

ELECTORAL ACT 2022 AND THE PROSPECTS OF FREE AND FAIR ELECTIONS

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Abstract.

The Electoral Act 2022 (the Act) has repealed the Electoral Act No 6, 2010 and now regulates the conduct of federal, state and area councils elections. The Act also makes provisions, inter alia, for restriction of qualification for elective office to the relevant provisions of the Constitution of the Federal Republic of Nigeria 1999 (CFRN); the use of card readers and other devices in elections and political party primaries; criteria for substitution of candidates; limits of campaign expenses and the omission of names of candidates or logo of political parties. One of the significant developments in the Act is the jurisdictional restriction of all pre-election matters to the Federal High Court in its section 84(14)¹. Prior to the amendment of the Act, the jurisdiction to determine federal and state pre-election matter was principally vested jointly in the Federal High Court, State High Court and the High Court of The Federal Capital Territory pursuant to Section 87 (9) of the old electoral Act 2010. Pre-election matter and litigation essentially refer to intra-party disagreement arising from issues of qualification, disqualification, nomination, substitution, wrongful omission, false declaration, on oath, conduct of primaries and sponsorship of candidates for general elections. This work adopts the doctrinal research methodology and uses statutory and case law, internet resources, journals and other literal juristic works to achieve its purpose. Key words: Pre-

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¹ This restriction could be queried for making most likely that the Federal High Courts could be over burdened.

election, campaign, disqualification, nomination and substitution.

Keywords: Constitution, Electoral Act 2022, Free and Fair Elections, Elections in Nigeria

1. Introduction

Every democratic country in the world strives and aims at standardizing its democratic process through electoral reforms mostly by legislations. This is simply to entrench democracy which in recent times has become the world order. The rising wave of electoral malpractices and other ugly trends in Nigeria have made it obligatory for the Nigerian legislature and other major stakeholders to also think in the line of ensuring that the Nigerian electoral system and democratic governance is strengthened to meet the need of a viable democratic system.

The law need not be static; it ought to be growing with the society. Society on the other hand has never been static; it changes as the time passes. Change in the society brings both positive and negative developments; thus we have electoral malpractices and political manipulations. There is, therefore, the need for law to also change in line with the society in order to stamp out seemingly negative developments accompanying society in its growth. John Samba thinks in line with the above position when he opines that:

Efforts should be made to see law as it exists and functions in society... to present [law] against a background of social developments and changing economic and political attitudes.²

In response to social developments and changing economic and political attitudes as regard the Nigerian electoral system, the Nigerian government through President Muhammad Buhari on 25th February,

² J N Samba, *Fundamental Concepts of Jurisprudence*^{3rd}edn, (XXX: Bookmakers Publishing, 2007),p.7

2022, signed the Act into law.³ In its explanatory memorandum, it is clearly stated that:

This Act repeals the Electoral act No.6, 2010 and enacts the Electoral act, 2022, regulates the conduct of Federal, State, and Area Council elections, to make provisions for the restriction of the qualification for elective office to relevant provisions of the Constitution of the Federal Republic of Nigeria 1999, use of card readers and other technological devices in elections and political party primaries, to provide a time line for the submission of list of candidates, criteria for submission of candidates, limit of campaign expenses, and address the omission of names of candidates or logo of political parties.⁴

Drawing from the above, the Act is intended to bring innovations to the regulation of federal, state, and area council elections in Nigeria.

It is worthy to note that key legislation in the Nigerian electoral system has recently come under criticism for being, essentially, weak, and not in tandem with modern trends. Obvious gaps in the law have been exploited by political actors to perpetrate electoral malpractices and other unethical conducts that have increased the incidence of awful democratic process. For these and other reasons, the electoral law had to be amended in order to curb the negative tendencies and stamp them out of the system.

Before the enactment of the Act, there were series of legislations in Nigeria that had been fashioned to regulate the Nigerian democratic process. One example of such legislations is the Electoral Act, 2010. The old Act had been in existence for some time. Unfortunately, the old Act had serious shortcomings that the Act had to be enacted to

³ S Adewole, "Buhari Signs Electoral Act Amendment Bill into Law," *The Punch Newspaper, Friday* 25th February 2022 <<https://punchng.com/breaking-buhari-electoral-act-amendment-bill-into-law>> accessed 26th March 2023.

⁴ The Act, *Explanatory Memorandum*

make up the gaps. The unpredictable policy environment, downturn in political participation and political upheavals at the time, also led to the difficult situation that the country found herself in. The Independent National Electoral Commission (INEC), which is constitutionally saddled with the management of the democratic process,⁵ was toothless in her effort to avert impending systematic crises and its resultant consequences.

As Nigeria moved toward the 2023 elections, there was every need to amend the electoral law to strengthen the key pillars of the country's democracy. So, given these factors, the Act introduced so many changes. These changes are, inter alia, financial independence to INEC, extension of time for publication of election notice, encouragement of early party primaries, extension of timeframe for campaign by political parties, provision for central electronic voters database, revision of definition of over voting, the INEC power of review, provision to cover the death of election candidates, technological changes in electoral process.

The crucial point to note and what verily interests this investigation is that the new law is specifically fashioned to address current realities in the Nigerian electoral system such as political manipulation, election rigging, money politics or the prevalence of fraudulent activities such as the advent of unscrupulous spending by political parties and such other similar challenges. To emphasize the point, it is apparent that the enactment of the Act, was intended to update the then existing Act in order to tackle some of the challenges in the Nigerian democratic process occasioned by the 2010 Act which had proved to be grossly inadequate in the present ecosystem and to bring it in line with global best practices. By and large, the new law seeks to update commensurate penalties for regulatory breaches in the Nigerian electoral System.

⁵S15(a)-(i) of the CFRN, 'Third Schedule' , Part I.

2. The ‘Revolutionary’ Provisions of the Act

The Act introduced and amended major provisions that govern the activities of political parties and candidates seeking to participate in the electoral process. It entirely strengthens the regulation of the Nigerian electoral system and democratic process, reflecting the evolution of democratic governance in Nigeria. The Act, among other things, seeks to strengthen regulatory oversight and increase the confidence of participants in the electoral system. It is intended that the Act will usher in a new era in regulation of the electoral system for the improvement of the political climate in Nigeria. Focused in this direction, the Act also empowers and expands the scope of INEC regulatory oversights in the democratic process.

The amended legislation, though long overdue is commendable and progressive because it addresses new and emerging areas of electioneering process.

In a sharp contrast to the above assertions, however, some stakeholders are not comfortable with some of the provisions of the Act on various grounds. Members of the camp with a voice of dissent have advanced arguments that the prominence or power given to INEC under the Act is over blown; and that some provisions with overbearing mandates such as the provision excluding political appointees from acting as voting delegates or aspirants,⁶ should be expunged. It is on these varied grounds that this investigation seeks to examine the Act, and its impact on the Nigerian democratic process.

President Muhammadu Buhari, while assenting to the law described it as “revolutionary piece of legislation.”⁷ From all indications, Buhari statement cannot be considered as being flippant, especially when Jide Ojo corroborates the President’s statement when he avers that “the Act contains a wide range of reforms that, if truly and genuinely

⁶s84 (12) of the Act.

⁷ J Ojo, “ How Electoral Act, 2022 Impacts Political Parties, Contestants.” *Twitter* :@Jideojong (Lagos 16th March 2022) <<https://jideojo.ng/how-electoral-act-2022-impacts-political-Parties-Contestants>> accessed 26 June 2022.

implemented, will enhance credible future elections and deepen our democracy.”⁸ Miracle Eme agrees with the above submission by postulating that “as Nigeria approaches its 2023 general elections, the enactment of the new law has come at the right time.”⁹

3. A Critique of the Revolutionary Provisions of the Act

The Act establishes the Independent National Electoral Commission Fund, wherein payments from the Federal Government, investments made from the fund and other aids and grants shall be paid to enable INEC to perform its functions.¹⁰ Furthermore, the Act stipulates that election funds due to the INEC for any general election are to be released not later than one year before the next general election.¹¹ This provision grants financial autonomy to the INEC, but more importantly allows for timely preparations for elections and saves INEC the bending knee before bureaucrats and all it portends under the former Act.¹²

One other encouraging factor about the Act is that political parties are mandated to submit the list of their sponsored candidates who have emerged from valid primaries conducted by the party, not later than 180 days before the date appointed for general election¹³ in contrast ‘not less than 60 days before the date of general elections’ rule under the old Act.¹⁴ This change in the time frame to submit the names of party candidates facilitates settlement of intra-party squabbles before elections.

Unlike the old Act that allowed keeping of voters registers in manual and hard copies form¹⁵, the Act provides that INEC register shall be

⁸*Ibid* (n6), 1

⁹ M Eme, “Nigeria: The Electoral Act 2022: Key Changes And Impact on the 2023 Elections” *S.P.A Ajibade and co* (Lagos 26th April 2022), 2

¹⁰s3 (1) of the Act.

¹¹s3 (3)s3 (1) of the Act..

¹²s5 of the Electoral Act, 2010.

¹³S29(1) of the Act.

¹⁴s31 (1) of the Electoral Act, 2010.

¹⁵s.9(2) of the Electoral Act, 2010.

kept in electronic format in its central database, in addition to being kept in manual or hard copy format.¹⁶

The section 84(12) of the Act provides that no political appointee at any level shall be a voting delegate or be voted for at the convention or congress of any political party for the purpose of the nomination of candidates for any election. This has generated controversies and litigation. The Federal High Court declared it unconstitutional and directed the Attorney General of the Federation to delete same from the Act.¹⁷The last has not been heard about the controversies on the constitutionality or otherwise of this provision, as the National Assembly has vowed to appeal the decision of the Federal High Court.¹⁸

It is perfectly true that the pre-section 84(12) of the Act era saw governors of states and the President of Nigeria appointing loyalists in good number as advisers and assistants to dominate the delegates that would constitute the electorate in any party primary election. This was to the suppression and domination of competitors and a corruption of the democratic process. On the other hand, in this world of unemployment, it is hardly inhuman for people to be provided with employment. It would hardly be justifiable to deny them participation in an election process of their country because they are employed. This is the dilemma that a critique of section 84(12) of the Act finds himself.

4. An Examination of some Democratic Terms/Concepts

Understanding some key concepts or terms is key to understanding the democratic scheme of the Act. This is, however, not to run away from the fact that the definition of terms is a difficult thing in the arts and

¹⁶s9 (2) of the Act.

¹⁷“ Court Nullifies Section 84 (12) of the Amended Act” *The Vanguard* (Lagos 18th March 2022)<<https://www.vanguard.com/2022/03/court-nullifies-Section-84-12-of-amended-electoral-act>>accessed 27 June,2022.

¹⁸ National Assembly to Appeal Judgment Voting Electoral Act Section 84(12), *The Nation* (Lagos:18th march 2022) < <https://thenationonline.net/national-assembly-to-appeal-judgement-voiding-electoral-act-section-84-12>> accessed 26th June 2022.

social sciences. There is no description of a term that is universally acceptable or even tenable at all times and in all places. For instance, “democracy or good governance” could mean whatever anyone wants them to mean depending on the perspective he chooses to look at it.

Some terms or concepts have been considered crucial to this research shall be our subjects of discussion. These concepts are the *Nigerian electoral system and process, majority rule, free and fair election and democratic rule*. These shall be discussed not in any particular order.

4.1 The Nigerian Electoral System and Democratic Process

The term ‘democratic process’ is a synonymy of the ‘electoral process’. In this wise, Agbaje and Adejumobi assert that ‘the electoral process includes voter registration, political campaigns, voting, the declaration of election results and post- election petitions and complaints. It also includes the electoral law itself.’¹⁹ Azikiwe refers to it as ‘a method of choosing leaders where the citizens have right to vote and be voted for.’²⁰ Oni et al agrees with Azikiwe and adds that ‘elections in Nigeria are forms of choosing representation to the Federal Government of Nigeria and the various states.’²¹

From the views sampled above, the investigation holds that an electoral system and democratic process is a method through which citizens of a country elect their representatives or political officials to oversee the affairs of the nation. This method determines and spells out the criteria required of a candidate or a party before they can participate in the elections and the way votes are counted. In Nigeria, INEC is the current body set up to oversee electoral processes in Nigeria. INEC organizes the pre-election run, controls all the conditions of this period; prepares everything for the voting, and so on.

¹⁹A Agbaje and S Adejumobi, “The Travails of Electoral Politics in Nigeria” *African Development* (2006) *Council for the Development of Social Science Research in Africa*, 32

²⁰N Azikiwe, *The Development of Political parties in Nigeria* (London 1957), 53

²¹C Oni and F Chidozic, and G Agbude, “Electoral Politics in the Fourth Republic of Nigeria’s Democratic Governance” *Rochester* (New York August 2014), 13

The CFRN provides for qualifications to stand elections²² into public offices while the Act provides the guide to the conduct of the elections pursuant to the CFRN²³.

4.2 Free and Fair Elections and the Concept of Democratic Rule

Democracy, like most other concepts, is devoid of a universally acceptable meaning. This is because it has changed with time and because of increase in population and complexities of social systems democratic practices differ from state to state. For instance, in the ancient Greek, when the population was small, every person of age would show his approval by a raise of hand in voting in a sitting. It is no longer possible to practice this today because of the large number of persons to vote and their geographical distribution. This makes a universally valid definition of democracy a mirage.

‘Democracy’ is, however, defined in the Black’s Law Dictionary ‘as that form of government in which the sovereign power resides in and is exercised but the whole body of free citizens directly or indirectly through a system of representation as distinguished from monarchy, aristocracy oligarchy.’²⁴ In the 11th edition of the same dictionary, democracy is defined as ‘government by the people either directly or through representatives.’²⁵

These definitions are too sweeping as they do not prescribe or define the system of representation through which the people exercise their sovereign power. The pertinent question is, would a system of representation by nomination and selection, which may satisfy the above definitions, qualify a polity where this is practised as democratic? The popular definition of democracy is that it is ‘government of the people, by the people, and for the people’. This

²² CFRN, section 131, provides for the qualifications required of one aspiring to be the President of Nigeria;

²³CFRN, ss 132, 133and 134 for the President. There are provisions too for the governors of states, national and states’ assemblies members.

²⁴B A Garner (ed), *The Black’s Law Dictionary* (6thedn. Thompson Renters 2019)

²⁵*Ibid*

definition also, according to Osinbajo and Kalu, 'has gloomily given a picture of what democracy is. First of all, it does not define the people (whether the minority or majority). Second, it does not specify the *modus operandi* by which this government is run.'²⁶

Shishi has quoted Schattschneider as defining democracy as a competitive political system in which competing leaders and organizations define the alternatives of public policy in such a way that the public can participate in the decision making process.²⁷

In this definition, emphasis is laid more on the leaders than the people. Moreover, the way the alternatives of public policy are defined is not determined apart from the failure of the definition to define the public (minority or majority) and the level of their participation is not also defined.

In the *Encyclopedia Americana*,²⁸ Democracy is viewed as a form of government in which the major decisions of government or the direction of policy behind these decisions rest directly or indirectly on the freely given consent of the majority of the adults governed. This definition, although appears more comprehensive than the others considered above, is lacking in the fact that it has no provision on how this free consent of the majority of the adults is given, would it be by election or selection?

The last two definitions of democracy represent the socialist and capitalist perception of democracy respectively. While the latter emphasises political freedom but does not emphasise economic justice, the former emphasises the ability of the leaders to make policies to

²⁶Y Osinbajo and A Kalu, *Democracy and the Land Federal Ministry of Justice* (Lagos September 1991), 32

²⁷J M Shishi, *The Link Between Democracy and Development Rights in Nigeria* [2012] 4 (1) *Benue State University Law Journal*, 74

²⁸*Ibid*, 75

guarantee and provide the economic security for the people, without giving the people wide political freedom.²⁹

All said and done, this investigation would not be helping matters if it does not proffer a working definition of democracy. The study therefore defines democracy as a practice in which decisions are taken or those in positions of authority are determined by the exercise of the right of members of a given society by acceptable norms in a voting procedure.

Democracy under Nigerian laws leaves much to be desired. Nigeria has gone through the 1960, 1963, 1979 and is currently on the CFRN. Apart from the 1960 Constitution, the subsequent constitutions have provisions entrenching the principles of democracy.³⁰ For illustration, the 1979 Constitution provides for its supremacy,³¹ separation and division of powers,³² fundamental objectives and directive principles of state policy and sovereignty of the people,³³ fundamental rights,³⁴ judicial independence,³⁵ and electoral process.³⁶ The bedrock of democracy is a constitution that guarantees fundamental rights such as are enshrined in chapter four of the CFRN. No country in the world would be taken to be a serious practitioner of democracy of these rights are not provided for and respected. Violators of these rights have always been rightly described as dictatorial regimes.

The Nigerian Constitution, as noted by Shishi 'is autochthonous,'³⁷ that is, it derives its authority, force and validity from its own native

²⁹CFRN 1979, Preamble, s14 (1) and (2)

³⁰Constitution of the Federal Republic of Nigeria, 1979, s1.

³¹Ibid, ss4 – 8, Cap v – viii

³²CFRN, s13 – 22

³³Ibid, s14 (2) (9)

³⁴Ibid, s33 – 46

³⁵Ibid, s6 (6)

³⁶Ibid, ss65 – 79; 106 – 119; 132 – 134 and 142; 177 – 179; 187 and 285 and other provisions on the electoral process in the Constitution while the third schedule to the Constitution establishes the federal and state electoral commissions.

³⁷*JM Shishi*, (n27), 82

authority or people but the country is still struggling to achieve democratic rule today. According to Ayua:

The democratic apparatus on the ground were not necessarily bad or was the constitutional foundation deficient but the players were thoroughly and wholly lacking in empirical principles to depend upon other than resorting to tribal, regional and emotional appeals³⁸

Ayua further states that:

No constitution of any country is perfect however wisely drawn as there would be occasions to amend it... we are a nation making constitution after constitution, not amending constitution we suspend and start all over only to bring in almost all we have suspended.³⁹

The above valid submission is not unconnected to our not enduring democracy that has been caused by several military interruptions. A check of the Nigerian constitutional history reveals only one fact, that if Nigeria has had more than two constitutions, the only two that have civilian origin are those of 1960 and 1963. The remaining have been products of military regimes that take over power by ‘destroying the existing constitution first, and assembling one at the point of their handover of power to another civilian government.

5. The Concept of Majority Rule

Majority rule is an integral part of democracy. It is, in fact, democracy. One cannot contemplate a democratic set up where those in elected position were not elected by the majority. Ayua holds the view that for ‘majority rule’ to prevail:

³⁸I A Ayua, *Law, Justice and the Nigeria Society Institute of Advanced Legal Studies* (Lagos 1995), 145

³⁹*Ibid*, p. 145

There must be an understanding that when the enfranchised members of the community disagree as to what ought to be done...the majority of the elaborate and not the minority should carry the day.⁴⁰

This view became insufficient with the emergency of the theory of human rights beginning in the 17th century and its explicit development in the writings of Thomas Hobbes and above all John Locke.⁴¹ Thomas Hobbes and John Locke maintain that:

Majority could do everything except deprive minorities of the freedoms of speech, press, assembly, rights to fair trial, and so on, the exercise of which might enable the minority peacefully win over the electorate and come to power. Minorities might do everything within the context of these human rights to present their case.⁴²

Constitutional democracies enshrined majority rule as the basis of their democracies. A stateshort of this practice could be any form of government but a democratic government. It is for this reason that the CFRN does not only provide for qualifications to contest positions⁴³ but also creates institutions to ensure that the minority are not denied their say and the majority are not denied their way in an electoral process⁴⁴. The rule of the majority remains a fallacy in the absence of a free and fair election. The hue and cry against the outcome of the general elections of 2023 in Nigeria could find another expression in a complaint of lack of a free and fair election.

⁴⁰*Ibid* , p. 4-5

⁴¹*The Encyclopedia Americana*, Dandury (Americana Corporation International 1978), 685 xxx

⁴²*Ibid* (n39), 686

⁴³(22 and 23).

⁴⁴s221-225 of the CFRN provides for political parties; s285 of the CFRN provides for election tribunals and the CFRN, s153 that establishes INEC.

6. Conclusion and Recommendations

The fault is not always in the law of elections but in the abiding of citizens to play in accordance with the rule. The laws have had to be changed from time to time all because the sharp 'democratic' practices of citizens that occasion electoral malpractices have to be curbed. It is the recommendation that the emphasis be shifted from dissipating energy on legislative amendments to the reorientation or re-socialisation of the citizens on the need for free and fair elections. Moral suasion from religious leaders would be a strong weapon of use in this regard.

The scheme of the Act is to ensure free and fair elections. This underscores the employment of electronic devices to read voters cards, transmit results, upload of results from one level of the electioneering process to the other to ensure transparency. This, however, is far from realisation because of the human factor and every drive in contestants to win at all costs and by all means. Sorting out election differences in the courts is the most democratic step to take but without even the slightest guarantee that all parties before the courts have clean hands. It has always been the one that is out rigged complains to underscore the recommendation above made.