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Section 84(12) electoral act: Issues and controversies towards 2023 general elections

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Abstract
Previously, there has been controversy on whether a political appointee can still be in office and contest for a new position in the next general election while his tenure has not expired. This study seeks to examine the issues and controversies towards provisions of section 84(12) of the Electoral Act 2022 which discusses the rationale for the provisions of this very section of the Electoral Act; 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. It equally argues that the actions of political appointees are incongruous with election proceedings and the perplexity as to the rights and responsibilities of political appointees during election process. This study adopted doctrinal methodology with the use of primary and secondary sources such as case laws, articles, relevant statutes and internet sources. Thus, it finds that many political appointee in Nigeria usually participate in voting and being voted for during conventions or party congress in choosing candidates for national election. It therefore recommended that a strict compliance with the provisions of the Electoral Act is paramount and violation of such provisions of the statutes will amount to disqualification of such candidate and the party being represented is barred from participating in the general election.

Keywords: electoral act, president, political appointee, constitution, court, judgment

Introduction
It is wide held aphorism that invention is the child of necessity. This is largely seen within the ambience of the irregularities inherent in previous elections conducted which gave rise to the general clamour for an amendment of the 2010 Electoral Act. Legally conceived by the 8th National Assembly and midwifed by the 9th National Assembly, 2022 Electoral Act came into force. Record has it that on 25th February 2022, President Muhammadu Buhari signed the 2022 Electoral Act Amendment Bill into law, after months of withholding assent. The 2022 Electoral Act repealed the Electoral Act, 2010. Despite his assent as required by Section 58 [1] he, however sent a letter requesting for the removal of section 84(12) of the Act. This request and corresponding refusal by the legislative arm of the federation create an issue for determination; whether section 84(12) is Constitutional? Hence, it is my intention to share with you, my legal opinion about this controversial section and attempt to find an answer to the issue raised.

Provisions of Section 84(12) [2]

> "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".

The import of this section is that political appointees are barred from participating actively during the convention of their respective political parties for the purpose of nominating candidates for elective positions nor be voted for, save that such appointee resigns prior to the convention or congress. The intended mischief targeted at seems to be the avoidance of conflict of interest by the political appointees, misappropriation of public funds and level playground for aspirants. It did not stop at this; subsection (13) [3] provides that; "Where a political party fails to comply with the provisions of this Act in the conduct of its primaries, its candidate for election shall not be included in the election for the particular position in issue".

Assent of the President and Request for Amendment

By the virtue of section 58(4) [4], the President on the 25th February 2022, signed the 2022 Electoral Act Amendment Bill into law which attracted nationwide jubilation and sets a new pace for 2023 general elections. In his assenting speech, the President requested the National Assembly that SECTION 84(12) [5] be removed. According to him, the said section infringes on the fundamental rights of the referred persons. He further argued that Section 84(12) constitutes a disenfranchisement of serving political office holders from voting or being voted for at conventions or congresses of any political party, for the purpose of the nomination of candidates for any election in cases where it holds earlier than 30 days to the national election. However, the National Assembly refused to consider the president's request and threw out the bill seeking the amendment of the section, with lawmakers stressing that an amendment would be going against the civil service norms and would be injurious to the well-being of the society.

It was the refusal of the National Assembly to delete the said section as requested that gave rise to the legal tussle confronting the judiciary. The first court to give judgment over the constitutionality of the controversial section was the Abia State Division of the Federal High Court. What was the decision?

The Abia State Federal High Court's judgment

The Federal High Court sitting in Umuahia, Abia State ordered the Attorney-General of the Federation to immediately delete Section 84 (12) of the amended Electoral Act. The Honourable Justice Evelyn Anyadike held that the section was unconstitutional, invalid, illegal, null, void and of no effect whatsoever and cannot stand, as it is in violation of the clear provisions of the Constitution. In the suit [6], Anyadike J re-echoed Sections 66(1)(f) [6], 107(1)(f) [7], 137(1)(g) [9] and 182(1)(g) [8, 9] that appointees of government seeking to contest elections were only to resign at least 30 days to the date of the election and that any other law that mandated such appointees to resign or leave office at any time before that was unconstitutional, invalid, illegal null and void to the extent of its inconsistency to the clear provisions of the Constitution.

The erudite judgment of Anyadike J attracted wide appraisals from legal luminaries, both in positive and negative perspective. However, Ariyo-Dare Atoye, the Executive Director of Adopt Goal Initiative (AGI) and one of the front liners in the push for the Electoral Act to be signed into law told Dataphyte that the National Assembly acted rightly on Section 84(12). Accordingly, he opined that political appointees give the executive arm an undue advantage during party conventions and congresses for elective office; while political appointees seeking elective office deny other aspirants a level playing field if they remain in the office during the primaries. He strongly argued that Sections 66(1)(f), 107(1)(f), 137(1)(g), and 182(1)(g) of the 1999 Constitution did not cover political appointees because they are not public servants. He further argued that political appointees are not public servants that they exist at the pleasure of the appointors who can hire and fire without recourse to the public service rule which is not the case for a public servant, as the executive cannot fire a public servant without going through the laid down procedure in the Public Service Bye-law. He further relied on the case of *Adamu* v *Takori* [10] where the court held that a political appointee like the Attorney General is not a public servant employed in the service of the Federation or of a State and therefore not covered by Section 318(1) [11] of the Constitution.

Similarly, Femi Falana a jurist and senior advocate of Nigeria avers that there are no existing constitutional provisions compelling political appointees to resign to contest in a general election as the judgment submitted. According to most lawyers, political appointees are not part of the public service which section 318 [12] requires to resign within 30 days to contest an election. The legal luminary further argued that persons referred to in section 318 [12] are those employed in the public service which excludes political appointees.

In alignment with earlier argument, the researcher is of the opinion that section 84(12) does not infringe upon the right to freely assemble and associate with other persons as provided for in section 40 of the Constitution [13] or the right to form a political party as provided for under section 221 [14]. By virtue of the provisions of the Constitution, it thus provides the right to freedom of movement for every citizen, but to travel out of Nigeria, you need a passport, without which you would not be allowed to board the plane. It is in that passport that the travelling visa to your country of destination will be imposed. The Courts have also held that the requirement for a passport as a condition to travel does not infringe upon the constitutional right of movement. In the case of *Awolowo* v. *Ministry of Internal Affairs* [15], where the appellant Chief Obafemi Awolowo, SAN, was charged for treasonable felony. He engaged the service of a British lawyer, Mr. E.F.N. Gratiaen to defend him. On arrival in Lagos, Mr. Gratiaen was denied entry into Nigeria by the Federal Ministry of Internal Affairs. The court had to determine the import of section 21(5) (c) [16] (now section 36(6)(c) of the 1999 Constitution, which provided that "an accused person is entitled to defend himself in person or by a legal practitioner of his own choice". Chief Awolowo contended in that case that he was entitled to be represented by any lawyer of his choice whether indigenous or British. Thus, the order prohibiting his lawyer, Mr. Gratiaen, was ultra vires and against his right to a fair hearing. He, therefore, prayed the court to grant an order of injunction, restraining the defendant from preventing the said Mr. Gratiaen or any other British counsel who might be the counsel of his choice, from entering Nigeria to defend him in the pending charge. On the other hand, the defendants, in that case, argued that the provisions of section 13 of the Immigration Act which provides that "Notwithstanding anything in this ordinance contained, the Governor-General may, in his absolute discretion, prohibit the entry into Nigeria of any person, not being a native of Nigeria", gives the ministry the power to refuse a non-Nigerian entry into the country. Hence, in the exercise of the right conferred by section 21(5)(c) of the 1960 Constitution, the legal

representative must be a qualified person entitled to a right of audience in Nigerian courts. Secondly, he must be available to take up the case, and therefore must be able to enter Nigeria as of right and must be a Nigerian.

The High Court of the Federal Territory of Lagos, Per Justice Udo Udoma held that based on the above provisions, the legal representative chosen by an accused person if resident outside Nigeria must be a person who could enter Nigeria as of right and must not be anyone under any disability. In the words of the judge: "I must state at once that I do not accept as sound proposition the submission that the provision contained in Section 21(5)(c) of the Constitution, liberally interpreted, can be construed to entitle anyone to bring a Counsel from the United Kingdom to defend him in a criminal charge. To accept that interpretation, would be to strain language. The Constitution is a Nigerian Constitution, meant for Nigerians in Nigeria. It only runs in Nigeria. The natural consequence of this is that the legal representative contemplated in Section 21(5)(c) ought to be someone in Nigeria, and not outside it." This decision was affirmed by the Supreme Court in the appeal filed against it by Chief Awolowo.

By the foregoing theses and anti-theses, it is obvious that the crux of the argument hinges on whether the provision of section 318 of the Constitution could be applicable to political appointee. For the purpose of this academic exercise, it will be sacrosanct to subject the innovative core word to lingual analysis to divest it of its ambiguities. Hence, who is a political appointee?

Political Appointees

Subject to the provisions of 1999 Constitution, it shows that the constitution is silent on the phrase "political appointees". Before the advent of the introduction of the clause on political appointees into the Electoral Act, experience has it that political appointees usually bank on the provisions of the constitution on public officers as regards election matters. Sections 66(1)(f), 107(1)(f), 137(1)(g) and 182(1)(g) of the 1999 Constitution (as amended) stipulates that elected public officers, which include civil servants, who want to contest an election must have resigned their position at least 30 days to the date of the election. These sections in the 1999 Constitution make use of the phrase in their opening sentence "being employed in the public service of the federation or any state". The big hitch then becomes whether political appointees "employed" into the public service at the federal or state level are public servants? For some analysts since political appointees are paid from the public funds, it is logical to conclude that they are "employed" in public service. This appears to be a strange line of argument and difficult to digest considering the wobbling feet of the argument. It is a long practice that to be 'employed' into the public service demands going through the Public Service Commission which is not the case with political appointees. This is manifestly seen in the permanent nature of those employed regardless of the government in power.

On abundant instances, the court has given interpretation on who is a public officer as mentioned in section 318 of the Constitution. In *Commissioner for Local Government and Chieftaincy Affairs & Anor* v. *Oba Adeyinka Onakade* [17] the Court of Appeal held that, the Local Government Commissioner is not a public officer and his appointment is at the mercy of the State Governor, who appointed him. Another instance is the case of *INEC & Ors* v. *Chief T.A. Orji & Ors* [18], the Appeal Court ruled that the first respondent (Chief of Staff) and second respondent (Commissioner) are not public officers and therefore qualified to contest for the offices of governor and deputy governor without the 30-day-before-election resignation notice stipulated in the constitution. From the earlier arguments, it is crystal clear that the constitution has no provision compelling political appointees to resign as envisaged by Justice Evelyn Anyadike. However, the final determination of this case is before the apex court.

A comparative Analysis

The United States of America electoral law and constitution accentuate that eligibility requirements vary by political office within a given jurisdiction. For instance, the President of the U.S. must be a natural-born citizen, due to the natural-born citizenship clause of the U.S. Constitution. Nonetheless, there has been some legal debate over what constitutes natural born citizenship, particularly regarding cases where an individual is born outside the U.S. to American citizens or in cases of adoption. Generally, however, natural born citizenship is understood to include anyone who is entitled to U.S. citizenship at birth, even if they are born outside of the U.S. Over the years. In offices other than that of the President, eligibility requirements tend to be less stringent. For example, according to the Constitution, members of the U.S. House of Representatives must be over the age of 25 and an American citizen for at least seven years. The Senate's minimum age requirement is 30 and nine years an American citizen. Both chambers of Congress require members to be residents of the state they seek to represent. House members are not required to live in their districts. For local offices, the requirements are often even less strict — in certain jurisdictions, local officials simply need to be current citizens over the age of 18 who have established local residency. Devoid of leave-taking from the lynchpin of our discussion, it is crystal clear that the U. S. electoral law and constitution pay no attention to the issue under consideration. The Constitution summarily specifies age, residency, and citizenship requirements to run for the House or Senate and that individuals who satisfy those requirements cannot be prohibited from running for office for failing to satisfy other qualifications.

From another clime, section 99 [19] provides for the qualifications and disqualifications for election as member of Parliament. Thus:

1. Unless disqualified under clause (2), a person is eligible for election as a member of Parliament if the person

a. is registered as a voter;
b. satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament; and
c. is nominated by a political party, or is an independent candidate who is supported--
1. in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or
2. in the case of election to the Senate, by at least two thousand registered voters in the county.
2. A person is disqualified from being elected a member of Parliament if the person--
a. is a State officer or other public officer, other than a member of Parliament;
b. has, at any time within the five years immediately preceding the date of election, held office as a member of the Independent Electoral and Boundaries Commission;
c. has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;
d. is a member of a county assembly;
e. is of unsound mind;
f. is an undischarged bankrupt;
g. is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or
h. is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six.

3. A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.

From the preceding extracts from U. S. and Kenyan Constitution, it apparently displays the prime of place attached to citizenship and public service in election of members to elective positions. As a leap in general practice, the notorious section 84(12) [20] succinctly delineates the guidelines for political appointees in Nigerian electoral system which the Nigerian Constitution and others are silent about.

6. Nigerian Legal Position to Political Appointee towards Election

The Supreme Court in President Buhari & Ors v NASS [21], struck out the suit filed by the federal government against provisions section 84(12) of the Electoral Act [22], for being incompetent and lacking in merit. The Apex Court in a unanimous decision described the suit as an abuse of court process and subsequently dismissed it. Accordingly, Musa Mohammed-Dittjo JSC ruled that the plaintiffs having earlier assented to section 84 (12) of the Electoral Act 2022, cannot turn around to approach the court to strike it down and further held that, "there is no provision in the constitution that vests the president the power to challenge the constitutionality or desirability of a legislation after he has assented or denied his assent. In the instance case, the president gave his assent," and the Act is duly constituted.

Conclusion

There are several of judicial decisions that political appointees hold their offices at the inclination of the appointor and they are not civil or public servants as provided for in the Constitution. Thus, the study submits that there is no apparent or implied conflict between section 84(12) of the Electoral Act and any of the provisions of the Constitution discussed above. The researcher further contends that Section 84(12) has not stopped any citizen from contesting election but has only imposed a condition upon political appointees to first step down from their political position to seek elective office. There is no illogicality or incongruity at all in this valiant provision with the Constitution. One would want to ask 'whether the National Assembly has by Section 84(12) of the Electoral Act negated the constitutional stipulation of 'at least 30 days'? The answer is in the negative; the two concepts do not oppose themselves at all. For civil and public servants, the Constitution demands that they resign not less than thirty days prior to any election for which they seek to contest whereas section 84(12) simply prohibits political appointees from participating in elections to be conducted at the conventions and congresses of their political parties though still retaining their political appointments. With the Supreme Court's ruling on the matter, the controversial section has come to stay.

References

1. Constitution of the Federal Republic of Nigeria (as amended), 1999.
2. Electoral Act, 2022.
3. Ibid.
4. Constitution of the Federal Republic of Nigeria (as amended); provides that where a bill is presented to the President for assent, he shall within thirty days thereof signify that he assents or that he withholds assent, 1999.
5. Electoral Act, 2022.
6. FHC/UM/CS/26/2022

7. No person shall be qualified for election to the Senate or the House of Representatives if – He is a person employed in the public service of the Federation or of any State and has not resigned, withdrawn or retired from such employment thirty days before the date of election.
8. No person shall be qualified for election to a House of Assembly if – He is a person employed in the public service of the Federation or of any State and has not resigned, withdrawn or retired from such employment thirty days before the date of election.
9. A person shall not be qualified for election to the office of President if – being a person employed in the civil or public service of the Federation or of any State, he has not resigned, withdrawn or retired from such employment thirty days before the date of election.
10. Constitution (as amended), 1999.
11. No person shall be qualified for election to the office of Governor of a State if – being a person employed in the public service of the Federation or of any State, he has not resigned, withdrawn or retired from such employment thirty days before the date of election.
12. All FWLR (Pt. 540) 1387 C. A, 2010.
13. This section defines "civil service of the Federation" to be service of the Federation in a civil capacity as staff of the office of the President, the Vice President, a ministry or department of the Government of the Federation assigned with the responsibility for any business of the Government of the Federation;
14. "civil service of the State" to be service of the Government of a State in a civil capacity as staff of the office of the Governor, Deputy Governor, a ministry or department of the Government of the State assigned with the responsibility for any business of the Government of the State.
15. "public service of the Federation" to be the service of the Federation in any capacity in respect of the Government of the Federation, and includes service as –
16. "public service of a State" to be the service of the State in any capacity in respect of the Government of the State and includes service as -
17. Constitution of the Federal Republic of Nigeria (as amended), 1999.
18. Ibid.
19. Ibid
20. Ibid.
21. (1962) LLR 177
22. 1960 Constitution of the Federal Republic of Nigeria (as amended).
23. (2016)LCN/8565(CA)
24. (2006) LCN/3116(CA)
25. The Constitution of Kenya, 2010
26. Electoral Act, 2022.
27. SC/CV/504/2022
28. Ibid