Supreme Court and democracy in the Fourth Republic: An analysis of politics of judicial review

By Sam Amadi

INEC has argued that Section 137 of the constitution that disqualified persons who had been indicted by administrative tribunals from contesting elections and Section 32 of the Electoral Act empowered it to screen and disqualify candidates. This argument was rejected by the Federal High Court but accepted by the Court of Appeal. The Supreme rejected INEC's submission and held that "the disqualification in section 137(1) clearly involves a deprivation of right and a presumption of guilt for embezzlement or fraud in derogation of the safeguards in Section 36(1) and (5) of the constitution. The trial and conviction by a court is the only constitutionally permitted way to prove guilt and, therefore, the only ground for the imposition of criminal punishment or penalty for criminal offence of embezzlement or fraud solely on the basis of an indictment for those offences by an administrative panel of enquiry implies a presumption of guilt, contrary to Section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999, whereas the convictions for offences and imposition of penalties and punishments are matters pertaining exclusively to the judicial process".

Here again, the separation of power principles became a handmaiden for judicial review. What the court seems to be saying is that both the administrative panel of enquiry and the INEC, being part of the Executive branch, cannot exercise a judicial function in the nature of a criminal trial and conviction of Atiku Abubakar.

But, the confusion here is whether the Supreme Court frowns at the fact of indictment and conviction by an administrative panel of enquiry or protesting that INEC did not provide due process in its quasi-judicial function, or both. The reasoning of the Supreme Court is two-fold.

First, disqualification on the basis of an indictment for crime is a judicial function, which a court of law ought to handle under separation of power principles.

Second, there is no clear power given to INEC in both the constitution and the Electoral Act to disqualify candidate. The power to so do under the 2002 Electoral Act has been repealed. The 2006 Electoral Act requires persons who feel aggrieved against a candidate to go to court to secure disqualification. Therefore, INEC cannot disqualify candidates without first getting the approval of the court.

Many lawyers, like the President of the Nigerian Bar Association (NBA), Mr. Olisa Agbakoba, hails this judgment as explicative of the doctrine of rule of law and the principle of separation of power. But others like Chief Gani Fawehinmi carpet the law as wrongful and an encouragement to fraudulent conducts. What is the nature of the politics that the court is pursuing through this sort of judicial review? It is not fully convincing to read the power of INEC to organise elections so restrictively as it does as to not permit the body from reviewing the application of a candidate and where there is manifest case of defect, disqualify the candidate. To glory as the court seemed to do in the lacuna in the law, even if such lacuna was deliberately created by the legislature, and to argue that since there is no explicit provision authorising INEC to disqualify candidates, the court is the only body that can do so, sounds like a barely concealed contest for power to govern.

The temptation is high to presume that the interpretative stance of the Supreme Court in this case is borne out of distrust for the independence and impartiality of the INEC whose negative political image is that of an attack-dog of former President Olusegun Obasanjo.

The credibility of INEC as an institution before the justices was not helped by the many attempts by Obasanjo to humiliate his deputy and stop the latter's succession to the Presidency. Of course, by then, the Obasanjo government had already branded itself as 'lawless self-opinionated government that does not accord enough respect to the Judiciary.

This case supports my proposition about the political character of judicial intervention by the Supreme Court, especially, whether democratic accountability is imperilled.

The point here is that the interpretation that the court gave to the provisions of the Electoral Act and the constitution and its position on the power of INEC to disqualify are based on its commitment to promote the rights and liberty of the Nigerian people.

Since INEC has proved incredible as a federal agency to promote democratic election, the court was disposed to strip it of responsibility where textual vagueness could admit and where there is a clear public interest to be served by so limiting INEC. The court played real politics. Its choice to deny INEC of power of reviewing and disqualifying candidate through interpretative stance is political choice. It is predetermined. It is based on a pre-textual reading of INEC's credibility and the challenges of the polity.

This robustly democratic analysis of the decision is the only way to make sense of the court's position. The decision fails one of the technical components of judicial review, which was succinctly articulated by the U.

S. Supreme Court in Chevron USA v. NRDC Inc., 467 US. 837 (1984), to wit, that the court should defer to the expertise of the agency unless it involves an error of law. May be, if INEC was credible agency, the Supreme Court would have allowed it to determine whether a candidate was qualified to contest based on section 137 of the constitution and then subject such determination to judicial review at the instance of aggrieved candidates.

In that wise, the disqualification of the former Vice President Atiku Abubakar could still be invalidated based on facts of that case. But, the court would not have issued a blanket prohibition of disqualification of candidates by INEC for whatever reason.

It is not in my view a correct interpretation that the constitution created an electoral body with mandate to organise an election without the power to make preliminary determination of the qualification of candidates based on the provision of the constitution. The Supreme Court ought to have given greater consideration to INEC's interpretation of its power just as the U.S. Supreme Court stated in the Chevron case. As Justice Breyer of the U.S. Supreme Court rightly observed, "the agency that administers the statutes is likely better able than a court to know how best to fill those gaps.

The agency, experienced in administering the statute, will likely better understand the practical implications of competing alternative interpretations, consistency with congressional objectives, administrative difficulties, the consequences for the public and so forth". But, as the justice wisely observes, this pragmatism, will of course give way to commitment to promote active liberty. So, the Supreme Court decision to strip INEC of the power to disqualify candidate does not flow with the text. It is a politically nuanced and influenced decision that may have furthered democratic freedom, especially in an era of less than democratic behaviour by the Executive branch of government.

The other case that comprehensively announced the politics of the Supreme Court is Ameachi v. PDP. This case follows the Ararume case with the only key difference being that whereas Ararume contested and lost the election, Amaechi was effectively excluded from the contest. The facts are simple. Ameachi contested and won primary election for PDP governorship candidate for Rivers State. But his name was removed by the party on allegation of misconduct. He challenged his substitution but the matter was not finally determined when the election was held and his substitute, Celestine Omehia, was elected governor. After being sworn in as governor, the Supreme Court ordered Omehia to vacate and Amaechi to be sworn in as governor. This judgment is unprecedented in Nigerian jurisprudence.

The politics of judicial review

The Amaechi case provides the best context to justify my proposition that whenever the demand of democratic freedom so requires, the court plays bare-knuckle politics. What rankles people most is how the Supreme Court could order a person to be sworn in as governor who was not on the ballot, even though he ought to be on the ballot.

The Supreme Court reasoned that the case was on all with Ugwu v. Ararume where it held that there was no valid reason for substituting Ararume's name. The court ruled that Amaechi remained the valid governorship candidate of the PDP. The court managed to overcome the hurdle of imposing a candidate who was not voted for by declaring that "this court shall rise up to do substantive justice without regards to technicalities. We would not make an order which does not address the grievances of the party before this court".

The court further reasoned that "the only way to accord recognition to his right not to be trampled upon is to declare him (Amaechi) and not the second respondent (Omehia) to have won the April 14 gubernatorial election".

There is nothing wrong or unusual for the court to commit itself to 'substantive' justice. It has done that often and has counselled lower court to pursue 'substantive justice' instead of getting trapped in technical justice.

The Supreme Court justifies its decision on the need to grant Amaechi effective remedy. But, what remedy is effective and valid in this context? Is it to get Amaechi back on the ballot and allow the people to vote for him or to foist him on the people as governor with a judicial fait? I think the former option, which the court did not follow, is effective in guaranteeing effective remedy for Amaechi in the context of the case. I will quote the critique of Gani Fawehinmi. It brings out forcefully the impropriety of the court's decision. "I consider the assumption of office by Amaechi

as a judicial imposition on the electorate of Rivers State who when they were voting on April 14, did not have in view or consideration of Amaechi who was not a candidate in the eyes, in the minds and in the hearts of the electorate of Rivers State".

Gani gets to the point. Election is the democratic means of electing officials. As he puts it, "the essence of democratic elections is that the electorate should decide who should be their governor. The obvious implications of the order of the Supreme Court that Amaechi be sworn in as governor of Rivers State are that the electorate of Rivers State were denied the opportunity of electing their governor and that Amaechi was imposed by judicial fiat and not through the ballot".

The politics of the court is clear. It imposed Amaechi because it is irked by the conduct of the PDP in the Ararume case where the party nullified the effect of the court's declaration of Ararume's right by expelling him from the party and campaigning against him even though he was on the ballot as a PDP candidate.

The court does not want to suffer similar disgrace. It reckoned that if it orders for another election, the party leaders who have shown that it did not want Amaechi, would re-organise and ensure that he fails to win the election. Therefore, the court had to enter a fait accompli, a masterstroke against the party.

The import of this analysis is not to establish that the decision of the court was legally wrong. I think that could easily be proved, although it is not my concern. My simple task is to analyse the 'political' character of the decision and to justify my proposition that the court is a political actor just like other branches of government. The court plays its brand of politics. But, this politics is not really different in its objective, even though its orientation and approach may differ.

The politics, which the court plays through its power of judicial review, is determined by the predominant jurisprudence and the political expectation of the people. It is also determined by the political orientation of the justices and the power of incentives and sanctions embedded in the political economy. In the Amaechi case, the Supreme Court felt safe to uncharacteristically play bare-knuckle politics and by-pass voting process and 'elect' Amaechi governor of Rivers State for a mixture of reasons.

First, its decisions in Ararume and Atiku have been hailed as redemptive without any repercussion.

In fact, it burnished the image of the Judiciary by so doing. It was more braying for blood by the Nigerian electorate.

Secondly, the Supreme Court felt persuaded of the need for such interventions in order to better promote and protect the 'active' liberty of the people, that is, relation between citizens and the government that is participatory, responsive and accountable.

Is judicial politics permissible?

One may ask why the Supreme Court should play such politics under the guise of judicial review. In the first place, does the court play politics through judicial interpretation? I think the answer is yes. But, many folks demur. Professor Herbert Wechsler claims that "the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved".

So, judicial interpretation is devoid of the contamination of politics. The proponents of 'judicial review is not politics' argued that judicial review is disinterested, stands from party politics and the pressure of ego and promotes values that are public and external.

Professor Wechsler puts it succinctly, "the demand of neutrality is that a value and its measure be determined by a general analysis that gives no weight to accidents of application, finding a scope that is acceptable whatever interest, group, or person may asset the claim. So, too when there is conflict among values having constitutional protection, calling for their ordering or accommodation, I argue that the principle of resolution must be neutral in a comparable sense (both in definition of the individual competing values and in the approach that it entails to value competition)".

The debate about the role of politics in judicial interpretation is as ancient as jurisprudence. If you take the governance theory of Abraham Chayes, politics is inescapably part of adjudication. The Judiciary, as a governing branch of government, has to play politics in order to protect the Commonwealth. From the interest theory, politics is part of judicial review. Judges have their interests in some outcomes, which they may promote.

Is it good for society for the judges to determine outcomes in the manner they did in the Amaechi case?

Most importantly, we will answer yes considering the dismal context of 2007 elections and what we now know of the inequalities and injustices of the elections. So, these folks will hail the court as the champion of the oppressed and redeemer of social injustice.

But, the problem is that when the judges play politics through judicial review, there is no mechanism to make them amenable to the needs of the people. They decide for themselves what the people need and how justice is served. It is doubtful if this Platonic Guard mentality is agreeable to the 'active liberty', which the likes of Justice Stephen Breyer argue is at the heart of constitutional democracy. No one articulates anti-democratic critique better than Justice Learned Hand. He says, "For myself, it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.

Of course, I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls, I have a satisfaction in the sense that we are all engaged in a common venture. If you retort that a sheep in the flock may feel something like it; I reply, following Saint Francis, "My brother, the sheep".

The Supreme Court is a political institution. It, therefore, plays politics. How it plays politics, whether subtly or openly, depends on political contexts. In the political contexts of the run-up to the April 2007 elections, the Supreme Court was motivated and encouraged to be more open with its political choice.

In the electoral case pending before it, the Supreme Court politics will also reflect the risks and hazards and the political incentives for more interventionist interpretative stand. Read my lips.

Dr. Amadi is the director, Centre for Public Policy and Research, Abuja.