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Judicial Discontents in Democracy: Interrogating the Contradictions

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ABSTRACT: The French judge and political philosopher, Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, otherwise, simply known as Montesquieu, propounded the theory of separation of powers, currently implemented in many democracies across the world. Implicit in the terminology of separation of powers, is the desire for a seamless democracy or the type of democracy with minimal national bitterness. None of the three arms of government was ever envisaged to be a possible source of discontent in democracy. What then is to be done when one of these tripartite coequals (specifically the judiciary) becomes the source of discontent in an assumed democratic polity? This paper interrogates the embedded issues.

KEYWORDS: judiciary, judicial discontents, democracy, democratic regimes, Nigeria

Introduction

Despite all the attempts by different generations of scholars and lay-writers to achieve some academic and other empirical variations, the Lincolnian description of democracy remains unassailable – government of the people, by the people and for the people. This implies inclusive governance, which translates to minimal discontents, or at the height of inevitable contentions, amicable resolution of the surrounding issues, according to the wishes of the majority of the people. Conflict resolution is therefore expected to be among the operational procedures of democracy. The judiciary appears to be the preeminent conflict resolution body in all democratic polities. Can the judiciary also become a source of continuing conflicts (denoted as discontents in this paper) in a putative democracy? Such a scenario presents portraits of contradictions. The paper is situated within the national context of the Nigerian State in West Africa. In the structure of the presentation, there is an introduction of the study area (Nigeria), a précis on democracy, a digest on the role of the judiciary in Nigeria's electoral process, then instances of judiciary-induced discontents in the Nigerian democracy and finally, some prognosis on straightening out the embedded contradictions.

The Study Area (Nigeria)

The Nigerian state is in the West African sub-region of the world. It is in the continent of Africa. Nigeria was ruled by Great Britain from the mid-19th century up till 1960 when she obtained independence (Encyclopædia Britannica, 2020). But the Nigerian nationals that succeeded the British colonialists at independence were not particularly successful in governing the post-colonial Nigerian state. By 1966, the military arm of the newly independent state had toppled the government of the new state. The ensuing intertribal antagonisms which preceded the military putsch and also characterized the affairs of the different military administrations that followed also led to a civil war fought between 1967 and 1970. When the war ended, the military remained in power with civilian governance being permitted intermittently, while the military usually returned to oust the intermittent civilian regimes or topple an existing military regime. This represented the scenario in the country until 1999, which seems to have ushered in a regime of sustainable democracy in the country.

Among the subsisting epithets of the Nigerian nation is that of a crippled giant (Osaghae 1998). According to Osaghae, Nigeria is arguably one of the most complex countries in the world and belongs to the genre of the most troubled complex societies called deeply divided societies. It is a place rich in physical, natural and (debatably) human resources. Principally due to its comparatively humongous population, the country once prided itself as the giant of Africa. The country's population is currently estimated at over 200 million (Worldometer 2020). But this putative giant has only managed to remain a middle income country by all international standards. Its governmental system is presumably a democracy. But the brand of democracy in the country frequently throws up some worrisome tendencies, ranging from human rights abuses, to intractable terrorism (Ogundiya 2010; Idada & Uhunmwuangho 2012; Adenrele & Olugbenga 2014; Tella, Bello & Adejeumo 2018). In this trend of bothersome drifts has also been added what this paper studies as judicial discontents whereby the issues that heat up the democratic process in the country are the pronouncements of the judiciary.

A Précis on Democracy

The Lincolnian description of democracy (government of the people, by the people and for the people) remains a benchmark for democracy's definition but some amplifications have since been done (and such add-ons continue to be made) to reflect current realities, practice trends and hopes – scholarly and empirical hopes. Dalton, Shin & Jou (2007) accordingly identified three alternative approaches to the definition of democracy - procedures/institutions, freedom and liberties, and social approaches. Consequently, under the procedures/institutions approach, Dahl (1971) identified eight criteria in defining democracy:

- the right to vote
- the right to be elected
- the right of political leaders to compete for support and votes
- elections that are free and fair
- freedom of association
- freedom of expression
- alternative sources of information
- the existence of institutions that depend on votes and other expressions of preference.

Dahl thus, largely equates democracy with the institutions and processes of democratic government. Theorists and activists that belong to this institutional/procedural school of thought therefore believe that if citizens can participate equally in free and fair elections, and if such free and fair elections direct the actions of government, then democracy is on course. Robust electoral institutions would then constitute the defining elements of democracy or minimum measures of a democratic system. Under this scenario, free and fair elections, responsiveness of government, multiparty competition, and popular control or majority rule, become key elements in defining democracy (Dalton, Shin & Jou 2007).

The second approach is to focus on the outcomes of democracy. It is therefore partly implicit in much of the democratic theory that electoral democracy presumes the existence of freedom of speech, assembly and other rights essential to make electoral competition meaningful. Hence, democracy includes an emphasis on freedom and liberty as its essential goals, with the institutions of democracy a way to achieve these goals (Dalton, Shin & Jou 2007). Citing Diamond (1999), Dalton, Shin & Jou (2007) list political liberties, participation rights of citizens, equal justice before the law, and equal rights for women as four of the core democratic values. Democracy might then be defined in terms of the individual rights and liberties protected by a democratic form of government, such as freedom of speech, religion, and freedom of assembly.

The protection of individual liberty and rights by the rule of law thus become essential to democracy (Dalton, Shin & Jou 2007).

Then thirdly, there may be a social dimension to the public images of democracy, particularly in developing nations. Therefore, in addition to civil and political rights, democracy should include social rights, such as social services, providing for those in need, and ensuring the general welfare of others. And so, unless individuals have sufficient resources to meet their basic social needs, democratic principles of political equality and participation are meaningless to such persons, unless democratic freedom includes freedom from wants. And in these regards, contemporary expressions of support for democracy in developing nations are merely expressions of support for a higher standard of living, as democracy is identified with the affluent, advanced industrial societies. The endorsement of democracy in these developing countries is presumed to mean a desire to achieve the same economic standards even if not necessarily the same political standards (Dalton, Shin & Jou 2007). Where then is the role of the judiciary in all of this?

The role of the judiciary in Nigeria's electoral process

The operative 1999 constitution of Nigeria provides for a judiciary in Section Six. And the powers of the judiciary on all adjudications in the country derive from this source. The issues to be adjudicated upon, as provided for in this section, both expressly and impliedly extend to election matters. Additionally in Part III of this section of the Constitution, there are provisions for Election Tribunals, with well spelt out functions. Sections VIII and IX of the nation's Electoral Act 2010 (particularly Sections VIII) also amply recognize the judiciary as partners and actors in the electoral process. But how has the judiciary fared in the discharge of its duties?

Instances of judiciary-induced discontents in the Nigerian democracy

During Nigeria's ill-fated Second Republic (October 1, 1979 - December 31, 1983) there was the extremely divisive case of Chief Obafemi Awolowo Vs Alhaji Shehu Shagari, in 1979. The gravamen of the case was that Shehu Shagari did not obtain the required 25 percent of votes cast in 2/3 of Nigeria's then 19 states which could only translate to his obtaining 25 percent of votes cast in 13 of the states. Nigeria's Apex Court in deciding the law relating to election cases in the country had by a majority of 6-1, affirmed the election of Alhaji Shagari as duly elected President. The Learned Justices of the nation's Supreme Court held that two-third of the country's 19 states was 12 2/3 states instead of 13 (HLF 2014).

The Supreme Court agreed that Shehu Shagari got 25% of the votes cast in twelve (12) states but the 13th state was the issue. It was Kano state, where Shagari scored 243,423 votes, equivalent to 19.4% of the 1,220,763 votes cast in total. But in arriving at its position the Apex Court divided the 1,220,763 total votes cast in Kano by two-thirds to arrive at 813, 842, and then declared that Shagari's own votes of 243,423 in Kano was greater than 25% of the total votes cast in Kano. The day this judgment was delivered has been described as the day the law died in Nigeria (Awofeso 2013). But Adediran (1982) described it as a case of compromise between law and political expediency.

An eminent professor of law in one of Nigeria's oldest universities has since summarized the relationship between law and politics in Nigeria as political jaywalking and legal jiggery-pokery, in the governance of Nigeria, wondering: Wherein lies the rule of law (Amadi 2011)? According to Amadi, "all in all, the political jaywalker is that person whose mental state readily accommodates such flawed tendencies as deceitfulness, selfishness and shamelessness in pursuit of politics and politicking, in contempt of the rule of law." Then legal jiggery-pokery is the deliberate employment of deceit or dishonesty by lawyers, whether as legal practitioners or judges, in the interpretation of the law, or law makers making bad and or self-serving laws (Amadi 2011, 15).

In the case of Omehia Vs Amaechi (2007) Celestine Omehia was sworn in as the fourth Governor of Nigeria's Rivers State on 29th May 2007. But on 25 October 2007, the country's

Supreme Court annulled Omehia's election, on the grounds that Chibuike Amaechi, not Omehia, was the political party's legitimate candidate. Amaechi had won the party primaries, but became substituted with Omehia at the last moment due to allegations of graft (BBC 2007). Amaechi did not campaign in the elections, his name was not on the ballot paper but he was declared winner of the election by the highest court in the land, which held that the votes of the voters were for the political party, not for candidates (Adejumobi & Kehinde 2007).

But we move ahead in acceleration, and arrive at 2020, in the case of Hope Uzodimma Vs. Emeka Ihedioha. In this case, a seven-member panel of Justices of the country's Supreme Court presided by the Chief Justice of Nigeria (CJN) held that Ihedioha was not validly elected as governor of the country's Imo State, by majority of lawful votes cast in the election. The Supreme Court accordingly sacked Ihedioha who had been in office for about seven months. The Apex Court held that Uzodimma proved the allegation of exclusion of results in 388 polling units of the state where he scored 213, 695 votes. The court upheld the argument of counsel to Uzodimma, that the issue was whether their results were unlawfully excluded from the total results, and not whether elections held in the controversial polling units (Azu, Matazu, Olaniyi, Jimoh & Owuamanam 2020). Amidst public protests and street demonstrations on opposing sides of the political divide in the state, Ihedioha headed back to the Supreme Court, the court of ultimate jurisdiction, which of course lacks appellate status. The Uzodimma Vs Ihedioha struggle became a subject of immense national discontents in the country's democracy.

Ihedioha went back to the Supreme Court to argue that when Uzodimma initially presented his table of exhibits, to the Apex Court Justices, he mischievously excluded the votes of other political parties that contested the election and on the bases of his own exhibits alone the court declared him winner. He submitted that an error was discovered in the judgment of the Supreme Court as the total number of votes cast in the election now exceeded that of accreditation by over 100,000 after adding Uzodimma's new votes. The Ihedioha side argued that Uzodinma was granted the request he did not pray for, as he prayed for fresh election in 388 polling units, but got the imposition on the people as Governor by the Supreme Court. The Supreme Court viewed the new application as an invitation to sit on appeal over its own final judgment. It concluded that granting the request would open a floodgate by other parties for all kinds of appellate litigations against Supreme Court judgments and then decided as follows:

> The general law is that the court has no power under any provision to order a review of its own judgment unless to correct an error. This court has on each occasion stated that it lacks jurisdiction to do that. We cannot sit as an appeal court. We have no hearing power in respect of the matter. The court does not have the competence and lacks the jurisdiction to review its own judgment. The finality of the Supreme Court is inherent in the constitution. To ask us to set it aside means an appeal for us to sit on our own decision, which we have no jurisdiction over. The application is hereby dismissed and parties are to bear their respective costs (Onochie, et al. 2020).

Correcting the contradictions

As the discontents arising from the Uzodimma Vs Ihedioha case and others subsist, a major contentious issue (a contradiction) borders on the beneficial role of the judiciary (or otherwise) in the electoral process. The judiciary currently plays a dominant role in Nigeria's democracy. It appears as if the role of the political parties on matters of their candidates for elections is being taken over by the law courts in Nigeria. The prime position of the voter in deciding who governs is increasingly eroded while the political parties perform poorly in their choice-of-candidates roles. Instances are many on the choice of candidates being determined by the courts, adjudicating on litigations (Banire 2017). The nation's political parties lack clear ideological commitments, do not articulate alternative worldviews, rarely mobilize the voters, and usually adopt anti-democratic methods to confront their intraparty democratic issues (Adejumobi & Kehinde 2007). The political parties and their candidates seem to be engaging in too frequent resort to the law courts in electoral matters, leading to

contentious judicial pronouncements and judiciary-caused discontents in democracy in the country. When judicial pronouncements are contentiously made in continuity (with inherent finality) in a democracy, they inevitably breed discontents. Chairman of the nation's electoral commission recently advised political parties not to allow the courts determine the outcome of future elections in the country **(**Channels Television 2020**).**

In an overall context, the judiciary serves as the final arbiter in a democracy, over all disagreements and disputations, which include disagreements over elections, nomination of candidates by political parties and election results. But the assumption is that the arbitration of the judiciary would always, be nearly unassailable if not completely incontrovertible. The right to choose their leaders in a democracy fundamentally belongs to the voters. The seeming usurpation of this right (the taking over of this right) by the judiciary is certainly contradictory. At what point and under what circumstances then, may the judiciary validly take over the voters' rights of declaring with finality, who governs? On the face of it, it seems the judiciary may do so as arbiter in litigations and when members of the judiciary serve as judges, in disputed processes of the election and contested election results. On deeper contemplation however, it appears as if it is only when the decisions of the judiciary over such matters are unassailable that such interventions may be tolerated. In correcting the implicit contradictions of judicial discontents in a democracy, judgments of a national judiciary, particularly at the Supreme Court level is expected to be incontestable.

Conclusions

Tenuous judicial pronouncements in the process of democracy are undesirable. A high frequency of these contentious adjudications is also unacceptable. When such tendencies become frequent, they lead to what we have examined in this paper as judicial discontents in democracy. Such scenarios erode confidence in the judiciary as final arbiter. Where the judiciary was previously assumed to be the last hope of the proverbial common man, this erosion of confidence may make this same commoner to lose hope in the prospects of democracy.

What is to be done? This requires a reversal of the trend of making the judiciary (the Supreme Court of the land) a usual and frequent participant in election matters. But it is up to a nation's political elite to make this vision a reality, to allow the votes of the masses count in an election. The role of the political parties is central in these regards. Currently obtainable in the Nigerian setting is the situation whereby the politicians increasingly overstretch the electoral contests to the highest court in the land, while the political parties participate helplessly in taking the electoral contests to the courts for judicial decisions. This appears to give the political class the room to manipulate the process, even at the highest judicial level. This scenario continues to give the Nigerian democracy some colouration of judicial discontents and carves a portrait of awkward democracy for the country.

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