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THE ELECTORAL ACT 2022: KEY CHANGES AND IMPACT ON THE 2023 ELECTIONS

INSIDE TOLG ADVISORS



INTRODUCTION

The birth of the Electoral Act, 2022 (the “2022 Act”) set in motion hope of a new dawn. The President of Nigeria, Muhammadu Buhari (GCFR) assented to the bill on February 25, 2022, thereby repealing the Electoral Act No. 6 of 2010 (the “2010 Act”).

In view of the forthcoming elections, it is indisputable that all patriotic citizens in Nigeria, as well as lovers of democracy, stakeholders of the country and foreigners operating their businesses in Nigeria yearn for an amendment/repeal of the 2010 Act, to regulate activities and issues bordering on the said Elections, which will be a reflection of the realities of the country.

The 2022 Act, is enacted to regulate the conduct of Federal, State, and Area Council Elections, political party primaries, especially regarding the use of card readers and other technological devices for the elections and political party primaries, timeframe for the submission of list of candidates, list of campaign expenses, addressing the omission of names of the candidates, election petition proceedings, logo of political parties and to provide for restriction of the qualification for elective offices to the relevant provision of the Constitution of Nigeria, 1999 (as amended).

The Electoral Act, 2022 has 153 sections and it is divided into 10 parts:

- (a) Establishment and functions of the Independent National Electoral Commission (1-7).
- (b) Staff of the Commission (8).
- (c) National register of voters and voters' registration (9-23).
- (d) Procedure at election (24-74).
- (e) Political parties (75-97).
- (f) Procedure for election to area council (98-113).
- (g) Electoral offences (114-129).
- (h) Determination of election petitions arising from elections (130-140).
- (i) Miscellaneous provision (141-153).

It is pertinent to point out that in all the sections of the 2022 Act, the word 'shall' is used, meaning that all the provisions of the 2022 Act are mandatory provisions, therefore, a contravention of any of the provisions is an outright commission of an offence and renders the offender liable to the penalties stipulated in the 2022 Act. There is no gainsaying that this article is important to educate and provide a legal orientation to citizens of the country, lovers of democracy, stakeholders of the country, candidates for elective offices, government officials and political parties.

The reason for the enactment of the comprehensive 2022 Act with its varied innovations is to show that elections are very important in a democracy and 'sui generis', because elections or petitions arising therefrom are special proceedings. Every citizen in the country is required to comply with the provisions of the 2022 Act and where there are any infringements of the provisions of the 2022 Act, the said infringer will be prosecuted in line with our laws, regardless of his or her status.

The major objectives of this publication are to:

- provide essential political and legal orientation to public office holders, state party executives, local government officials and chairman and secretaries; and
- promote due process and total compliance with the provisions of the 2022 Act by public officials and party officials.

2. POLITICAL PARTY PRIMARIES

The foundation for building a successful election is a proper and regulated conduct of the general primaries of the political parties. This is so because the outcome of the primaries of the political parties determines the candidates produced, affects the choice of the people on whom to vote for and affects the general outcome of the election.

For instance, it is mandatory for every political party about to conduct its primaries to notify the Independent National Electoral Commission (the "INEC") where it seeks to either nominate any candidate, engage in a "merger", elect members of its executive committees and other governing bodies or nominate candidates for any of the elective offices specified under the 2022 Act. INEC is at liberty to either notify or not notify the Party of their intention to attend the convention, congress, conference or meeting, as specified in Section 82 of the 2022 Act. Subsections 1-5 of the said Section are reproduced hereunder:

- (1) every registered political party shall give the commission at least 21 days' notice of any convention, congress, conference or meeting convened for the purpose of "merger" and electing members of its executive committees, other governing bodies or nominating candidates for any of the elective offices specified under this act.*
- (2) the commission may, with or without prior notice to the political party attend and observe any convention, congress, conference or meeting which is convened by a political party for the purpose of:*
 - (a) electing members of its executive committees or other governing bodies;*
 - (b) nominating candidates for an election at any level; and*
 - (c) approving a merger with any other registered political party.*
- (3) The election of members of the executive committee or other governing body of a political party, including the election to fill a vacant position in any of the aforesaid bodies, shall be conducted in a democratic manner and allowing for all members of the party or duly elected delegates to vote in support of a candidate of their choice.*
- (4) notice of any congress, conference or meeting for the purpose of nominating candidates for area council elections shall be given to the commission at least 21 days before such congress, conference or meeting. Notice of convention and congress.*
- (5) failure of a political party to notify the commission as stated in subsection (1) shall render the convention, congress, conference or meeting invalid.*

2.1 CONDUCTING THE PRIMARIES

There are three types of procedures for conducting primaries, namely:

- a) Direct
- b) Indirect
- c) Consensus



A) DIRECT PRIMARIES

In layman terms, Direct Primaries mean that all registered members of a political party shall (or has the right to) vote at a designated ward of the political party in the federation. A special convention or congress will then be held to ratify the persons with the highest number of votes from the direct primaries. This is provided for in Section 84 (4) of the 2022 Act reproduced below:

A political party that adopts the direct primaries procedure shall ensure that all aspirants are given equal opportunity of being voted for by members of the party and shall adopt the procedure outlined:

(a) in the case of presidential primaries, all registered members of the party shall vote for aspirants of their choice at a designated center at each ward of the Federation;

(b) the procedure under paragraph (a) shall be adopted for direct primaries in respect of gubernatorial, senatorial, federal and state constituencies, monitoring of political parties and nomination of candidates by parties;

(c) special conventions or congresses shall be held to ratify the candidate with the highest number of votes at designated centers at the national, state, senatorial, federal and state constituencies, as the case may be.

B) INDIRECT PRIMARIES

Indirect Primaries mean that the delegates of the party shall, in the case of the nomination of a presidential candidate and governorship candidate, hold a special congress or convention as agreed by the National Executive Committee at the Federal Capital Territory or anywhere within the Federation and State Capital or any place within the State respectively, whereby at the end of the special congress or convention, the aspirant with the highest number of votes shall be declared winner and the name shall be forwarded to the Commission; this is provided for in Section 84 (5) of the 2022 Act reproduced hereunder:

- (5) *a political party that adopts the system of indirect primaries for the choice of its candidate shall adopt the procedure outlined:*
 - (a) *in the case of nominations to the position of presidential candidate, the:*
 - (i) *political party shall hold a special presidential convention at a designated center in the federal capital territory or any other place within the federation that is agreed to by the national executive committee of the party where delegates shall vote for aspirants of their choice;*
 - (ii) *aspirant with the highest number of votes cast at the end of voting shall be declared the winner of the presidential primaries of the political party and that aspirant's name shall be forwarded to the commission as the candidate of the party.*
 - (b) *in the case of nominations to the position of a governorship candidate, the political party shall, where it intends to sponsor candidates:*
 - (i) *hold a special congress in the state capital or any other place within the state with delegates voting for aspirants of their choice at the congress to be held on a specified date appointed by the national executive committee (NEC) of the party; and*
 - (ii) *the aspirant with the highest number of votes cast at the end of voting shall be declared the winner of the primaries of the party and the aspirant's name shall be forwarded to the commission as the candidate of the party, for the particular state.*

C) CONSENSUS

Consensus means that the political party endorses only one candidate where all other aspirants withdraw from the race. In this instance, it is required that a written consent from all cleared aspirants be obtained and forwarded to INEC, as delineated in Section 9 of the 2022 Act below:

“A political party that adopts a consensus candidate shall secure the written consent of all cleared aspirants for the position, indicating their voluntary withdrawal from the race and their endorsement of the consensus candidate.”

3. MAJOR CHANGES INTRODUCED BY THE ELECTORAL ACT 2022

a) Financial Autonomy of the Commission

The new Act establishes an INEC Fund wherein, payments from the Federal Government, investments made from the Fund and other aids and grants, shall be paid to enable the Commission to perform its functions. Furthermore, the Act stipulates that election funds due to the Commission for any general elections are to be released not later than one year before the next general election.

This provision grants financial autonomy to the Commission, as it may now receive funds for the conduct of elections directly as opposed to getting funds subject to vetting by the Ministry of Finance as provided under the former Act.

b) Extension of Timeframe for Publication of Election Notice

The 2022 Act provides that the Commission shall, not later than 360 days before the day appointed for holding of an election, publish a notice in each State of the Federation and the Federal Capital Territory stating the date of the election and appointing the place at which nomination papers are to be delivered. This notice is to be published in each constituency in respect of which an election is to be held. This is in contrast with the provisions of the erstwhile 2010 Act which provided that the Commission should publish this notice not later than 90 days before the date of election. The effect of this extension of time is to give the Commission more time to prepare for the election and also give the political parties no excuse as regards the candidacy and the partisan and propaganda politics that comes with choosing a candidate and preparing for a campaign.

However, for by-elections, the new Act retains the same provision as the old Act, as the required period for publishing a notice stating the date of by-elections is 14 days before the by-elections.



c) Early Party Primaries

Under the new Act, 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 a general election. This is in contrast to the former Act which prescribed that this submission should be done not less than 60 days before the date of general elections. The change in the timeframe to submit the names of party candidates from 60 days to 180 days makes it compulsory for political parties to conduct their primaries early enough to meet up with submission of their list of candidates at least 180 days before the general elections.

d) Extension of Timeframe for Campaigns by Political Parties

The new Act provides that the period of campaigning in public by every political party shall commence 150 days before polling day and end 24 hours prior to that day. This is different from the provisions of the repealed Act which prescribed that campaigns may commence 90 days prior to polling day and end 24 hours prior to that day. The impact of this provision is the extended time given to political parties to propagate their manifesto to the populace and the corresponding extended time for the electorates to decide what party and candidate would receive their votes.

e) Introduction of the Central Electronic Voter Database

The new Act provides that the Commission shall keep the Register of Voters at its National Headquarters and other locations, provided that the Register shall be kept in electronic format in its central database, in addition to being kept in manual or hardcopy format. Under the repealed Act, this Register was kept in manual or hardcopy format only. This provision is laudable as it will promote transparency and effectiveness in the Commission's record-keeping and in tracking the number of registered voters for upcoming elections, thereby curbing illegal voting by non-registered voters.

f) Revision of Definition of Overvoting

Under the new Act, where the number of votes cast at an election in any polling unit exceeds the number of accredited voters in that polling unit, the Presiding Officer shall cancel the result of the election in that polling unit. "Number of accredited voters" refers to the number of intending voters accredited to vote in an election on the election day. Under the repealed Act, it is when the number of votes cast at an election in any polling unit exceeds the number of registered voters in that polling unit. By the provisions of the new Act, "overvoting" would mean where votes cast at a polling unit exceeds the number of accredited voters and not the number of registered voters as provided in the former Act.

g) The Commission's Power of Review

Under the new Act, INEC has the power to review the final decision of the Returning Officer with respect to questions of unmarked ballot papers, rejected ballot papers, declaration of scores of candidates and the return of a candidate within seven (7) days of the decision, and return where the declaration was not made voluntarily or was made contrary to the provisions of the law or the guidelines for the election. Under the provisions of the former Act, the decision of the returning officer was only subject to review by an election tribunal or court. However, it appears that under the new Act, the election tribunal or court can still review the returning officer's decision, but the Act is unclear as to whether this is to be done after INEC's review or can replace the INEC review process totally. It is suggested that this should be done after INEC's review.

h) Exclusion of Political Appointees from Acting as Voting Delegates or Aspirants

Section 84 (12) of the 2022 Act stipulates 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 means that political appointees must relinquish their positions before they can be eligible to participate in the electoral process either as a candidate or as a delegate. This is a positive improvement because it will bar political appointees from using their influence in contesting for elections and prevent them from remaining in the helms of power for longer than they are supposed to. Accordingly, room is given for fresh candidates with no prior political appointments to take up appointments, instead of recycling the same old candidates. The provision has, however, proved very controversial, and has been the subject of criticism and denouncement, with even a Federal High Court declaring it unconstitutional and directing the Attorney General of the Federation to delete same from the 2022 Act. The last has not been heard about the controversies on the constitutionality or otherwise of section 84(12) of the 2022 Act, as the National Assembly has vowed to appeal the decision of the Federal High Court.

i) Death of Electoral Candidates

The death of a candidate in elections had generated lots of bickering among political parties and politicians in the past under the former Act, leading to cases in our Courts. To cure some of the mischief in the former Act, the new Act provides that where before the commencement of polls a candidate dies, the election shall be postponed and shall commence within fourteen (14) days of the candidate's death. Where a candidate dies after polls, but before announcement of final winner/ announcement of final result; the implication is that the election will be suspended for not more than 21 days. Where the election is for a legislative house position, the election shall start afresh and the political party whose candidate died may, if it intends to continue to participate in the election, conduct a fresh primary within 14 days of the death of its candidate and submit the name of a new candidate to the Commission to replace the dead candidate. For gubernatorial, presidential and FCT area council elections, the running mate shall continue with the election (as the new candidate) and nominate a new running mate.

j) Technological Changes in Electoral Process

Under the 2022 Act, the use of electronic devices such as smart card readers, electronic voting machines and other technological devices, is allowed in the accreditation process for voters and in the general conduct of elections. Furthermore, the new Act provides for electronic transmission of election results in accordance with the procedure determined by the Commission.



4. CONCLUSION

The Electoral Act 2022 is a commendable effort to keep the Nigerian electoral process up to standard with that of other democratic countries all over the world. More so, as the country approaches the 2023 general elections, it is only hoped that the provisions of this Act are judiciously implemented to enable Nigerians enjoy the exercise of their political franchise during and after the 2023 general elections.

This writeup was done by the Regulatory Compliance & Consulting Team and Company Secretarial Services Team in our Company Secretarial & Regulatory Compliance Practice.

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Brains & Hammers Limited –

TOLG Advisors is pleased to officially announce the closing of the \$4mn Note Issuance Exercise by Brains & Hammers Limited.

TOLG Advisors acted as Transaction Counsel on this deal and we are proud to be one of the few law firms in Nigeria to have advised on deals of this nature in 2022.

We congratulate our Enterprise, Projects & Infrastructure Team for a job well done.

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