

Judicialization of the Electoral Process and its Impact on Democratic Process in Nigeria

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Abstract

This paper explores judicialization of the electoral process in Nigeria and finds institutional features, judicial behavior and political dynamics and or determinants culpable for the trend in the country. The paper also finds that between 2003 and 2019, there were 3, 979 litigations arising from the conduct of general elections in the country. Similarly, the paper equally reveals that there were 640 pre-election cases and 40 court orders that arose from the conduct of party primaries for the 2019 general elections. The paper also establishes that the judicialization of elections has eroded the majesty of democracy in Nigeria as the vote does not count in the face of courts' rulings in favour of appellants especially in pre-election cases. Equally too, judicialization of elections takes away the sovereignty of the electorates. In a similar vein, the paper discovers that judicialization of the electoral process breeds voter apathy, wherein, the majesty of democracy lies in the electorates voting at elections. The paper therefore concludes that, until the electoral process in Nigeria is dejudicialized, we cannot talk of majesty of democracy in the country and as such, the country will, at best, remain in the hybrid regime classification of governments around the world. The paper finally proffers some recommendations for addressing the desperation of politicians who seek to influence the normal course of the law among which is an inclusive governance system that will accommodate losers at elections.

Keywords: Democracy, Election, Judicialization, Litigation, Majesty and Nigeria

Introduction

Democracy is a universal concept and a system of government which ironically, has eluded a universally accepted definition due to different perspectives it is construed by scholars and politicians. Though democracy has varied definitions, its indices and tenets the world over are the same. According to Sandbrooks as cited in Ezonbi (2017, p. 83), "democracy is a political system characterized by regular and free elections in which politicians organize into political parties, compete for power by right of the virtue of all adults to vote and by the guarantee of a range of political and civil rights." Implicit in this definition is the importance of democracy which supposedly has made it, to use Ezonbi (2017) words, a global maiden which every nation woos as seen in its craze that has swept across the whole world.

The importance of democracy as a system of government in any given society is enormous. Kooijma (2018, p.3) states that democracy places the right level of faith in humanity, gives the people autonomy to choose who rules them and respects people's rights of freedom and equality. Obialor (2017) contends that the importance of democracy is to be appreciated in the context of ensuring the rule of law, fundamental human rights of citizens, legitimacy which is derived from the people and in accordance with legal requirements, sound decision-making process which

entails thorough consultation and scrutiny and change of government which could either be through elections or through impeachment and elections or recall of legislators.

It was in recognition of the importance of democracy that democratic activists, civil rights and pro-democracy groups within and outside Nigeria desirous of tapping the benefits of the system fought tirelessly for its return in the country in 1999. Unfortunately, since the return of democracy in 1999, election which is described by some people as the festival of democracy, as it is the paramount way to choose who governs and or represents the people, is replete with a bevy of petitions in both regular courts and election tribunals in post-election matters thus judicializing the electoral process in the country.

Judicialization of the electoral process is conceived to mean the reliance on courts, tribunals and judges in dealing with core political controversies that define politics and or determine the winners of elections as against the electorates (Hirschl, 2011). Between 2003 and 2019, there have been 3, 979 election petitions in Nigeria ((Nigeria Civil Society Situation Room (NCSSR) 2017; p. 17 and Punch Newspaper May 9, 2019). A breakdown of the figures indicates that at the end of the 2003 elections, 560 petitions were filed; 1, 290 petitions in 2007; 732 petitions in 2011; 611 in 2015 and 786 in 2019. This means that on average, there were 663.16 election petitions at the end of the conduct of every general election in Nigeria since 1999. The Chairman of the Independent National Electoral Commission, Professor Mahmood Yakubu, is quoted to have said of the quantum of electoral petitions in Nigeria that:

So far, the commission has been joined in 396 pending actions in various courts across the country arising from the conduct of party primaries and nomination of candidates by political parties. We have also received 302 requests for Certified True Copy (CTC) of documents, mainly our monitory reports of party primaries and copies of personal particulars of candidates. These requests are obviously a prelude to more court actions. We have also received 52 petitions and protests from aggrieved party aspirants. The implication of these challenges is that as we prepare for the general election, we are also going to grapple with pre-election litigations (The Nigerian Tribune December 1, 2018).

This has made some people to question the sovereignty of the court in deciding who governs or represents the people vis-à-vis the electorates whose wish is the foundation and beauty of democracy and its majesty thereof at its most regal. The Editorial of the Guardian Newspaper January 25, 2019 has assented to this when it held that, “government is about the people and the people are the sovereign upon whom no elected leader has the right to impose a narrow vision.” This suggests that routine consultations are encouraged and practiced without which elected officials are detached from everyday reality talk less of the courts deciding who governs or represents the people. This paper explores how elections have been judicialized and how this development has impacted on the majesty of democracy in Nigeria.

This paper is segmented into six (6) sections for purposes of logical analysis beginning with introduction as the first (1) section and is followed by clarification of concepts which is the second (2) section. Following clarification of concepts is the causes of judicialization of elections and the impacts of judicialization of the elections on democracy in Nigeria which are in sections three (3) and four (4) respectively. Section five (5) is the conclusion and the recommendations are housed in the final section which is section six (6).

Clarification of Concepts

Democracy

Huntington (1991) sees democracy as a political system whereby popular candidates are chosen through fair, honest, and periodic elections while candidates freely compete for votes and virtually all the adult population are qualified to vote. The premium placed on election in Huntington's definition of democracy indicates that the mere mention of democracy suggests that one is talking about elections and this explains why politicians are always prepared for elections. In other words, democracy subscribes to the conduct of elections in choosing leaders that will represent the people. Rousseau and Rivero (2003) see democracy as the power of the people as it manifests in ways of thinking, behaving, and organizing that enhance participation in and influence over the decisions affecting their everyday lives. This too is not a complete departure from the earlier conceptions of democracy as the power of the people is ultimately demonstrated by voting at elections. Invariably, election is the heartbeat of every democratic process.

Election

Election is a basic component of a liberal democratic political system. This assertion is underscored by the fact that democratic representation is built on elections. It is in line with this assertion that Flanigan and Zingale (1998) conceptualize election as the formal mechanism by which citizens maintain or alter the existing political leadership, and, as such, it is the only recognized vehicle for acquiring power in a democratic system. According to Nnoli, as cited in Nwozor (2017, p. 3), "election is the process of choice agreed upon by a group of people...which enables them to select one or a few people out of many to occupy one or a number of authority positions." Implicit in Nnoli's conceptualization of elections is the recognition of the fact that an identified group of people have to make the choice (s) among a few or many. Election as a tool for choosing representatives is not restricted to political organizations but also applies to informal groups like clubs and associations.

Judicialization of Elections

To judicialize, as cited in Vallinder (1994, p. 93), is "to treat judicially, arrive at a judgment or decision upon." Thus, the judicialization of elections simply means the expansion of the province of the courts or the judges at the expense of the electorates and or the politicians, that is, the transfer of the decision making rights from the electorates to the courts, or tribunals. This is simply turning the electoral process into a judicial process. This explains why Hirschl (2011) sees judicialization of elections as the reliance on courts, tribunals and judges dealing with or determining the winner of election (s) or core political controversies that define (and often divide) whole politics as against the electorates.

Causes of Judicialization of Elections in Nigeria

Three main factors have been identified as been responsible for the judicialization of politics generally, and elections in particular, the world over. These factors, according to Hirschl (2011), are institutional features, judicial behavior and political determinants. The institutional features as a factor that accounts for the judicialization of elections requires the existence of a reasonably independent judiciary, whose cardinal function is to defend the rights of citizens as well as the

entire polity. Hirschl (2011) argues that the close affinity between the existence of a constitutional catalogue of rights and viable judicial review mechanisms in a polity, and judicial activism on the part of that polity's judiciary does not only provide the necessary institutional framework for courts to become more vigilant in their efforts to protect the fundamental rights and liberties of a given polity's residents, but also enables them to expand their jurisdiction to address vital moral dilemmas and political controversies of crucial significance to the polity. The 1999 Nigerian constitution as amended, fourth alteration No. 21 Act, 2017, the electoral law 2010 have catalogues of electoral laws which have been subjected to routine reviews which have made the courts and judges become vigilant to protect it from being infringed upon by politicians hence the judicialization of elections in Nigeria.

The judicial behavior as a factor for the judicialization of elections implies the willingness of the judiciary in receiving, hearing and determining electoral matters brought before it. The Nigerian judiciary has made an eloquent statement affirming its willingness in hearing and determining electoral matters as demonstrated in the amount of pre and post election cases it has received, heard and determined since the return of democracy in the country in 1999. However, it is to be noted that the establishment of courts and electoral tribunals does not develop, and cannot be understood, separately from the concrete social, political and economic struggles that shape the Nigerian political system. Indeed, the expansion of judicial powers and judicialization of elections in Nigeria are integral parts and important manifestations of the struggles, and cannot be understood in isolation from them hence the judicialization of elections in Nigeria.

Political determinants as a reason for judicialization of elections in Nigeria are understood in the context of receptiveness and support, tacit or explicit, of the political sphere. This is explained under the headings of macro socio-political trends, the prevalence of rights discourse and litigations, and, most importantly, strategic maneuvering by powerful political stakeholders. Democracy, by its very nature, entails the establishment of some form of separation of powers among the major branches and the rule of law which are in existence in Nigeria.

Rights discourse and litigation emphasize the prevalence of rights discourse or greater awareness to rights issues. Epp (1998) suggests that the impact of constitutional catalogues of rights may be limited by individual inability to invoke them through strategic litigation. But Nigeria is not in want of a support structure for legal mobilization as a number of rights-advocacy organizations, rights supportive lawyers and law schools, global rights-enforcement agencies and legal aid schemes exist in the country which have provided a fertile ground for the judicialization of elections in the country. This has also made strategic maneuvering by political stakeholders easy. Strategic maneuvering by powerful political stakeholders which is largely a function of concrete choices, interests, or strategic considerations by self-interested political stakeholders is the transfer to the courts elections matters which offers a convenient retreat for politicians who have been unwilling to settle contentious elections disputes. It also offers refuge for politicians seeking to avoid difficult or "no win" decision and/or avoid the collapse of deadlocked or fragile governing coalitions. Conversely, political oppositions may seek to judicialize elections (for example through petitions and injunctions) in order to harass and obstruct government. At times, opposition politicians may resort to litigations in an attempt to enhance their media exposure and keep their followers regardless of the outcome of the litigations.

The Impact of Judicialization of Elections on Democracy in Nigeria

Consultation with the constituents and constituency briefings which provides the opportunity for elected representatives to account for their time in parliament constitutes the majesty of democracy. However, the judicialization of the electoral process which sees the courts determining who rules or represents some constituencies poses a threat to consultation and constituency briefings. There is the likelihood that those whose seats to rule or represent the people in the parliament are determined by the courts will hardly consult and or brief their constituencies, especially those not seeking re-election. This thus explains why some “elected representatives” do not consult their constituents before voting in major decisions in their respective legislative houses as there have been no reflection of consultations with the constituents as seen in some protests against some decisions of some “elected representatives” in the country. The parliament as the highest body of elected persons in the country’s various tiers of government is supposedly the people’s voice, however, the determination of their representation by the courts has obviously taken away the people’s voice in some constituencies in the country, as the affected representatives constitute a voice of their own in their respective constituencies.

The judicialization of the electoral process in the country which has led to court rulings in favour of appellants, especially in pre-election matters to occupy elective positions, puts to question whether the votes actually count. The majesty of democracy is rooted in the decision of the majority of the electorates to choose their rulers and representatives, but the determination of who rules or represents the people by the courts implies that, to some extent, the sovereignty of the majority of the electorates is now transferred to a panel of judges who are a negligible minority to exercise the sovereignty of the electorates. It is said that the majority are not always right, but it is curious to understand the soundness, intelligence and rationality of the decision of less than ten people (judges) compared to thousands of people if it were not on the point of law. If democracy means majority rules, then, how valid is this meaning in the face of a decision of less than ten persons as against the thousands in a constituency.

We should not, however, be misconstrued of being unaware of the fact that, democracy also entails the rule of law which, according to the Black’s Law Dictionary as cited in Nwogu (2010, p. 188) “is the supremacy of regular law as opposed to arbitrary power and every person is subject to the ordinary law within the jurisdiction.” Nevertheless, the judiciary’s dominance of the electoral process which ordinarily ought to be completely the affairs of the electorates is what has given rise to the concept of judicialization of the electoral process and its impact on the majesty of democracy. The ballot box ought to be the sole determinant of elections in a democracy rather than the courts.

Election is generally regarded as the festival of democracy and if this is accepted, then, party primaries are conversely regarded as necessary and compulsory pre-festival activity that chooses the major participants in the festival of democracy, and so a situation where one does not participate in the festival for whatever reason but after the festival he/she is authorized by a panel of judges to represent a constituency as against the decision of the participants (electorates) of the festival questions the essence and majority decision of the participants of the festival.

Though the law recognizes political parties above and against candidates in elections, which is the basis why certificates of return are issued to appellant candidates who win in pre-election matters,

it however robs the people of their sovereignty in the court decided elections. This is because those who win in pre-election matters and are issued certificates of return by the electoral umpire in compliance with court rulings would not have necessarily been able to win secondary election as they would probably have not been the peoples' choice even if they were validly nominated by their political parties. Perhaps, this must have informed the enactment by the National Assembly, and assented to by the president, the Constitution of the Federal Republic of Nigeria, 1999, (Fourth Alteration, NO.21) Act, 2017 which alters the provisions of the constitution of the Federal Republic of Nigeria, 1999, to provide time for the determination of pre-election matters; and for related matters. Most importantly, the Act's provision in Section thirteen (13) that "an election tribunal or court shall not declare any person a winner at an election in which such a person has not fully participated in all stages of the election" is an indication that the erosion of the majesty of democracy by the judicialization of the electoral process had not gone unnoticed hence the Act.

Judicialization of the electoral process also has negative influence on voters' perception of the whole election outcome and therefore makes them complacent, disillusioned, indifferent, or a sense of futility (a perception that one's vote will not make a difference) which has led to an increase in low voter turnout since the return of democracy in the country in 1999. Low voter turnout is undesirable because it is an indication of the height of political apathy and the majesty of democracy lies in political participation, especially by the electorates voting at elections, and so their (electorates) staying away from elections erodes the majesty of democracy in Nigeria.

Voter turnout from 1999 when the first general elections in the Fourth Republic was conducted to the 2019 general elections shows that in 1999, there were 57, 938, 945, registered voters while voter turnout was 30, 280, 052, which was 52.26 percent (International Institute for Democracy and Electoral Assistance (IIDEA), as cited in Garba and Shaapera 2018, p. 173). In the 2003 general elections, IIDEA, as cited in Garba and Shaapera (2018, p. 173) also states that there were 60, 832, 022 registered voters, while 42, 018, 735 voters turned out for the elections which is 69.08 percent, representing 16.82 percent increase in voter turnout which is far considered as golden in the annals of voter turnout in Nigeria's Fourth Republic. Though, other reasons might also be adduced for the notable voter turnout in the 2003 general elections, it is instructive to note that this may not be unconnected to the fact that there were very minimal pre and post-election litigations arising from the conduct of the 1999 general elections which probably encouraged and gave the people the confidence that their votes would count against court determinations of elective positions, hence the remarkable turnout in the 2003 general elections.

In 2007, IIDEA in Garba and Shaapera (2018, p. 173) further avers that there were 61, 567, 036 registered voters in Nigeria and the voter turnout was 35, 397, 517, which is 57.49 percent, representing a decrease of 11.59 percent. The number of pre and post-election litigations witnessed in the 2003 general elections probably informed the drop in voter turnout in the 2007 general elections. There were 560 post election litigations in 2003 (NCSSR 2017, p. 17) that witnessed twists and turns with some lasting the whole tenure for which the elections were held thereby becoming an academic exercise and as such, frustrating and dampening the hope of the appellants and their supporters in not just the litigations but elections as well as democracy in Nigeria generally.

The 2011 general elections witnessed a fall in voter turnout as out of the 73, 528, 040 registered voters in the election 39, 469, 484 voters, which is 53.68 percent, turned out for the elections which

represent 3.81 percent decrease (IIDEA, as cited in Garba and Shaapera 2018, p. 173). It is pertinent to note that the 2007 general elections which preceded the 2011 general elections have so far gone as the most judicialized election in the records of election litigations in Nigeria as there were 1, 290 post-election litigations in the country (NCSSR 2017; p. 17). This, no doubt, explains the decrease in voter turnout in the 2011 general elections. The percentage of decrease would have been higher than what was witnessed but the 2011 general elections also saw 11, 961, 004, representing 19.42 percent, increase in the number of registered voters which was the highest ever increase as at that time.

In the 2015 general elections, IIDEA, as cited in Garba and Shaapera (2018, p. 173) as well asserts that there were 67, 422, 005 registered voters in the country and less than half, 29, 432, 083, representing 43.65 percent, voters turned out for the elections which was 10.03 percent decrease. Though there was 43.25 percent drop in the number of post-election litigations recorded in 2011 as there were 732 cases (NCSSR 2017; p. 17), it still cannot be pushed or overlooked in explaining the drop in voter turnout in the country in the 2015 general elections.

The 2019 general elections further witnessed a drop in voter turnout as out of 84, 004, 084 registered voters only 29, 364, 209 (Pulse.ng February 27, 2019), representing 34.95 percent, turned out for the elections, which indicated 8.7 percent decrease from what was obtained in 2015. As it were in 2011, there was also a marginal drop in the number of post-election litigations in the 2015 general elections from 732 to 611 in 2015 (NCSSR 2017; p. 17), which represents 16.53 percent drop. However, the precedence set over the previous elections had already entrenched an apathetic voting behavior among the electorates and so the judicialization of the electoral process in the country cannot be exonerated from the fall in voter turnout in the 2019 general elections.

According to Ali Zubairu as quoted in the Daily Trust Newspaper of April 9, 2019, the increased number of pre and post-election litigations in the 2019 general elections is an indication of a reversal of the gains of the 2011 and 2015 general elections. This, thus, constitutes a serious challenge to the development and or consolidation of democracy in Nigeria. It was INEC (2015; p. 19) that held that “the one important measure of democratic development is the number of post-electoral disputations that end up in court, the fewer the post-election petitions, the more consolidated.” As such, we cannot proudly talk about the majesty of democracy in Nigeria in the face of the numerous post-election litigations always witnessed in the country after every election since the return to democratic rule over twenty years ago. This singular development gave rise to the concept and judicialization of the electoral process in Nigeria.

The Economist Intelligence Unit (2019) holds that the most important indices of democracy are electoral process and pluralism. It further states that since 2006 when the state of democracies around the world began to be measured, Nigeria has witnessed a snail movement from authoritarian to hybrid a regime classification which is due, largely, to its poor performance in electoral process and pluralism and the judicialization of the electoral process. These factors are among the prominent factors which have accounted for the country’s poor performance in the electoral process and pluralism. Statistics at our disposal (Economist Intelligence Unit 2006, 2008, 2010 to 2018) indicate that Nigeria moved from authoritarian regime to hybrid regime classification only in 2015 and has remained in the hybrid regime classification to date with a rank of 108 out of the 167 countries measured with an overall score of 4.44 percent, as well as with an electoral process and pluralism score of 6.08 percent. Thus, with this statistics, we cannot

glowingly talk about the majesty of democracy in Nigeria, as the country does not even belong to the category of flawed democracies not to talk of full democracies where the majesty of democracy is fully respected and observed.

Conclusion

It is evident from the preceding analysis that institutional features, judicial behavior and political dynamics and or determinants have led to an increasing judicialization of the electoral process in Nigeria since the return of democracy in 1999. This is evident in the number of pre and post-election litigations witnessed in the country, except for the 2011 and 2015 general elections where the figures dropped. This, thus, has constituted an impediment to the development of democracy in the country and, as such, it has robbed the country of the majesty of democracy. Therefore, we cannot proudly speak of the majesty of democracy in Nigeria in the face of the numerous electoral court cases. To this extent, the impact of the judicialization of the electoral process on the majesty of democracy is real, not deserving too much of an explanation. In other words, the most important index of democracy is an electoral process that is devoid of litigations.

Nigeria, on the basis of this development, cannot proudly talk of the majesty of democracy, and until the country's electoral process is dejudicialized and other challenges that militate against the development and or consolidation of democracy which have made her ranked 108th on democracy index in the world surpassing only 59 countries are surmounted the majesty of democracy will continue to elude the country's democracy. It is also pertinent to add that the trend is not likely to abate any time soon because politicians in their desperation would most likely continue to seek to influence the normal course of the law. Invariably, identifying and addressing the desperation of the politicians is very central to reversing the trend of judicialization of elections in the country.

Recommendations

- i. The winner takes all syndrome that has characterized Nigerian politics should be replaced with an inclusive governance system to accommodate other contestants to address the desperation by politicians to win either by hook or crook.
- ii. There should also be social and economic inclusion, especially of the teeming youth population to reduce the level of unemployment which has made our idling youths to be willing tools in the hands of desperate politicians.
- iii. There should be decentralization of more powers to the states and local governments to discourage the unhealthy competition for elective positions, especially at the federal level, that leads to desperations.
- iv. The prevalent corruption, especially in the public sector, in the country that makes public office attractive should be addressed.
- v. The political class should be reoriented to see public office, especially elective positions, as platforms for service delivery rather than money making ventures that have spurred the desperation for them.

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