (See Appendix 2) have been complemented with desk review of literature related to health emergencies and electoral processes to provide insight into the development of the legislative oversight framework presented in this report to make the material a useful resource for public emergencies.

4. Why Legislative Oversight of Elections in the Context of Pandemic Matters

There are several justifications for legislative oversight of the electoral process during a pandemic. The first is the fear that there is the tendency for greater accretion of powers on the part of the executive at the expense of the legislature and the civil society which could impact adversely on the electoral processes. The fear is that taking advantage of the disruptive impact of pandemics on lives, livelihoods and the functioning of critical institutions in the society,¹⁰ the measures adopted by the executive to contain the pandemic in the forms of executive orders, decrees and emergency regulations fall short of required standards for the preservation of fundamental rights of citizens and tend to by-pass the legislative process¹¹. However, the resort to Executive Orders to by-pass the legislature is more a feature of presidentialism.

The consequence, as seen with COVID-19, is an environment of fear it has foisted which heightens the possibility of political exploitation of such fear, especially on the part of the executive. The fear that creeping autocratic populism occasioned by a pandemic erodes the foundations of human rights and liberal democracy or favours greater consolidation of executive power is real¹². The real source of fear, as the situation in Hungary seems to suggest, is that executive overreach may be promoted beyond the protection of public health.

10 Guidelines for Pandemic Emergency Preparedness Planning: A Road Map for Courts (<https://www.tx-courts.gov/media/1353181/PandemicRoadMapFINAL-031407.pdf>)

11 Nick Eagles, 'Executive Orders are a Threat to Democracy' The John Hopkins Newsletter, November 16, 2020.

12 Bonavero Institute of Human Rights; A Preliminary Human Rights Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 11 Jurisdictions; Report No.3, 202

According to the Online Dictionary, Wikipedia, there are genuine fears that the executive may be unwilling to give up such powers in the post-pandemic era. With respect to democratic elections in particular, it is feared that pandemic control measures could include banning mass protests, postponing elections or holding them while the opposition may not effectively campaign, selectively enforcing of lockdown rules on political opponents, handing out relief payments to political supporters and scapegoating minorities.¹³ The implication of this is that conducting elections amidst COVID-19 requires weighing the tradeoffs between public safety and democratic imperatives; for while on the one hand leaders who decide to hold planned elections risk hastening the virus's transmission, the pandemic presents an opportunity for leaders to strengthen their grip on power on the other hand, by exploiting health restrictions to suppress turnout, or even delay voting¹⁴. In this kind of situation, legislatures become essential lines of defense against executive branch power grabs, including sweeping emergency orders that restrict civil liberties or potential abuses of state resources.

The lockdown measures announced by the Federal and some State governments, which derive their legitimacy from the Quarantine Act of 1926, provides broad indications of the extent of powers the executive branch can exercise in the face of a public health emergency. The measures assigned sweeping powers to both Federal and State governments. The Infectious Diseases Bill which was proposed to replace the outdated Quarantine law was also widely condemned and rejected by Nigerians for its draconian provisions and failing to meet the minimum standards justifiable in a democratic society.

The enormous powers conferred on the health authorities and functionaries of the executive in the Infectious Disease Bill is demonstrated by the wide powers given to the Director-General of the Centre for Disease Control (CDC). These include the power to place a citizen under surveillance on mere suspicion of infection; to issue a notice to take over a citizen's property and declare it an isolation centre without the consent and permission of the owner; exempt a vessel coming from an infected area, from being deemed to be infected; and the discretion to determine any vaccine that will be compulsory for citizens to take, before they can travel out of Nigeria. The Bill was therefore rejected on the ground that it could open the flood gate for egregious human rights abuses only contemplated in an authoritarian state.

13 https://en.wikipedia.org/wiki/Impact_of_the_COVID-19_pandemic_on_politics

14 <https://www.csis.org/events/online-event-elections-democracy-and-covid-19-west-africa>

A related factor that makes legislative oversight of elections during pandemics mandatory is the need to reinforce oversight of electoral activities by observers and other stakeholders in the face of the tendency for restrictions on movement to diminish the ability to deploy for effective oversight of the executive and the health authorities. Indeed, more often than not, the protocols and guidelines put in place by government and health authorities can impact on the quality of election observation as a mechanism for assessing and evaluating the conduct of EMBs and other stakeholders in the electoral process. Legislative oversight of key institutions including those charged with election administration and different public health agencies is therefore needed to ensure their accountability as well as the accountability of political parties, election duty personnel, communities and the electorate.

Thirdly, in Nigeria as in many African countries, the political class is more oriented towards public gatherings in conducting the affairs of their parties and in mobilizing voters in the form of rallies and conventions. There is a low level of adapting to the new technologies in the registration of party members and maintaining membership data base, a problem that is compounded by the low level of technology infrastructure. Despite pledges from the campaign organisations of the different political parties and candidates, the conduct of party primaries by these parties have raised fears that COVID-19 guidelines and INEC Voters Code of Conduct may be breached creating room for the legislature to step in and provide oversight.

Furthermore, COVID-19 shows that a pandemic is not only gendered in its impact but can trigger measures that may impact on the integrity and inclusiveness of the electoral process. This implies that legislation, decision-making, operational and security planning, campaigning, observation and training programmes for election officials and support to civil society throughout the electoral cycle need to be embedded in the strategy for effective legislative oversight¹⁵.

Lastly, the need for legislative oversight arises from the near state of paralysis of the health sector and the absence of requisite facilities to meet the health care needs of citizens. The evidence that Nigeria's present health system is in disarray is confirmed by its 187th position in global ranking, only ahead of Democratic Republic of the Congo,

15 Meredith Applegate, 'How to Protect Gender Equality in Elections During COVID-19', International Foundations for Electoral Systems

Central African Republic and Myanmar¹⁶. The gross underfunding of the sector and numerous challenges bedeviling it draws attention to the urgent need to strengthen the nation's health systems to respond effectively to health emergencies, absorb shocks and adapt to changing health demands.

It is however important to recognize that the legislature itself is constrained in terms of discharging its core mandate in the context of a pandemic. According to Bar-Siman-Tov¹⁷, pandemic conditions threaten the workings of the legislature in two important ways. First, the measures required to contain its spread make it difficult or even dangerous for the legislature to operate as multi-member bodies that assemble a large group of people together to deliberate and vote. Second, it creates a sense of emergency that gives more powers to the executive at the expense of the legislature as witnessed by the Regulations made pursuant to the Nigerian Quarantine Act, 1926 which gave the executive wide emergency powers.

In response to this situation, some legislatures have adopted emergency provisions in parliamentary procedure and innovative techniques for connecting with the citizenry¹⁸. The responses have varied from one country to another. For example, whereas the legislatures in countries such as Albania, Columbia, Brazil and the Maldives changed their rules of procedure to work remotely and convene virtually, their counterparts in France, Germany and Norway have been holding parliamentary sessions in full observance of social distancing with few members in attendance. In other climes such as Armenia, Guatemala and Indonesia, Facebook and Twitter are being used to connect with constituents, and for parliaments to continue to function.

The most important task therefore is to ensure that the legislature finds means of continuing with its core mandate of law making and oversight in order to assure the citizens that it would continue to provide a bulwark against executive excesses including sweeping emergency orders that restrict civil liberties or potential abuses of state resources. Even when a country like Australia has given consideration to

16 <https://magarya.wordpress.com/2017/02/19/who-ranks-nigeria-ranks-187-out-of-190-in-world-health-systems/>

17 Ittai Bar-Siman-Tov, Parliamentary Activity and Legislative Oversight during the Coronavirus Pandemic- A Comparative Overview; Bar Ilan University Faculty of Law Research Paper, No. 20-06

18 NDI, Parliaments Respond to COVID-19 (<https://www.ndi.org/our-stories/parliaments-respond-covid-19>)

conduct elections by means of post, rather than cancelling or postponing elections, concerns still remain that its suspension of the Parliament and the concentration of power in the executive have the potential to undermine democratic deliberation at a time where more accountability is required¹⁹. Thus, despite the challenges faced by the legislature to function under pandemic situations, the situation strengthens the case for sustaining the operations of the legislature to ensure legislative oversight of the executive.

5. Pandemics and Elections: Lessons from Elections Held During COVID-19

The outbreak of COVID-19 has demonstrated that conducting elections during pandemics and public health emergencies could pose serious challenges. Following the outbreak of COVID-19, elections, which are a fulfilment of social contract between the government and its citizens, were postponed by many countries around the world. International IDEA noted that in the month of April 2020, while a few of countries with scheduled elections chose the difficult path of going ahead with the elections, 50 countries, states and territories faced with the prospect of potentially spreading the virus deferred elections²⁰. The number of countries that postponed their scheduled elections increased to 66, while 33 countries and territories decided to hold their elections as originally planned²¹. What this implies is that, in the context of a pandemic, democracies are faced with the dilemma of choosing between holding elections as a fulfilment of the democratic rights and freedom of citizens on the one hand and avoiding their exposure to the threats of infectious diseases and mass death, on the other hand.

There appears to be a reasonable ground to postpone elections and suspend electoral activities when the full weight of public health measures and guidelines for containing the spread of infections is considered. To begin with, the entire electoral process starting with voter registration, electioneering, counting and tabulation of votes require high level of human interaction. What this means in practice is that countries choosing

19 Ibid.

20 International IDEA, Global Overview of COVID-19: Impact on Elections

21 Romain Rambaud, Holding or Postponing Elections During a COVID-19 Outbreak: Constitutional, Legal and Political Challenges in France Case study, International Institute for Democracy and Electoral Assistance 15 June 2020.

to continue with their electoral activities face a balancing act of containing the spread of virus, on the one hand; and deploying the necessary resources to conduct credible elections safely, on the other hand. In addition to the health risks faced by voters and election workers, low voter turnout occasioned by fear of voters could whittle the legitimacy of elected governments.

Despite the ravaging impact of a pandemic and the risks associated with conducting elections, a more viable option is for democracies to consider holding scheduled elections and ensure that such elections are credible and meet global and regional standards of elections that substantially reflect the will of the people. Elections are at the heart of the democratic rights of citizens as the custodians of popular sovereignty to elect their government and to affirm or withdraw their consent at regular intervals. Furthermore, elections are not only a mechanism through which citizens freely choose their leaders and hold them accountable; but also, a mechanism for peaceful transfer of power and resolving political conflict. As a mainstay feature and the 'basic predicate of democracy, elections provide the primary mechanism through which political leaders are chosen and held to account and through which individuals participate in the governance of their country and communities²². For the new democracies in Africa including Nigeria, where democratic institutions remain weak and fragile, and the attitude of the elite to power is defined by unbridled competition, ensuring that the electoral process is not disrupted reduces the temptation by incumbents to stay in power and create crisis of succession.

Election postponement in deference to the health risks associated with a pandemic can throw up political tension and crisis, especially in countries where scheduled elections have legal and constitutionally determined deadlines for transmission of power. This for example, was the case of the off-season governorship elections in Edo and Ondo states where the Electoral Act stipulates that election into office of Governor cannot be conducted not less 30 days to expiration of the tenure of a sitting governor. INEC conducted the governorship elections in Edo and Ondo on 19 September 2020 and 10 October 2020, respectively, despite demonstrated reluctance on the part of the major political parties involved and their preference for a postponement²³.

The political risks and the crisis of democratic legitimacy associated with postponed

22 Robert Dahl, *Polyarchy: Participation and Opposition*, Yale University Press, 1971.

23 Saawua Terzungwe, Malikatu Umar Shuaibu & Abbas Jimoh, 'Nigeria: How COVID-19 will Affect Edo, Ondo Governorship Elections', *Daily Trust*, April 13, 2020.

elections is demonstrated by the experience of Ethiopia and Bolivia which have been embroiled in a political turmoil following postponed elections. In Ethiopia, for instance, the opposition has openly accused the ruling party of using delay tactics to prolong and consolidate its grip on power following the postponement of the first competitive election since Prime Minister Abiy Ahmed extended the tenure of his government in 2018 after that year's mass uprisings against his government. In the face of continued postponement, issues regarding the legitimacy of the government will continue to fuel political crisis. Similarly, mass revolts occasioned by a flawed election in 2019 which forced President Evo Morales into exile has unsettled democracy in Bolivia. It took the intervention of the country's Supreme Court to broker a new election date which was scheduled to hold in September 2020 to calm the situation. However, in countries where the will and capacity for political dialogue does not exist, the political outcome could be more difficult to predict.

On the other hand, there are lessons to learn from countries like France and Mali that have conducted elections under the constraints imposed by COVID-19 in terms of ensuring that electoral cycle planning responds to the exigencies of public health emergencies. The French provide an instructive example of the dilemma thrown up in conducting elections in the midst of a pandemic and the lessons to learn. Municipal elections which are held every six years following different rules depending on the local municipality's number of inhabitants. The municipal elections were planned for March 2020. However, the two-round municipal elections were not entirely held, and were not entirely postponed either.

Although the President of the Republic had doubts about holding the elections, a postponement was not an attractive option because of the absence of provisions for postponement in the law. The only option therefore was to proceed with the first-round election with a number of safety measures outlined to assure voters of safe voting environment. These included keeping safe distance of at least one metre from each other and the use of hand sanitizers. However, unlike the example of South Korea, wearing of face masks and temperature checks were not included in the measures²⁴. Measures adopted by other countries such as postal voting and early voting could not be adopted because they were not provided in the legal framework. As it turned out, voter turnout especially of older people who are most vulnerable to COVID-19 was dramatically low because the safety measures were not enough to assure voters.

24 Romain Rambaud, Holding or Postponing Elections During a COVID-19 Outbreak: Constitutional, Legal and Political Challenges in France Case study, International Institute for Democracy and Electoral Assistance 15 June 2020.

For the elderly population who used to have high turnout of voters, it declined to 80 percent, 15 percent lower than the turnout figure in previous elections.

According to analysts,²⁵ the first round of the municipal election held on 5 March 2020 turned out to witness the lowest voter turnout in recent times. In French political history, municipal elections along with the presidential elections attract the highest voter turnout. Available data shows that from 1995 to 2014, the turnout for these elections hovered around 62 and 70 percent, respectively, while the first-round of municipal election of 2020 witnessed a voter turnout of about 44 percent, 18 percent lower than the election held five years earlier. Emboldened by the low voter turnout, opposition candidates challenged the legitimacy of elected councils in the administrative courts. Regardless of the outcome of such court processes, the question of legitimacy of election arising out of this provides indications of the fate of elections during a pandemic.

Among others, two lessons stand out from the French example. First, is the choice to hold or postpone elections considering the consequence of any choice for the health of the population or the health of a democracy. The second lesson is what kind of measures to outline and enforce as a means of adapting voting procedures to ensure healthy voting during a pandemic. These two lessons informed the decision to postpone the second-round of the municipal election which was scheduled for 28 June 2020, and involved stakeholders' consultations which reached consensus on a wide range of issues including Coronavirus-related restrictions and regulations, increasing the number of proxy voters and to facilitate technological adaptation of electoral campaigning²⁶.

In many ways, the experience of France is a sharp contrast to that of South Korea where it has been established that it is possible to conduct an election under conditions of a public health emergency. South Korea took a decision to hold the 5 March 2020 parliamentary election, despite having in place a law that empowered the President to postpone presidential and National Assembly elections. In order to ensure safe voting in the election which achieved unprecedented increase in voter turnout, measures such as social distancing, mandatory wearing of face masks while queuing to vote and checking temperatures of voters were all enforced²⁷

25 Ibid.

26 Ibid.

27 Spinelli, A., 'Managing Elections under the COVID-19 Pandemic: The Republic of Korea's Crucial Test' (Stockholm: International IDEA, 2020),

Mali provides yet another example of how holding elections under conditions of security and health emergency can raise the issue of democratic legitimacy. The peculiarity of Mali's case of conducting a two-stage parliamentary election is the twin challenge faced by the country of dealing with COVID-19 and insurgency in parts of the country. In making the choice, the country had to confront the reality of either postponing the election or remained saddled with a parliament whose legitimacy had come under serious question after the election had been postponed twice in 2018 and 2019 as a result of strikes and political disagreement.

Thus, while confronting Islamist forces in some parts of the country in the context of threats to the security of the voters, election workers and opposition candidates some of whom were harassed, intimidated and even kidnapped, the authorities issued measures for protecting the health of voters and promoting their confidence. However, as it turned out, voter turnout was abysmally low at 7.5 percent, thus bringing to the fore issues of the credibility of the election and the legitimacy of the elected government. The responses from the public include the series of demonstrations and protests that followed the questionable legitimacy of the election and largely resulted in the institutional stalemate that gave birth to the coup d'état of 7 August 2020²⁸.

Recognizing some of the challenges that conducting elections may pose during a pandemic, some observers have identified some organizational 'elephant traps' as well as how such traps can be side-stepped to protect the healthy running of elections.²⁹ These include the lack of adequate attention to the resource consequence of organizing elections, a tendency to neglect public consultations with the stakeholders, focusing on election day activities without thinking through the required preparations and a late legal framework, among others. The suggestion put forward is that stakeholders especially governments and electoral management bodies take a holistic view of the impact of pandemics on the entire electoral cycle, engage in wide consultations and identify required resources to secure electoral integrity. International IDEA³⁰

28 Ibrahim Maiga and Habibou Souley Bako, 'Lessons from Mali as Burkina Faso and Niger head for the Polls' (<https://issafrica.org/iss-today/lessons-from-mali-as-burkina-and-niger-head-for-the-polls>)

29 Ashley S. James, New Development: Running Elections during a pandemic, Public Money and Management, June 2020 (<https://doi.org/10.1080/09540962.2020.1783084>)

30 International IDEA, Managing Elections During the COVID-19 Pandemic: Considerations for Decision Makers, July 2020. Policy Brief,

summarizes the dilemma and choices that a pandemic like COVID-19 presents before policy makers such as:

- 1) How to ensure a sufficient and credible level of voter participation that in turn guarantees the representativity and legitimacy of resulting democratic institutions;
- 2) How to provide a safe voting environment for both voters and poll workers and minimize the health risks associated with electoral operations that require crowding people into one space such as voter registration, campaigns, voting, observation and counting processes;
- 3) How to deliver in the face of mandated restrictions, a transparent and accountable electoral process that enjoys a high degree of integrity;
- 4) How to ensure that all phases and operations comprising the electoral process are inclusive and safe for all age groups and vulnerable groups in the society.

While countries scheduled to hold their elections in the context of public health emergency need to address this set of concerns, it is important to bear in mind some key lessons that have emerged from countries that conducted elections in the context of COVID-19. These lessons can be used to review existing legal framework for elections across democracies as well as the review of operational framework for conducting elections. These include the importance of political consensus in sustaining decisions made on the electoral calendar and procedures, factoring in issues such as public health considerations, low voter turnout and potential damage to democratic legitimacy and constitutional provisions supporting such decisions; considerations for special voting arrangements, such as early voting, postal voting and online basis and their implications for upholding the integrity, transparency and legitimacy of elections; the important role of communication by electoral authorities of the voting mechanisms in place and the detailed protocols to enhance safe voting; measures to reduce the risks of infection such as availability of masks, PPEs, availability of more voting centres and extension of voting periods; and ultimately addressing the pandemic³¹.

31 International IDEA (: (<https://www.idea.int/news-media/media/issues-challenges-and-protocols-conducting-elections-during-covid-19-sharing>).

6. Existing Legislative Oversight Framework

It may be useful to ground the analysis of the existing legislative oversight of elections in Nigeria on the legal framework of elections. The 1999 Constitution of the Federal Republic of Nigeria (as amended) provide the constitutional and legal framework for regulating elections in Nigeria. The Constitution established the Independent National Electoral Commission (INEC) as a federal executive body and broadly defines the scope of the Commission's powers and responsibilities and as well provides for its independent funding and operation. The Commission is empowered to conduct, organize and supervise elections into the offices of the President, Vice-President, Governors and Deputy Governors, the Senate and the House of Representatives, which constitute the National Assembly, and the State Houses of Assembly. The 1999 Constitution also created at the state level, the State Independent National Electoral Commission (SIECS), mandated to conduct Local Government and Area Council elections. Despite the demand for the abolition of the SIECs, by adding the responsibility of conducting local government elections to INEC, the logic of federalism has ensured the continued survival of the SIECs. The 13-member Independent National Electoral Commission is constituted through nomination by the President subject to the approval of the Senate. Members of the SIECs are also nominated by the State Governors subject to confirmation by the State Houses of Assembly.

The Electoral Act, which is enacted by the National Assembly, provides details on the structures of the Commission and its powers as well as the guidelines for the registration of voters, procedures for the conduct of elections, the registration and regulation of political parties, what constitutes electoral offences and the determination of electoral offences, among others. Since returning to democracy in 1999, the flaws identified in the series of elections have led to consistent demands for review of the election legal framework. Repeal and re-enactment of the election legal framework occurred in 2002, 2006 and 2010. The 2010 Electoral Act has also been subjected to further amendments. At present, the Commission appoints its Secretary, while the relationship between the Commission at the national level and the Resident Electoral Commissioners (RECs), which previously remained ambiguous has now been streamlined to ensure that they work more seamlessly with the Commission at the national level.

The foregoing provides the legislative framework for elections that the Nigerian legislature is expected to oversight primarily through the Senate Committee on INEC and two other Committees in the House of Representatives - the House Committee

on Electoral Matters and the House Committee on Political Parties. This oversight framework is grossly inadequate in carrying out effective oversight of the electoral process in peace or normal times, let alone respond to the exigencies of public health emergency like COVID-19.

Legislative oversight of the electoral process arises from the core constitutional mandate of law making, representation and oversight assigned to the legislature by the Constitution. Consequently, apart from enacting the legal framework for the conduct of elections, the standing committees in the two chambers of the National Assembly are to exercise oversight of electoral matters and political parties.

Legislative oversight covers a wide range of activities undertaken by parliament including the review, monitoring and supervision of federal agencies and independent commissions appointed by the executive. The overarching goal of legislative oversight is to promote effective governance and ensure that agencies and institutions are accountable to the public. Among others, the National Assembly's oversight power is exercised through the power of the legislature to debate, deliberate, mold and/or amend legislation. Section 88 of the 1999 Constitution as amended elaborates on oversight powers of the National Assembly.

Legislative oversight of the electoral process is also an important element of electoral governance broadly defined. Electoral governance involves the interaction of constitutional, legal and institutional rules and organizational practices that determine the basic rules for election procedures and electoral competition, organize campaigns, voter registration, election day tallies and resolving of disputes³². Electoral governance refers to "the wider set of activities that creates and maintains the broad institutional framework in which voting and electoral competition take place." Electoral governance involves rule-making which covers designing the basic rules of the game; rule application which requires implementation of these rules to specifications to organize the electoral game; and rule adjudication or the resolution of disputes arising from the game. While electoral governance is the primary duty of the EMBs and the judiciary, overseeing of that process to improve the transparency and accountability of that process lies with the legislature.

Nonetheless, as alluded to earlier, the two chambers of the National Assembly have the constitutional mandate to carry out oversight of the EMB and political parties within their regular oversight. Legislative oversight is exercised only through the activities of

32 Jonathan Hartlyn, Jennifer McCoy, and Thomas M. Mustillo, 'Electoral governance matters: explaining the quality of elections in contemporary Latin America', *Comparative Political Studies* 41, 1 (2008), p. 75.

these Committees that oversee annual and supplementary appropriation for electoral activities. INEC is presently not funded by the executive. Instead, it receives its fund directly from the Consolidated Revenue of the Federation. This then calls for periodic engagements with the Commission for a review of the electoral environment to assess how the Commission is discharging its responsibilities. However, because legislators and their parties are not disinterested actors in the electoral process, not much attention has been given to their role of oversight.

In the context of COVID-19, which has disrupted the traditional manner in which the legislature operates, it is important that an oversight of the electoral process does not lose traction now and in future public emergencies. While the parliament has found some ways of working with the aid of online technology, it lacks a coherent framework including elaborate rules of procedure for carrying effective oversight effectively at this time.

7. Data Analysis and Findings

This section provides analysis of data from the study seeking to propose a framework for legislative oversight of elections that promotes the accountability of all government institutions involved in the conduct of elections and the protection of the safety of the Nigerian electorate during public health emergencies. As noted earlier, the data generated in the course of this study is essentially qualitative. As can be discerned from the analysis of the data, the interviews conducted with members of the relevant committees of the National Assembly, civil society and other experts yielded rich and nuanced insights regarding the framework for legislative oversight of the electoral process under conditions of public health emergencies and the challenges associated with the implementation of the framework.

Against the backdrop that the legislature has the mandate to promote the health and wellbeing of Nigerians while discharging their civic obligation of voting during pandemics, respondents in the study were asked to express their views on the desirability for a legislative framework to oversight elections in the context of a pandemic; the kind of framework needed to enhance legislative oversight of elections in that context; the relevant committees of the National Assembly that have roles to play within the framework; the mechanism for coordination as well as the range of partnerships required to make the framework effective. They were equally asked to

offer their opinions on the modality for conducting the business of legislative oversight in the context of the coronavirus pandemic.

The information generated from the interviews yielded the following insights:

- While some of the respondents admit that COVID-19 has created a major challenge for the electoral process and that security and governance issues have always existed, they drew attention to the fact that COVID-19 has merely exacerbated them.
- The dominant opinion rejects postponement of elections because of the outbreak of a pandemic given that there would always be a pandemic outbreak.
- Some of the respondents, however, expressed reservations about holding elections in the context of a pandemic, not just because of the health risks associated with such exercise, but because of the fear that COVID-19 and future health emergencies could provide a convenient excuse for undermining the integrity of elections in the country. Consequently, they argued that it was necessary to elaborate the procedures for postponement of elections during public health emergencies. Some proponents of this view maintain that Section 26 of the Electoral Act should be expanded to specifically mention public health emergencies as a ground for the postponement of elections. They further proposed that the ongoing process of amending the Electoral Act provides a window for amending the relevant sections of the Electoral Act.
- A section of the respondents who expressed opinions against legislative oversight of elections during a pandemic further contended that it appears contradictory to look up to legislators to carry out effective oversight of the electoral process during a pandemic as they are likely violators of stipulated public health measures. Those who express this view argue that administrative measures to be enforced to ensure voting in safety is not beyond the capacity of the Election Management Bodies as shown by its response in the issuance of its Policy on Conducting Elections During COVID-19 and that Committees with oversight of the electoral process should rather hold INEC accountable in terms of the implementation of the protocol it put in place.
- Respondents who consider legislative framework for oversight of elections during public health emergencies observed that while Edo and Ondo elections should provide the opportunity to monitor compliance with health-related protocols that were put in place, the legislature should look beyond these elections and ensure that the framework is integrated into the country's electoral process.
- There is a consensus that a framework for legislative oversight of elections during public health emergency falls within the purview of the legislature, for which reasons there are

standing oversight committees for EMBs and political parties in the two chambers of the National Assembly. However, while a majority of the respondents express the view that such a framework is urgently needed, a few others expressed doubts regarding the capacity of the legislature to effectively implement such oversight responsibilities.

- The respondents indicated that the legislature should take advantage of the ongoing review of the Electoral Act to identify gaps exposed by COVID-19 and address such gaps.
- Some respondents further suggested that the process of the ongoing review of the Electoral Act should be as inclusive as possible to ensure that vulnerable groups such as women, persons with disabilities, and displaced persons are accommodated in the electoral process.
- There are also suggestions for adopting electronic voting. However, this suggestion appears not to recognize that the present Electoral Act as amended already gives INEC the power to adopt electronic voting once it is adequately prepared to do so.
- Sections of civil society expressed the view that although INEC has commenced awareness campaigns on personal hygiene, including hand washing with soaps and wearing of face masks, there remains a dilemma as to who provides these PPEs at the polling units.
- Some respondents underscored the need for increased budgetary allocation to INEC during a pandemic to be able to provide items such as face masks and other PPEs to voters, to increase the prospects of voting in safety and prevent politicians from inducing them with those items.
- Some Respondents expressed the need to raise awareness around the oversight responsibilities of the legislature over INEC and political parties through the relevant committees of the National Assembly. However, attention was drawn to the sensitivity around legislative oversight of elections because of the concern that as actors in the electoral process, legislators are not disinterested parties.
- Most of the respondents identified committees other than these two that should constitute an Ad Hoc Committee to oversight elections during a pandemic because of the need to expand the scope of legislative oversight to respond to the exigencies of the peculiar circumstances. The relevant Senate committees mentioned are: Committee on Human Rights and Legal Matters; Committee on Police Affairs; Committee on Appropriation; Women affairs and Youth Development Committee; Health (Secondary and Tertiary) Committee; and Committee on Primary Health Care and Communicable

Diseases. While in the House of Representatives, they mentioned Committee on Justice; Committee on Health; Committee on Appropriation; Committee on Human Rights; and Committee on Women Affairs and Social Development.

- However, of these committees, the Committees on INEC, Health and Police Affairs in the Senate and the Committees on Electoral Matters, Political Parties, as well as the Committee on Appropriation in the two chambers are considered to be critical to the membership of ad hoc Committees within each house and members of the Joint ad hoc committee for the purposes of driving oversight of elections during pandemics.

8. Towards a Legislative Oversight Framework

There are three elements of legislative oversight framework for elections during emergencies including health emergencies and natural disasters. These include a review of the existing legal framework or enactment of new legislation that accommodates the reality of health emergency; development of a Business Continuation Plan that enables the legislature to continue the work of law making and oversight in respect of elections during a health emergency and establishment of a Joint Monitoring mechanism of elections during pandemics to establish the level of compliance with public health measures involving the legislature, EMBs, NCDC and civil society.

8.1, Development of Ad Hoc Business Continuation Plan: There is urgent need for the National Assembly to develop a Business Continuation Plan that enables the legislature to function under conditions of emergencies and respond to the challenge of ensuring effective oversight of the elections. In this regard, the National Assembly can leverage on the Standing Orders of both chambers to regulate their own procedures to respond to emergency situations. The adoption of virtual platforms to continue with legislative and oversight functions is one of such ways. The primary consideration for the Business Continuation Plan arises from the fact that a pandemic is disruptive of the traditional and customary nature of parliament to assemble large number of people to deliberate and vote, meet mandatory quorum and its tendency to be slow in adopting technology to deliver on its core mandate.

More often than not, measures adopted to contain the pandemic essentially disrupts the functioning of the parliament. It is much easier for a small number of people constituted into Ad Hoc Committees to adopt technology to facilitate virtual meetings and report to parliament when normalcy returns. Each of the two chambers needs to set up an Ad Hoc Business Continuation Committee with membership drawn from

the relevant committees. In addition, there should be an Ad Hoc Joint Committee constituted from the two chambers for the purpose of ensuring concurrence.

The Business Continuation Plan should bring together relevant committees, especially with a mandate on electoral matters, health, security and appropriation to function in ad hoc capacity within each chamber and jointly across the two chambers to engage with relevant institutions and authorities, ensure coordination and feedback which ensures the accountability of institutions and authorities charged with electoral and health matters in terms of compliance with measures for safe voting during emergencies.

The committees frequently mentioned are the Committees on INEC, Health, and Police Affairs in the Senate and the Committees on Electoral Matters, Political Parties and Health in the House of Representatives. These Committees have primarily oversight responsibilities related to the electoral process and the governance of health institutions. Other standing committees mentioned in the two chambers include the Committees on Police Affairs, Appropriation, Justice (Senate), Committee on Human Rights and Legal Matters (House). However, because of the concerns in relation to inclusive and participatory electoral processes and the tendency for minorities and disadvantaged populations to be excluded during health and other forms of emergencies, the Committee on Youth and Social Development is considered very essential.

Furthermore, the ad hoc committees suggested above should coordinate with INEC, PTF/NDC to create synergy in efforts to ensure compliance with public health measures and hold INEC to account for the integrity of elections during pandemics and other emergencies. In addition, these committees should drive new legislation as well as review existing legislation to identify gaps that need to be addressed. These committees should drive among others, the review of the Infectious Diseases Bill that was introduced and withdrawn, seeking to replace the moribund Quarantine Act of 1926.

8.2. Review of Election Legal Framework: The level of disruption caused by COVID-19 to the country's electoral process including the postponement of a number of bye-elections has raised big concerns for the sustenance of Nigeria's democracy. The specific proposals are as follows:

- i. A review of Section 26 of the 2010 Electoral Act (as amended) to expand the conditions for postponement of elections within a specific limit and specify the procedures for arriving at postponement in ways that builds trust and integrity into the electoral

process. What this means in practical terms is that there is an urgent need for the National Assembly to expand Section 26 of the 2010 Electoral Act (as Amended). At the present, postponement of elections can happen on two conditions:

- 1) Where there is reason to believe that a serious breach of peace is likely to occur, and;
 - 2) as a result of natural disasters and other emergencies.
-
- i However, there is a feeling that the present provision appears vague and leaves INEC with wide discretionary powers since all that is required to postpone an election is to have a “cogent and verifiable” reason, which could be as serious as riots or a simple logistical problem of not having sufficient voting materials in the polling station. An amendment that includes conditions of health emergencies and pandemics will adequately cover situations as presented by COVID-19 or other emergencies.
 - ii. A holistic review of the electoral legal framework is required to identify gaps that have emerged in organizing elections during COVID-19 with a review to accommodate future challenges. Specifically, a consultative process is required in amending the Electoral Act to consider how health and other emergencies affect the participation of women, persons with disability and IDPs in the electoral process.
 - iii. Review the Constitution to recognize the need for additional funding of elections under conditions of emergency to accommodate phenomenal increase in budgetary requirements to procure PPEs, infrared thermometers and other requirements that demand additional funding.
 - iv. Legal reform is needed to include court processes that enable the electoral process to respond to the challenge of electoral justice during a pandemic. This has become necessary considering that the electoral environment during pandemics are not conducive to normal court processes. Both constitutional amendments and review of the Electoral Act are required to define court processes and procedures that comply with public health measures.

8.3. Joint Monitoring Mechanism for Compliance and Enforcement:

In order to enhance the prospect of observing public health measures and COVID-19 protocols established by the PTF and the NCDC, there is need for a Joint Monitoring Mechanism for Compliance and Enforcement. The proposed Joint Task Force should draw membership from the Joint Ad Hoc Committee of the National Assembly, INEC, PTF/NCDC, Security Agencies and the Civil Society. The Joint Committee should be tasked with undertaking joint assessment of preparations for elections and the monitoring of elections to enhance compliance with established public health measures as well as enforcement. The report of the Joint Committee should be laid before the National Assembly to generate public debate for the purpose of promoting accountability of public institutions.

9. Beyond Legislative Oversight Framework

This study shows that to achieve an effective legislative oversight framework of elections in the context of public health emergencies, an engaged civil society is required to, among others:

1. Engage with relevant Committees in the National Assembly to pressure members to rise above partisan interests and prioritise the health and safety concerns of citizens while voting. CSOs are to pressure the legislature to ensure that political actors do not use the COVID-19 pandemic as an excuse to perpetrate fraud, violence or the manipulation of the electoral process.
2. Sustain the traditional role of engaging citizens and political parties to promote public awareness about the health measures at the individual and community levels with emphasis on personal responsibility.
3. Intensify risks communication to reinforce INEC messages regarding voting in safety with emphasis on individual responsibility. The reinforcing power of the civil society and the mobilization of community-based groups (CBOs) into such advocacy campaigns will enable awareness campaigns to reach the communities.

10. Conclusion

The often pervasive disruptions to lives and the functioning of critical institutions occasioned by pandemics and other forms of health emergencies suggests a need for pandemic planning in all facets of national life. Pandemic planning for the electoral process all through the electoral cycle has been made imperative by the restrictions that need to be observed in order to contain the spread of the coronavirus. However, the necessity to ensure that the electoral process is not disrupted and that citizens vote in safety places a burden on the legislature to ensure effective oversight of the institutions charged with the responsibilities of conducting elections and the maintenance of public safety.

As legislative oversight of executive institutions and ensuring that they are accountable is at the heart of nurturing democratic culture and society, a framework of effective oversight of health institutions and election management bodies needs to be in place to anticipate similar public emergencies in the future. However, as the literature on pandemics shows, what needs to be anticipated in the development of a legislative oversight framework is not only about voting in safety but the tendency for the executive to expand its power at the expense of the legislature and civil society in ways that may affect the integrity of elections.

APPENDIX 1: List of Persons Interviewed with Dates

NASS Members

1. Senator Ike Ekweremadu, former Deputy Senate President and Member, Senate Ad Hoc Committee on the Constitutional Review; Interviewed; 2nd August, 2020
2. Senator Kabiru Gaya, Chairman, Senate Committee on INEC
3. Hon. Hajiya Aishat Dukku, Chairman, House Committee on Electoral Matter

Civil Society Leaders

1. Auwwal Musa Rafsa jani Executive Director, Civil Society Legislative Advocacy Centre (CISLAC)
2. Samson Itodo, **Youth** Initiative for Advocacy, Growth & Advancement (YIAGA)
3. Hussein Abdu, Country Director, PLAN International, Nigeria
4. Idayat Hassan, Executive Director, Centre for Democracy and Development (CDD)
5. Eze Nwagu, Executive Director, Partners for Electoral Reform

Academics/Experts

1. Professor Shola Omotola, Election Expert and Professor of Political Science, Federal University, Oye-Ekiti (Interviewed; August 11, 2020)
2. Professor Dung Pam Sha, Election Expert and Professor of Political Science and Director of Research, The National Institute for Policy and Strategic Studies, Kuru
3. Jake Dan-Azumi, Election Expert and Senior Researcher, National Institute for Legislative and Democratic Studies, Abuja.
4. Dr. Otiye Igbozor, Election Expert and Chief of Staff to the Deputy-Senate President (Interviewed; August 13, 2020).

**Appendix 2: List of CSOs Who Attended
Meeting on Oversighting Elections in
Public Emergencies**

1	Dr. Mohammed Mustapha	Executive Director, DAG Kano
2	Dudu Manuga	Executive Director, Responsible Citizenship and Human Development Initiative
3.	Idris Miliki Abdul	Resolution Centre
4.	David Anyaele	Centre for Citizens with Disabilities, (CCD)
5	James Ugochukwu	Executive Director, African Centre for Entrepreneurship and Information Development, ACEIDEV
6	Ernest Ereke	YIAGA Africa
7.	Moboho Eno	Premium Times Centre for Investigative Journalism
8.	Jane Igomu	ICADEF
9.	Umoh Ekaette	Joint National Association of Persons with Disabilities (JONAPWD)
10.	Jude Ohanele	Development Dynamics
11.	Ambassador Onoja	Next Generation Youth Initiative International
12.	Jake Epelle	The Albino Foundation
13.	Paul Kato	Young Innovators & Vocational Training Initiative
14.	Princess Hamman Obels	Electoral Hub
15.	Eunice Abogun	Challenged Parenthood Network Initiative (CPNI)
16.	Osaze Edigin	Edo Civil Society Organisation
17.	Tony Ayoka	Habitat Care
18	Emmanuel Acha	South East Social Accountability Network/ Citizens Advocacy for Good Governance
19	Samuel Yelmison	Development Exchange Centre
20	Abbas Rufai	Gadawar Youth Development
21	Muhammed Kolos	Freedom for Life Initiative
22	Mimidoo Aver Gaaba	Electoral Hub
23	Fatima Abdulhaziz	Jigawa State Civil Society Advocates
24	Yetunde Bakare	YIAGA Africa

About PLAC

Policy and Legal Advocacy Centre (PLAC) is a non-governmental organization committed to strengthening democratic governance and citizens' participation in Nigeria. PLAC works to enhance citizens' engagement with state institutions, and to promote transparency and accountability in policy and decision-making processes.

The main focus of PLAC's intervention in the democratic governance process is on building the capacity of the legislature and reforming the electoral process. Since its establishment, PLAC has grown into a leading institution with capacity to deliver cutting-edge research, policy analysis and advocacy. PLAC receives funding support from donors and other philanthropic sources.

