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Nigeria's Electoral Act 2022: Of Electoral Politics, Litigations and Matters Arising

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Abstract

This paper highlights the novel and significant provisions of the Electoral Act 2022. It examines the electoral politics, as well as constitutional and ethical issues arising from the litigation of section 84(12) of the Electoral Act 2022. Using the logical unity of the legal order theory, this paper argues that section 84(12) of the Electoral Act logically conforms with the Constitution of the Federal Republic of Nigeria 1999 (CFRN 1999), and is therefore constitutional. The paper recommends an amendment to the Electoral Act to include a clear definition for the phrase 'political appointee', as well as the amendment of relevant provisions in section 318(1) of the CFRN 1999, to avoid needless arguments going forward.

Keywords: Electoral Act, electoral politics, constitutionality, political appointee, public servant, forum shopping

1 Introduction

In Nigeria, the electoral process is regulated by certain provisions of the Constitution of the Federal Republic of Nigeria 1999,[1] the Electoral Act,[2] as well as regulations and guidelines for the conduct of elections issued by the Independent National Electoral Commission (INEC).[3] The need for robust and effective legal framework for the regulation of the electoral process for the realisation of the expectations of stakeholders cannot be overemphasised. Yet, to a large extent, electoral politics plays

[1] Constitution of the Federal Republic of Nigeria (CFRN) 1999, Cap C23 Laws of the Federation of Nigeria (LFN) 2004.
[2] Electoral Act 2022, which came into force on 25 February 2022.
[3] Regulations and Guidelines for the Conduct of Elections.

a crucial role in the enactment of the Electoral Act, which creates a nexus between the relevant provisions of the CFRN 1999 and electoral regulations and guidelines. Therefore, more often than not, electoral politics gets in the way, creating uncertainty and confusion for the political parties, the electoral umpire and the electorate.

The next round of general elections in Nigeria will be in 2023.[4] The state of flux that usually precedes elections in Nigeria has yet again come to the fore, mainly arising from the enactment of the Electoral Act 2022. This paper seeks to highlight the novel and significant provisions of the Electoral Act 2022, examine the electoral politics that foreshadowed its enactment, as well as the constitutional and ethical issues arising from the litigation of section 84(12) of the Act. Using the basic norm and logical unity of the legal order theory, this paper argues that section 84(12) of the Electoral Act 2022 is not unconstitutional, as it is in accord with the basic norm from where it derives validity. It also argues that a political appointee is not a public servant under the CFRN 1999, and proposes legislative actions to avoid needless argument on these issues.

This paper, in part 2, highlights the novel and key provisions of the Electoral Act 2022. Of all of them, section 84(12) appears to have generated so much debate, with lawyers divided as to its proper interpretation. Thus, in part 3, the paper examines the politics of section 84(12) of the Electoral Act 2022, while part 4 of the paper interrogates the constitutionality of section 84(12) of the Act and other issues arising from the litigations of its provisions. The paper concludes in part 5, wherein it proffers two recommendations.

2 Novel and Significant Provisions of the Electoral Act 2022

The Electoral Act 2022, which was passed in January 2022 by the National Assembly and signed into law on 25 February 2022 by President Muhammadu Buhari, repeals the Electoral Act No. 6 of 2010 as amended. It, *inter alia*, regulates political party primaries, the conduct of federal, state and area council (the Federal Capital Territory (FCT)) elections.[5] The novel and significant provisions of the Electoral Act 2022 include the following:

(i) Section 3(3), which requires the release of election funds due to INEC for the conduct of general elections not later than a year before the elections.

(ii) Section 8(5), which criminalises the act by persons who misrepresent or fail to disclose their membership, affiliation, or connection to a political party in the course of securing appointment or employment in any capacity with INEC.

(iii) Section 28, which requires INEC to issue a notice of election, not later than 360 days before the day of an election, stating the date and place at which nomination papers are to be delivered.

(iv) Section 29(1), which requires a political party to conduct valid primaries and submit list of candidates, at least 180 days before the date of an election. This gives sufficient time to aspirants, political parties and INEC to sort out issues arising from political party primaries, as the repealed Electoral Act 2010

[4] INEC, 'Timetable and Schedule of Activities for 2023 General Election' (INEC 26 February 2022).
[5] Electoral Act 2022, Explanatory Memorandum.

provided for a period of 80 days between the submission of list of candidates and an election.

(v) Section 29(5), which allows any aspirant who participated in the primary election of a political party and has reasonable grounds to believe that the affidavit or any document submitted by the candidate of his political party contains false information, in relation to the constitutional requirements to contest the election, to institute a suit at the Federal High Court seeking a declaration that the information contained the affidavit or document is false. This is a modification of the provisions of section 31(5) of the Electoral Act 2010 as amended, in terms of who can challenge the outcome of political party primary.

As a pre-election matter, an aspirant is required to comply with the provisions of section 285(9) of the CFRN 1999, which provides that 'every pre-election matter shall be filed not later than 14 days from the date of the occurrence of the event, decision or action complained of in the suit.' There are two possible routes for an aspirant who wishes to exercise his right. First, an aspirant can institute a suit against the candidate and his political party, with INEC as a nominal party, not later than 14 days from the date of the conduct of the primary election, challenging the eligibility of the person who emerged as the candidate to contest the primary election on the grounds that the candidate provided false information in relation to the constitutional requirements to contest the primary election. In real life scenario in Nigeria, such an aspirant may be faced with an arduous task of proving his claim. This is because at this point in time, the political party would not have submitted the personal particulars of the candidate to INEC, thus creating ample opportunity for the party to deploy its machinery in favour of the candidate against the aspirant and making it difficult, if not impossible, for the aspirant to prove that the candidate submitted false information to the political party.

The second route is for an aspirant to institute a suit against INEC with the political party and candidate as nominal parties, not later than 14 days from the date INEC published the personal particulars of the candidate in line with the provisions of section 29(3) of the Act, challenging the eligibility of the candidate to contest the election on the grounds that he provided false information in relation to the constitutional requirements to contest the primary election. It should be noted that irrespective of the path chosen, there is a legal impediment confronting the aspirant, arising from procedural law.[6] Thus, it is submitted that therein lies the subjectivity of pre-election cases, which will often produce problematic decisions.[7]

(vi) Section 31, which allows a candidate who has been nominated by a political party to withdraw his or her candidature by a notice in writing signed by him or her and personally delivered to the political party that nominated him or her for the election. The political party is required to convey the withdrawal to INEC not later than 90 days to the election.

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[6] *See* AD Sani, 'Still on Defences in Pre-Election Matters' *This Day Lawyer* (26 July 2022) vi.

[7] E Solomon and E Essien, 'The Nigerian Supreme Court and the Political Question Doctrine' (2019) 31 *The Denning Law Journal* 123, 139.

(vii) Section 33, which prohibits a political party from changing or substituting a candidate whose name has been submitted to INEC in accordance with section 29 of the Act, except for the withdrawal or death of the candidate. In the occurrence of any of the two events, the political party is required to conduct a fresh primary election, within 14 days of the occurrence of the event, to produce and submit a fresh candidate for the election.

(viii) Section 34(3), which allows a political party to conduct a fresh primary, within 14 days of the death of its candidate, to replace the candidate who died after the commencement of polls and before the announcement of the final result and declaration of a winner. Subsection (3) of section 34 of the Electoral Act 2022 takes care of the legal and constitutional issues that manifested after the death of Abubakar Audu, in 2015, shortly before INEC announced the results of the Kogi State gubernatorial election.

(ix) Section 47(2)&(3), which allows the use of smart card reader and other technological devices that may be deployed by INEC. This is to prevent multiple voting, and promote the transparency, accuracy and integrity of votes. It should be noted that INEC had earlier taken the initiative to provide for the use of smart card reader in its regulations and guidelines for the conduct of previous elections. However, in *Nyesom v Peterside*,[8] the Supreme Court of Nigeria held that INEC directives, guidelines and manual, which provide for the use of card reader machines, cannot be elevated above the provisions of the Electoral Act, so as to eliminate manual accreditation of voters.[9] This remained the position of the law until the enactment of the Electoral Act 2022, which now alters the decision of the Supreme Court in respect of card reader machines.

(x) Section 50(2), which allows INEC to determine the procedure for voting and transmission of results. The provisions of section 50(2) give INEC the latitude to adopt manual or electronic means in the conduct of voting at election and transmission of results.

(xi) Section 51(2), which empowers the presiding officer to cancel the results of the election in the polling unit, where the number of votes cast is more than the number of accredited voters in the polling unit. The provisions will enable the presiding officer to use the total number of accredited voters to determine whether there was over-voting.[10]

(xii) Section 54(2), which requires INEC to take reasonable measures to ensure that persons with disabilities and special needs, as well as other vulnerable persons are assisted at polling units to vote. This is to ensure that no person is disenfranchised by reason of physical disability.

(xiii) Section 64(9), which criminalises any act of false collation and announcement of results by a returning or collation officer, and stipulates a fine of N5,000,000 or imprisonment for a minimum of three years or both.

(xiv) Section 65(1), which empowers INEC to review election results, within seven days, where it is determined that a declaration of results was not made

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[8] [2016] 7 NWLR (Pt 1512) 452.

[9] ibid 528.

[10] *Cf Audu v INEC* (No. 2) [2010] 13 NWLR (Pt 1212) 456.

voluntarily or was made contrary to the provisions of the law, regulations, guidelines and manual for the election.

(xv) Section 77(2)&(3), which requires every political party to maintain soft and hard copies of register of their members, and make such register available to INEC not later than 30 days before the date of a primary, congress or convention. The implication of these provisions is to ensure that candidates nominated by political party for election are duly registered members of the political party on which platform they are seeking to contest an election.

(xvi) Section 84(1), which requires a political party seeking to nominate candidates for election under the Act to hold primaries for aspirants to all elective positions, which shall be monitored by INEC. Section 84(1) alters the previous position of the law regarding the role of INEC in political party congress and convention for the nomination of candidates for election. Previously, INEC's attendance and monitoring of a political party's congress or convention was not a *sine qua non* to the validity of the process, in so far as the statutory requirement of notice under section 82 of the Act was satisfied.[11] The extant law is to the effect that INEC's monitoring of a political party congress or convention is a legal requirement for its validity and not merely optional.

(xvii) Section 84(3), which forbids a political party from imposing nomination qualifications or disqualification criteria or conditions on aspirants in its constitution, guidelines or rules for nomination of candidates for election other than as prescribed in sections 65, 66, 106, 107, 131, 137, 177 and 187 of the CFRN 1999. Going by the provisions of section 84(3), it thus appears that the qualification or disqualification of aspirants in the process of nomination of candidates for election will no longer suffice as internal affairs of a political party, to allow the exercise of discretion one way or the other, but regulated as stipulated under the CFRN 1999.[12]

(xviii) Section 84(8), which requires a political party to outline, in its constitution and rules, the procedure for the democratic election of delegates to vote at party convention, congress or meeting, where the choice of indirect primary is adopted for the nomination of candidates for election. These provisions streamlined the participation of delegates to only democratically elected delegates for the purpose of a political party convention, congress or meeting for the nomination of candidates for election by a political party. This resulted in the amendment of section 84(8) by the National Assembly to allow other categories of delegates to participate in a political party's convention, congress or meeting for the nomination of candidates for election.

(xix) Section 84(9), which allows for the nomination of party candidates for elective offices by consensus. The provisions also require a political party that elects to adopt the consensus mode for nomination of candidates for election to secure the written consent of all cleared aspirants for a position, endorsing the consensus candidate and stating that their withdrawal was voluntary. It should be noted that the procedure in this subsection is only applicable to the nomination of

[11] *Munir & Anor v Emmanuel & Ors* [2015] LPELR-25970, pp 20-25, paras A-E (per Oseji JCA).

[12] *Cf APC v Moses* [2021] 14 NWLR (Pt 1796) 278, 320-323 (per Augie JSC); *APC v Engr. Pere* [2020] 1 NWLR (Pt 1705) 254, 285 (per Rhodes-Vivour, JSC).

candidates for election (which is to be ratified at a special convention or congress),[13] and not to elective party convention and congress at which members of the executive committee or other governing body of a political party are elected.[14]

(xx) Section 84(10), which provides that where a political party is unable to secure the consent, in writing, of all cleared aspirants endorsing a consensus candidate, the party shall revert to direct or indirect primaries for the nomination of candidates for election.

(xxi) Section 84(12), which prohibits a political appointee from participating as voting delegate or aspirant at the convention or congress of any political party for the purpose of the nomination of candidates for any election.

(xxii) Section 84(13), which gives INEC the power to exclude the candidate of a political party for an election for the position in issue, where a political party fails to comply with the provisions of the Electoral Act in the conduct of its primary election for the nomination of a candidate.

(xxiii) Section 84(14): By the provision of section 84(14), the Federal High Court is vested with exclusive jurisdiction to determine disputes arising from the selection or nomination of candidates of a political party for election. This is a modification of the provisions of section 87(9) of the Electoral Act 2010 as amended, which vested jurisdiction over the conduct of party primaries in the Federal, State and FCT High Courts.

(xxiv) Section 84(15), which seeks to prevent the use of the courts to stop the conduct of political party primary or election before the final determination of the issues before the courts. According to section 84(15) of the Act, '[n]othing in this section shall empower the Courts to stop the holding of primaries or general elections under this Act pending the determination of a suit.' It has been argued that the provisions amount to an ouster of the powers of the court.[15] This is, however, not the correct interpretation of section 84(15) of the Act, as the writer failed to consider the mischief, which the provision seeks to address in Nigeria's electoral process.[16] In Nigeria, the practice by politicians is to institute multiple pre-election suits, which often result in conflicting decisions by the courts. The failure to curtail this trend is capable of jeopardising the conduct of party primaries or election, which are legally and constitutionally required to be conducted within a time frame.

(xxv) Section 86(1), which requires political parties to submit to INEC a detailed annual statement of assets and liabilities, source of funding and other assets together with statement of expenditure, including hard and soft copy of their list of members in a manner required by INEC.

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[13] Electoral Act 2022, s 84(11).

[14] ibid, s 82(3).

[15] M Ozekhome, 'NASS, Stop Amending the Constitution through the Back Door (Part 1)' *This Day Lawyer* (22 March 2022) vii.

[16] EB Omoregie and DD Aaron, 'Challenges of Pre-election Litigation in the Electoral Process of Nigeria: Rivers and Zamfara States' Disputes in Perspective' (2019) 9 *Ahmadu Bello University Journal of Public and International Law*.

(xxvi) Section 94, which provides for 150 days of public campaigning by political parties that must end 24 hours before the day of an election. This section provides for extended time for campaign, as the period previously allowed for public campaigning under the repealed Electoral Act 2010 as amended was 90 days.

(xxvii) Section 115(1)(d), which prohibits a person from signing 'a nomination paper or result form as a candidate in more than one constituency at the same election'. These provisions have been interpreted to mean that a person cannot obtain multiple nomination forms and participate in more than one primary election of a political party for more than one constituency at the same election, as to do so will constitute an offence under the Act.[17] This cannot be the correct interpretation of the provisions of section 115(1)(d) of the Electoral Act 2022, in view of the word 'candidate', which is defined in section 152 of the Act as 'a person who has secured the nomination of a political party to contest an election for any elective office'.

In 1999, when Atiku Abubakar, secured the nomination of his political party for the gubernatorial election in Adamawa State (which he won) and was thereafter nominated to contest as vice presidential candidate in the presidential election at the same election. This practice, as it then was, suggests that a person can secure two nominations of his political party for more than one constituency at the same election. Therefore, the above electoral practice, which was witnessed in 1999, is the mischief that section 115(1)(d) seeks to cure.

3 Electoral Politics and Section 84(12) of the Electoral Act 2022

After many attempts to amend the Electoral Act 2010 as amended, or enact a new electoral law to repeal the existing one, on 19 November 2021, the National Assembly transmitted the Electoral Act (Amendment) Bill 2021 to the President. The Bill contained provisions that required the conduct of party primaries for nomination of candidates only by direct primaries. After the expiration of 30 days, which is constitutionally required for presidential assent, the President, in a letter to the Senate President, gave reasons for withholding his assent to the Bill, singling out the provisions for the conduct of party primaries, which he noted takes away the power of political parties to manage their own internal affairs.[18] This was after state governors, through the Nigeria Governors' Forum, and other political interest groups put up strong opposition to the provisions for direct primaries as the sole mode of nomination of candidates for election in the Bill.[19] For some commentators, the motive for the National Assembly's inclusion of direct primaries as the sole mode of

[17] M Igini, 'It's Criminal Offence to Obtain Multiple Nomination Forms' *This Day* (20 July 2022) <https://www.thisdaylive.com/index.php/2022/07/20/mike-igini-its-criminal-offence-to-obtain-multiple-nomination-forms/> accessed 22 July 2022.

[18] I Chiedozie, 'Why I Refused to Sign Electoral Bill – Buhari' *International Centre for Investigative Reporting* (21 December 2021) <https://www.icirnigeria.org/why-i-refused-to-sign-electoral-bill-buhari/> accessed 18 March 2022.

[19] I Chiedozie, 'How Buhari Bowed to Pressure in Declining Assent to Electoral Bill for Fifth Time' *International Centre for Investigative Reporting* <https://www.icirnigeria.org/how-buhari-bowed-to-pressure-in-declining-assent-to-electoral-bill-for-fifth-time/> accessed 18 March 2022.

nominating candidates of political parties for election was to whittle down the powers of state governors, who appear to exercise absolute control over political parties at the sub-national level and use the power of their office to determine the outcomes of political party convention and congress.

Having agreed to provide other options for political party nomination of candidates for election,[20] as requested by President Muhammadu Buhari in his letter notifying of the withholding of his assent to the Electoral Act (Amendment) Bill 2021, the National Assembly included new provisions—including section 84(12) of the Bill, which was not part of the Bill throughout the period of the public hearings. Subsection (12) of section 84 prohibits political appointees from participating in the process of political party nomination of candidates as voting delegates or aspirants for any election. According to the National Assembly, the provisions seek to provide a level playing field for every person in political party nomination or candidate selection process. On 31 January 2022, the Bill was again transmitted to the President. On 24 February 2022, in his statement before signing the Bill, the President commended the 'democratic efficacy of the Bill', but again made reservation regarding section 84(12), which he noted will constitute:

> a disenfranchisement of serving political office holders [or political appointees] from voting or being voted for at Conventions and Congresses of any political party, for the purpose of nomination of candidates for any election in cases where it holds earlier than 30 days to the national election.[21]

The President also suggested that section 84(12) of the Bill discriminates against and infringes on the right of political office holders or political appointees to participate in the internal electoral process of political parties, as the provisions have 'introduced qualification and disqualification criteria that [are] ultra vires the Constitution by way of importing blanket restriction and disqualification [for] serving political office holders [or political appointees] of which they are constitutionally accorded protection.'[22] The President further noted that, if he gave his assent to the Bill, section 84(12) will:

> subject serving political office holders [or political appointees] to inhibitions and restrictions referred to under section 40 and 42 of the 1999 Constitution (as amended). It is imperative to note that the only constitutional expectation placed on serving political office holders [or political appointees] that qualify, by extension as public officers within the context of the Constitution is resignation at least 30 days before the date of the election. Hence, it will be stretching things beyond the constitutional limit to import extraneous restriction into the Constitution on account of practical application of section 84(12) of the Bill where political parties' conventions and congresses were to hold earlier than 30 days to the election. [23]

However, in spite of the foregoing reservation to section 84(12) of the Bill, the President noted that 'with particular regards to the benefits of the Bill, industry,

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[20] Electoral Act 2022, s 84(2).

[21] Buhari's Full Speech at the Signing of Electoral Act Amendment Bill, *Channels Television* (25 February 2022) <https://www.channelstv.com/2022/02/25/buharis-full-speech-at-signing-of-electoral-act-amendment-bill/> accessed 19 March 2022.

[22] ibid.

[23] ibid.

time, resources and energy committed [to] its passage, I hereby assent to the Bill', and requested the National Assembly to consider amending the legislation to bring it in conformity with the Constitution.[24] Following this statement, the President forwarded a formal proposal to the National Assembly to amend the Electoral Act 2022—to remove section 84(12) from the Act. Amid an interim order by a Federal High Court, Abuja restraining the National Assembly from considering the President's request for the amendment of the Electoral Act 2022 pending the determination of a suit filed by the Peoples Democratic Party,[25] the Senate, however, went ahead to consider the amendment proposal, which failed to pass second reading.[26]

Reacting to the Senate's rejection of the President's proposal to remove, by way of amendment, section 84(12) of the Electoral Act 2022, the Attorney General of the Federation (AGF) and Minister of Justice, Abubakar Malami, stated that the federal government had other options, including seeking judicial interpretation. On its part, the Senate denied using section 84(12) of the Act as a political weapon against political appointees.[27] On 18 March 2022, in *Chief Nduka Edede v Attorney-General of the Federation*,[28] a case that has been described as unprecedented and suspect due to 'the speed with which the case was heard within eleven days, thus making history as the quickest suit to be heard and determined in Nigeria's judicial history,'[29] a Federal High Court at Umuahia declared that section 84(12) of the Electoral Act 2022 is inconsistent with sections 66(1)(f), 107(1)(f), 137(1)(g) and 182(1)(g) of the CFRN 1999 and therefore unconstitutional, invalid, null, void and of no effect whatsoever.[30] After nullifying section 84(12) of the Electoral Act 2022, the court went on to order the AGF to delete the subsection from the statute with immediate effect.[31]

In an unprecedented manner, the AGF noted that the declaratory order of the Federal High Court will be implemented by immediately gazetting and printing the Electoral Act 2022 without section 84(12). Also, reacting to the issues surrounding the contentious provisions of the Electoral Act 2022, the National Assembly resolved to appeal the decision of the Federal High Court, Umuahia.[32] It has been argued that

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[24] ibid.

[25] *Peoples Democratic Party v President of the Federal Republic of Nigeria & 10 Ors* (Suit No. FHC/AB/CS/247/2022, despite the strong judicial precedent in *A-G, Abia v A-G, Federation* [2006] 16 NWLR (Pt 1005) 265, 388, wherein the Supreme Court held that: 'it is not the best law to grant an injunction to restrain a legislature from performing its constitutional duties, although it can do so in most deserving circumstances of unconstitutionality. […] [t]his Court should be very careful in granting injunctions against the legislature because there is the danger of courts below it to use it as precedent.' (per Niki Tobi JSC).

[26] O Nwachukwu, 'Senate Rejects Bill to Amend 2022 Electoral Act' *Business Day* (9 March 2022) <https://businessday.ng/amp/politics/article/breaking-news-senate-rejects-bill-to-amend-2022-electoral-act/> accessed 20 March 2022.

[27] D Akinrefon and J Agbakwuru, 'Electoral Act Amendment Request: FG to Consider All Options Available—Malami' *Vanguard* (17 March 2022) <https://www.vanguardngr,com/2022/03/electoral-act-amendment-request-fg-toconsider-all-options-available-malami/> accessed 20 March 2022.

[28] (Unreported) Suit No. FHC/UM/CS/26/2022.

[29] SR Osagie, 'Section 84(12) and the Constitution' *This Day* (22 March 2022) 25.

[30] Enrolled Order in Suit No. FHC/UM/CS/26/2022, dated 18 March 2022, para 2.

[31] ibid, paras 3 & 4.

[32] H Umoru, L Nwabughiogu and J Agbakwuru, 'Removal of Section 84(12) from Electoral Act:

the judgement of the Federal High Court, Umuahia 'should be subjected to an inquiry by the National Judicial Council and the Nigerian Bar Association.'[33]

4 Litigation of Section 84(12) of the Electoral Act 2022 and Issues Arising

In this part of the paper, I examine four issues arising from the litigation of section 84(12) of the Electoral Act 2022. The issues are: (i) the constitutionality of section 84(12) of the Electoral Act, (ii) the dichotomy between a political appointee and public servant, (iii) the powers of the judiciary and executive in a constitutional democracy and (iv) ethical issues.

(i) The constitutionality of section 84(12) of the Act

According to Hans Kelsen's pure theory of law, which expounds the logical unity of the legal order, the validity of norms must derive from the basic norm.[34] To ensure the 'logical unity of the legal order and [determine] whether a norm belongs to the legal order […], a lower norm cannot contradict or violate a higher norm from which it derives validity.'[35] In a constitutional order with a written constitution as the basic and fundamental law, acts that contradict or violate the constitution may be held unconstitutional, if they are challenged in court.[36] In Nigeria, the CFRN 1999, as the fundamental law, establishes the basic norms and logical unity of the legal order,[37] as well as empowers the courts to determine the validity of a norm within the legal order.[38] To that extent, is section 84(12) of the Electoral Act 2022 unconstitutional?

It should be noted that the enactment of the Electoral Act 2022 is pursuant to the power vested in the National Assembly in section 4 of the CFRN 1999. With regards to the regulation of political parties, the CFRN 1999 empowers the National Assembly to provide 'guidelines and rules to ensure internal democracy within political parties, including making laws for the conduct of party primaries; party congresses and party conventions'.[39] In order to determine the constitutionality of section 84(12) of the Electoral Act 2022, with regards to the right of political appointees to participate in voting at political party convention and congress, I shall interrogate the relevant provisions of the CFRN 1999 that are, or have been, associated with the provisions of section 84(12) of the Act. The relevant provisions are to be found in sections 40 and 42(1) of the CFRN 1999, with respect to the right of persons, on the one hand, and sections 66(1)(f), 107(1)(f), 137(1)(g) and 182(1)(g) of

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Senate, Reps Head to Appeal Court' *Vanguard* (24 March 2022) <https://www.vanguardngr.com/2022/03/removal-of-section-84-12-from-electoral-act-senate-reps-head-to-appeal-court/> accessed 26 March 2022.

33 J Ogunye, 'Analysis: A Review of Justice Anyadike's 'Strange' Judgment Voiding Section 84(12) of Nigeria's Electoral Law' *Premium Times* (25 March 2022) <https://www.premiumtimes.com/news/headlines/519543-analysis-a-review-of-justice-anyadikes-strange-judgment-voiding-section-8412of-nigerias-electoral-law.html> accessed 27 March 2022.

34 H Kelsen, 'The Pure theory of Law: Its Method and Fundamental Concepts, Part II' (1935) 51 *Law Quarterl Review* 517.

35 S Ratnapala, *Jurisprudence* (2nd edn, Cambridge University Press 2013) 79.

36 ibid 80.

37 CFRN 1999, s 1(1) & (3).

38 ibid, s 4(8).

39 ibid, s 228(a).

the CFRN 1999, with respect to the disqualification of persons for election, on the other.

***(a) Section 40 of the CFRN 1999*:** Section 40 of the CFRN 1999 provides for the right of every person to peaceful assembly and association. In the context of the issue at hand, section 40 of the CFRN 1999 protects the right of a political appointee in Nigeria to congregate and identify with, as well as belong to any political party of his or her choice. What the provisions of section 84(12) of the Electoral Act seek to achieve is to prevent a political appointee from voting as a delegate or being voted for as an aspirant while still in office, and not to prohibit a political appointee from peacefully assembling and associating with other members of his political party. In essence, the protected right in section 40 of the CFRN 1999 is not absolute in nature as its protection is not equal to its scope, and its restriction is constitutionally justifiable.[40] In essence, the right of a political appointee, by virtue of the provisions of section 40 of the CFRN 1999, can be restricted and derogated by 'any law that is reasonably justifiable in a democratic society […] for the purpose of protecting the rights […] of other persons',[41] who do not have the same opportunity to be appointed or employed to political offices but seek nomination of a political party as candidates for election.

***(b) Section 42(1) of the CFRN 1999*:** Section 42(1) of the CFRN 1999 provides for the right to freedom from discrimination on the basis of being a member of a particular community, ethnic group, place of origin, sex, religion or holding a political opinion. Section 84(12) of the Electoral Act 2022 is not discriminatory against political appointees, as they do not belong to any of the groups nor is their status one of the grounds in section 42(1) of the CFRN 1999. Nevertheless, the practicality of section 84(12) is in its ability to realise the fundamental principle that is inherent in the provisions of section 42 of the CFRN 1999, namely, the equal treatment of all persons under the law.

However, supposing but not conceding that section 84(12) of the Act is discriminatory, it should be noted that the provisions of section 42(3) of the CFRN 1999 overrides any possible argument regarding the discrimination of political appointees by section 84(12) of the Electoral Act. According to section 42(3) CFRN 1999, '[n]othing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restriction with respect to the appointment of any person to any office under the State'. It is instructive to note that other synonyms for the word 'appointment' include 'selection', 'choice', 'employment', 'choosing', and 'nomination'.

***(c) Sections 66(1)(f), 107(1)(f), 137(1)(g) and 182(1)(g)*:** The provisions of sections 66(1)(f), 107(1)(f), 137(1)(g) and 182(1)(g) of the CFRN 1999 are *in para materia*, as they provide for qualification or disqualification for persons employed in the public service (public servants) for election to the National Assembly, House of Assembly, office of the President and office of Governor of a State respectively. Together, the sections provide that:

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[40] A Barak, *Proportionality: Constitutional Rights and their Limitations* (Trans. by D Kalir, Cambridge University Press 2012) 27.

[41] CFRN 1999, s 45(1) (b).

> No person shall be qualified for election to the Senate or the House of Representatives, House of Assembly, office of the President and office of Governor of a State if: he is [or] being 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.

The words to note in the provisions of sections 66(1)(f), 107(1)(f), 137(1)(g) and 182(1)(g) are: 'employed', 'employment', 'public service' and 'election'. On the other hand, the provisions of section 84(12) of the Electoral Act 2022 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.' The key words and phrases in the above section are 'political appointee', 'convention', 'congress' and 'nomination of candidates'.

As Jeremy Bentham notes, specificity is a necessary quality of law.[42] In other words, a law must of necessity be directed at subjects (persons to whom the law is directed) and objects (the acts or forbearances aimed at being secured).[43] Accordingly, the validity and constitutionality of section 84(12) of the Electoral Act 2022, therefore lie in whether its subjects and objects are the same as those of the provisions of sections 66(1)(f), 107(1)(f), 137(1)(g) and 182(1)(g) of the CFRN 1999. Notably, in terms of the subjects, while the constitutional provisions are directed at persons employed in the public service, section 84(12) of the Electoral Act 2022 is aimed at political appointees (persons appointed or employed to head or administer departments of government). In terms of the objects, while the various constitutional provisions affect both political party primary and election (which may give rise to pre-election and election issues respectively), section 84(12) of the Electoral Act 2022 pertains to only political party primary (which is a pre-election event that can only give rise to a pre-election matter[44]).

It should be noted that only the provisions of section 102(1)(f) of the Electoral Act 2022, which provide for time within which a person employed in the public service must disengage to qualify for election to area councils in the FCT, border on the same objects and subjects as those in sections 66(1)(f), 107(1)(f), 137(1)(g) and 182(1)(g) of the CFRN 1999. This is because under the Constitution, the power to make laws for the system of local government by democratically elected local government councils in the FCT is vested in the National Assembly.[45]

***(d) Section 318(1) of the CFRN 1999*:** With regards to the issue of whether section 84(12) of the Electoral Act 2022 is constitutional or not, it is important to examine the provisions of section 318(1) of the CFRN 1999, with a view to ascertaining the class of persons in the public service, who are subject to the provisions of sections 66(1)(f), 107(1)(f), 137(1)(g) and 182(1)(g) of the CFRN 1999. Section 318(1) of the CFRN 1999 defines public service to mean the service of the federation or state in any capacity in respect of the government of the federation or state. Some

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[42] J Bentham, *Of Laws in General* (University of London, The Athlone Press 1970) 34, 77.

[43] Ratnapala (n 35) 37.

[44] *See* CFRN 1999, s 285(14); Electoral Act 2022, ss 29(5) and 84(14); *APC v Dele Moses* [2021] 14 NWLR (Pt 1796) 278, 319 paras E-G (per Augie JSC); *APC v Lere* [2020] 1 NWLR (Pt 1705) 254, 279; *Modibo v Usman* [2020] 3 NWLR (Pt 1712) 470, 500-515; *APC v Umar* [2019] 8 NWLR (Pt 1675) 564.

[45] CFRN 1999, s 299(a).

commentators have argued that the use of the words 'any capacity' in the definition of public service qualifies political appointees as being public servants.[46] This appears to be a wrong interpretation of the section, as it fails to take into account the fact that the same section goes on to list the various classes of persons who are included as part of the public service of the government of the federation or state, without the mention of political appointees. Therefore, by the express use of the phrases: 'member of staff of' and 'staff of' to describe the categories of persons in the public service, it thus appears that the framers of the CFRN 1999 intended section 318(1) to be interpreted literally, as the express mention of one thing implies the exclusion of other things not mentioned (*expressio unius est exclusio alterius*). Also, the inclusion of one thing implies the exclusion of other things (*inclusio unius est exclusio alterius*).[47]

(ii) Public officers: The dichotomy between a political appointee and public servant

Who is a public officer? Under Nigerian law, 'public officer' is a terminology that is used to describe a person who is engaged in the country's public sector. The term has, however, been extended to include artificial persons, namely a public department and public body.[48] Under the CFRN 1999, the term is used to refer to elected public officials, political appointees and public servants.[49] In restating the law of the Constitution in respect of who a public officer is in Nigeria, the Supreme Court of Nigeria in *Modibbo v Usman*,[50] held that '[a] public officer is a holder of a public office. He is in the public sector of the economy as distinct and separate from the private sector. He is entitled to some remuneration from the public revenue or treasury.'[51] Also, in *Oni v Fayemi*,[52] the Court of Appeal provided some illumination and distinction to the effect that a minister of the Federal Republic of Nigeria is a public officer, but is not an employee in the public service, and therefore not required to resign his appointment before seeking public elective office. In other words, a political appointee is a public officer but not a public servant. Accordingly, the provisions of the CFRN 1999 requiring a person who is employed in the public service (a public servant) to resign, withdraw or retire from such employment 30 days before the date of an election are not applicable to a political appointee. I therefore submit that this is the lacuna that section 84(12) of the Electoral Act 2022 seeks to fill.

It is not in doubt that section 84(12) of the Electoral Act 2022 has reignited the debate whether a political appointee is a public servant, going by the provisions of the CFRN 1999, even though the issue has received prior judicial consideration, which seems to have answered the question in the negative.[53] Importantly, however, a careful examination of the relevant constitutional provisions reveals the intention

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[46] *See*, for example, O Braithwaite, 'Electoral Act 2022: When Constitution Trumps Politics' *This Day Lawyer* (22 March 2022) iii.

[47] BA Garner (ed), *Black's Law Dictionary* (8th edn, Thomson West 2004) 1717.

[48] *Wulangs v CBN* [2012] 16 NWLR (Pt 1802) 195, 250-251.

[49] CFRN 1999, Fifth Schedule, Pts I and II.

[50] [2020] 3 NWLR (Pt 1712) 470.

[51] ibid 536 (per Abba Aji JSC).

[52] (Unreported) Suit No. CA/EK/94/2018, delivered on 12 February 2019.

[53] *Dada v Adeyeye* [2005] 6 NWLR (Pt 920) 1, 19; *Asogwa v Chukwu* [2003] 4 NWLR (Pt 811) 540.

of the framers of the CFRN 1999 on the issue. This is to the effect that a political appointee, on the one hand, is a person appointed or employed by the relevant appointing authority—that is, the President, Governor of a State or Chairman of a Local Government or Area Council—in his discretion (which may or may not be subject to confirmation by the appropriate legislative assembly) and assigned responsibility to head the business of government and the administration of any department of government or the State. With the exception of a tenured position, which appointment is regulated by a law enacted by a legislative body, a political appointee serves at the pleasure of the appointing authority and his appointment or employment ceases when the appointing authority ceases to hold office.[54] However, a political appointee may terminate his appointment or employment by 'resign[ing] from that office by writing under his hand addressed to the [appointing] authority or person by whom he was appointed'.[55]

In Nigeria, there are four categories of political appointees. The first category comprises of political appointees with executive responsibilities. This category is made up of ministers and special advisers at the federal level and commissioners and special advisers at the sub-national level. The second category comprises of political appointees to certain independent and semi-independent executive bodies, boards, commissions, authorities or corporations.[56] A few of these are established under the CFRN 1999,[57] while the majority are established by enactments of the National Assembly and House of Assembly of a State. The third category of political appointees comprises of non-career high commissioners, ambassadors, and diplomatic and consular representatives. The fourth category comprises of persons appointed as personal aides of the appointing authority. While the term 'political appointee' is not defined in the Electoral Act 2022, it however appears that the subjects of section 84(12) of the Act include all appointees in the first, third and fourth categories, as well as those appointees in the second category who are not under any legal restriction to engage in politics such as political appointees to executive bodies listed in sections 153 and 197 of the Constitution, who are prohibited from being members of a political party.[58]

A public servant, on the other hand, is a person employed or appointed into the public service of the federal, state or local government, which employment or appointment is governed by certain conditions of service or regulations for public servants. Unlike the appointment or employment of a political appointee, the

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[54] CFRN 1999, ss 148, 151(3), 193 and 196(3).

[55] ibid, s 306(1).

[56] This category includes, for example, appointees to the management and boards of the Nigerian Port Authority, Central Bank of Nigeria, Nigeria Sovereign Investment Authority, Federal Inland Revenue Service, Corporate Affairs Commission, National Universities Commission, Tertiary Education Trust Fund, Nigerian Communications Commission, Securities and Exchange Commission, Independent National Electoral Commission, Electoral Economic and Financial Crimes Commission, Independent Corrupt Practices Commission, and any other commission, authority or statutory corporation established by an Act of the National Assembly or Law of a House of Assembly. These appointees are distinct from the staff or members of staff of boards, commissions, authority or statutory corporations, who are public servants, and whose employments are regulated by public service regulations. However, as earlier noted, both categories are public officers. *See* CFRN 1999, s 318(1) *cf* Fifth Schedule, pt II, items 10, 11, 12, 14, & 16.

[57] CFRN 1999, ss 153 and 197.

[58] ibid, ss 156(1)(a) and 200(1)(a).

employment of a public servant cannot be terminated except in accordance with the rules and regulations governing his employment. However, depending on the number of years in employment, a public servant can terminate his employment relationship by resignation, withdrawal of service or retirement. This state of affair is only applicable to public servants, as provided for in the various public service manuals otherwise referred to as rules and regulations governing condition of service.[59] The framers of the CFRN 1999 merely reproduced the regulations for the termination of employment relationship, which are contained in the various public service regulations governing condition of service for public servants, in sections 66(1)(f), 107(1)(f), 137(1)(g) and 182(1)(g) of the CFRN 1999, as one of the qualifications for public servants seeking election.

By the wordings of the relevant provisions of the CFRN 1999, it is clear that a political appointee is appointed or employed to a non-career position, as opposed to a public servant, who is employed or appointed to fill a career position. In other words, political appointees are 'short lived agents' and public servants are 'long lived agents' of government bureaucracy.[60] This is an important aspect of the dichotomy between the two categories of public officers, so much so that the appointment or employment of a political appointee is tied to the tenure of the appointing authority, or at best for a fixed short-tenure, while the employment of a public servant is long-term, which usually transcends several administrations. This is because '[t]he hiring process for civil [or public] servants is designed to promote a professional, apolitical workforce and to prevent discrimination, political favoritism, nepotism or other prohibited practices.'[61] In *Adamu v Takori*,[62] the Court of Appeal aptly noted that:

> the factor in determining a public servant is the mode of his appointment [….] [Therefore,] the Governor, Deputy Governor, the Speaker and other political office holders [or political appointees] are not in the public service within the meaning of section 318[1] of the 1999 Constitution.[63]

The above judicial interpretation corresponds with the categorisation of 'public service' in section 318(1) of the CFRN 1999, which does not include political appointees as well as elected public officials. This position is also in conformity with the global norm,[64] whereby public servants are employed and promoted by competitive procedures based on merit system rules, whereas, by contrast, political appointees are selected and employed noncompetitively, and strictly based on political considerations.[65]

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[59] *See*, for example, University of Uyo, 'Regulations Governing Staff Conditions of Service' (University of Uyo, October 20210) ch 8, 237-240; Akwa Ibom Public Service Rules (Office of the Head of Civil Service, Akwa Ibom State 2010) ch 2, s 7, 20-23; Akwa Ibom State Local Government Rules and Regulations (Local Government Service Commission 2010) ch 2, ss 1, 2 & 3.

[60] PT Spilller and S Urbiztondo, 'Political Appointees Vs. Career Civil Servants: Principals Theory of Political Bureaucracies' (October 1994) 10(3) *European Journal of Political Economy* 465, 469.

[61] A Tippett and T Cribb, 'Political Appointee to Civil Servant: What the Public Should Know About "Burrowing In"' (Center for Presidential Transition, 14 October 2020) <https://presidentialtransition.org/blog/political-appointee-burrowing-in/> accessed 21 March 2022.

[62] [2009] LPELR-3593 (CA).

[63] ibid 15-16 paras D-A (per Jega JCA).

[64] Spillller and Urbiztondo (n 60) 466.

[65] DM Cohen, 'Amateur Government: When Political Appointees Manage the Federal Bureaucracy' (CPM Working Paper 96-1, Brookings Institution 1996) 6-7.

(iii) Powers of the judiciary and executive in a constitutional democracy

In Nigeria's constitutional order, the powers of the judiciary and executive are well entrenched. In the exercise of its powers to determine the constitutionality of section 84(12) of the Electoral Act 2022, a Federal High Court in *Chief Nduka Edede v Attorney-General of the Federation*, nullified section 84(12) of the Electoral Act 2022 and proceeded to order the AGF to immediately delete the subsection from the statute. In response to the court's order, the AGF noted that the executive branch, through the office of the AGF, would take immediate steps to gazette and print the law without the subsection, even before a final and conclusive determination of the matter.

According to the doctrine of separation of powers, as expounded by Baron de Montesquieu, there is to be separated and distributed powers among the executive (the monarch), legislature and courts—with the courts as the *la bouche de la loi* (the mouth of the law). On the essence of separating judicial power from legislative and executive powers, Montesquieu stated thus:

> Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive however, the judge might behave with violence and oppression.[66]

The principle of separated powers is well established in Nigeria's constitutional law.[67] As much as the courts are empowered to interpret and determine the validity of legislation in relation to the Constitution,[68] they cannot engage in judicial law-making,[69] to the extent of ordering the deletion of provisions of a legislation legitimately enacted by the National Assembly. The farthest a court of law can go is to declare the validity or otherwise of legislation in relation to constitutional provisions.[70] In the same vein, the executive branch is empowered with the 'responsibilities of implementing and executing all the [legitimate] laws enacted by the legislature and orders made by the courts'.[71] Anything beyond the foregoing constitutes a usurpation of the legislative function, as well as a threat to the liberty of citizens.[72]

(iv) Ethical issues

The ethical issues arising from the litigation of section 84(12) of the Electoral Act 2022 pertain to the instigation of litigations and forum shopping. Even though the Federal High Court is vested with judicial powers that: (i) extend to all inherent

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66 B de Montesquieu, *De l'Esprit des Lois*, Book XI, ch 6, quoted in AW Bradley and KD Ewing, *Constitutional and Administrative* Law (13th edn, Pearson Educational Limited 2003) 81-82.

67 CFRN 1999, ss 4, 5 and 6.

68 *See,* for example, *Udeogu v FRN & 2 Ors* (Suit No. SC.622C/2019), judgment delivered on 8 May 2020, wherein the Supreme Court of Nigeria's voided the provisions of section 396(7) of the Administration of Criminal Justice Act 2015 for being inconsistent with the provisions of section 253 of the CFRN 1999.

69 *Cocacola (Nig.) Ltd. v Akinsanya* [2017] 17 NWLR (Pt. 1593) 74, 128.

70 *Ajakaiye v Idehai* [1994] 8 NWLR (Pt 364) 504.

71 *Gali v Male* [2010] 7 NWLR (Pt 1193) 225, 280.

72 Montesquieu (n 66).

powers and sanctions of a court of law; (ii) extend to all matters between persons, or between government or authority and any person in Nigeria; and (iii) extend to all actions and proceedings relating to the determination of any question as to the civil rights and obligations of persons,[73] however, with regards to the litigation of section 84(12) of the Act, only a person or persons (political appointee(s)), whose rights are infringed or likely to be infringed by the provisions of section 84(12) of the Act, can invoke the judicial powers of a court. This is because the issue at stake does not qualify as a public interest issue.

In *Chief Nduka Edede v Attorney-General of the Federation*, as well as *Chief Oyewole Bolanle v Attorney-General of the Federation*,[74] neither of the plaintiffs is a political appointee. While in *Edede*, the Federal High Court, Umuahia, held that section 84(12) of the Electoral Act 2022 is unconstitutional, in *Bolanle*, the Federal High Court, Ibadan, rightly held that the plaintiff lacks *locus standi* and that the court cannot properly assume jurisdiction to entertain the matter. This is because the provisions of section 84(12) of the Electoral Act 2022 is framed in a way that gives rise to a personal right, which is only exercisable by a political appointee. Regrettably, the two judicial proceedings, in which the courts were called upon to determine the constitutionality of section 84(12) of the Act, were instituted by persons whose civil right and obligation were not infringed or likely to be infringed by the provisions of the Electoral Act in contention. Therefore, an objective appraisal of the litigations that followed the Senate's rejection of the President's proposal for the amendment of section 84(12) of the Electoral Act 2022 suggests the law suits were covertly instigated,[75] and the forums shopped for favourable disposition of the case[76] by certain individuals, who put their personal interest above public interest. It thus behoves on the Nigerian Bar Association (NBA) to investigate the two litigations referred to above in a view to ascertaining how both cases ended up in the courts and who played what role.

Supposing the President had refused to assent to the Bill because of the inclusion of section 84(12), the dispute arising therefrom would rightfully be between the President and the National Assembly. In *Attorney-General of the Federation v National Assembly*,[77] a law suit that was instituted by the then AGF as a result of a dispute, in 2015, between former President Goodluck Jonathan and the National Assembly, which arose from a constitutional amendment by the latter, the Supreme Court of Nigeria noted, in respect of the proper parties to the suit, that the plaintiff should have been the President and not the AGF, as it was the former who withheld assent to the Fourth Alteration Bill 2015.[78] Following the guidance of the Supreme Court in the case above, the AGF, as the chief law officer of the federation, should have advised the President not to assent to the Bill in the first place, while a law suit is instituted at the Supreme Court of Nigeria (with the President as the plaintiff and the National Assembly as the defendant) for a determination of the constitutionality

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[73] CFRN 1999, s 6(6)(a) & (b).

[74] (Unreported) Suit No. FHC/IB/CS/32/2022, 17 March 2022.

[75] Rules of Professional Conduct for Legal Practitioners 2007, Rule 47(1).

[76] *Dingyadi v INEC* No 2 [2010] 18 NWLR (Pt 1224) 154, 195.

[77] (Unreported) Suit No. SC/214/2015, April 2015.

[78] E Solomon, 'The Basic Structure Doctrine and Implied Limitations on the Exercise of Legislative Powers Under the Nigerian Constitution' (2016) 9 *University of Uyo Law Journal* 267, 268.

of the contentious provisions, pursuant to the provisions of the Supreme Court (Additional Original Jurisdiction) Act.[79]

5 Conclusion

I have made three main assertions in this paper. The first is that section 84(12) of the Electoral Act 2022 is constitutional. Second, a political appointee is not public servant under the CFRN 1999, even though both classes of persons are public officers. Third, the litigations that followed the enactment of the Electoral Act 2022 amounted to abuse of the judicial process and perhaps defective, and stemming from this is the suggestion, in the preceding section, to the NBA to cause an investigation into the matter.

Furthermore, I make two recommendations. The first is for the National Assembly to provide a clear definition of the category of persons referred to as 'political appointee' in the Electoral Act. This should be done to avoid any confusion as to the subjects of the relevant provisions of the Act. The second recommendation relates to the inelegant drafting of section 318(1) of the CFRN 1999, in relation to the present discourse. Certainly, the inelegant definition of 'public service' in section 318(1) of the CFRN 1999 cannot be overlooked.

In as much as the intention of the framers of the CFRN 1999, concerning public servants, is obvious—particularly the provisions of sections 66(1)(f), 107(1)(f), 137(1)(g) and 182(1)(g)—the inelegant insertion of the phrase 'any capacity' in the definition of 'public service' in section 318(1) appears to have detracted from the purpose of the framers. This amounts to approbating and reprobating on the same issue in the same document. It should be noted that it untenable and illogical for the basic norm, within the same legal order, to permit different interpretations 'at the same time and in identical circumstances.'[80] Regrettably, there are other inelegant drafting scattered all over the CFRN 1999, which require the attention of the National Assembly.

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[79] Cap S16 LFN 2004, s 1(1)(a). At the time of concluding the writing of this paper, it was reported that the Attorney General had instituted a suit (SC/504/2022) at the Supreme Court, pursuant to the Court's original jurisdiction, for the determination of the constitutionality of section 84(12) of the Electoral Act 2022. On 24 June 2022, the Supreme Court struck out the suit, holding that it lacked the jurisdiction to entertain the suit, as the President was not a proper person to bring the action considering the nature of the reliefs that were sought. According to the Court, the suit amounted to abuse of the judicial process, the President having assented to Bill—as such bringing the action amounted to approbating and reprobating on the issue involved in the dispute. However, the Court did not determine the substantive issue of the case.

[80] Ratnapala (n 35) 80.