

JUDICIALISING PARTY PRIMARIES

Contemporary Developments in Nigeria

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ABSTRACT

This article explores the judicialisation of party primaries in contemporary Nigeria, which is a defining feature of the country's electoral politics. Since the inception of the Fourth Republic, the lack of internal democracy within the parties has been the source of protracted crises during nomination, and this often gravitates to the serenity of the court(s). Dominant disquisitions in legal theory contend that disputed primaries are internal party affairs; hence, they are non-justiciable. Drawing on primary and secondary data – YouTube interviews, the Constitution, the Electoral Act, judicial ruling, media reports, and personal observation – this article argues that to the extent that political parties are juridical entities, disputed primary elections are justiciable, hence a legal question to be resolved by the judiciary. To validate our argument, the article draws on Raphael's (1970) notion of universal and compulsory jurisdiction. Our enquiry reveals that the failure of the internal mechanisms of the parties to resolve disputed party primaries accounts for aggrieved aspirants' reliance on legal redress. While this approach has been questioned from a legalistic point of view, the constitutionality of seeking legal redress has its provenance in the change of legal regime regulating party primaries, which has shaped, reshaped, and positively impacted electoral democracy in Nigeria.

Keywords: disputed primaries, justiciable, judiciary, Nigeria, constitution

INTRODUCTION

It is axiomatic that political parties are crucial institutions of modern representative democracy. Based on the functions they perform (political mobilisation, political

recruitment, linking the electorate with the government, and implementing policy), it is plausible to argue that they make liberal politics participatory, inclusive, and meaningful. Consequently, some observers have asserted that 'political parties created democracy and modern democracy is unthinkable save in terms of political parties' (Schattschneider 1942, p. 1). Indeed, democracy would be inconceivable without political parties because elections in modern representative government can only be competitive when parties field candidates for elections. Nevertheless, political parties in both established and transitional democracies grapple with conducting inclusive candidate selections during party primaries (Hamalai *et al.* 2017; Hazan & Rahat 2010). In some contexts, parties emerge out of this process united, with high prospects of capturing power in the electoral marketplace and forming a government; while in other contexts they grapple with unresolved internal crises through the general election. The latter is commonly associated with transiting democracies, of which Nigeria is a paradigmatic example. Flowing from this, Gallagher and Marsh posited that the way political parties select candidates for election will serve 'as an acid test of how democratically they conduct their internal affairs' (cited in Bille 2001, p. 364).

In Nigeria, candidate selection is done through party primaries fashioned after the American model, but nowhere close to it in terms of process and outcome. Accordingly, scholars like Ikeanyibe (2014) have argued that it remains difficult to address the inability of political parties in Nigeria to present candidates for election through party primaries that disregard party rules and respect for internal democracy. The nature of primary election in Nigeria is essentially oligarchic in the dominant parties. Party oligarchs constrict the nomination process by anointing preferred candidates, while those with war chests secure the nomination without appealing to the will of party members. Most often, this creates uncertainties that birth schism, or what Ashindorbe and Danjibo (2019) referred to as 'intra-elite factionalism', which ends up weakening the party as an organisation. While the parties have internal mechanisms for resolving disputes of this nature as provided in their constitutions, the reality is that aggrieved members often turn to the judiciary to vent their grievances. Hence the ubiquity of judicial reviews of disputed party primaries in Nigeria. This is what we refer to as the judicialisation of party primaries.

This article critically interrogates the phenomenon of judicialised party primaries in Nigeria. It is the considered position of this article that judicialised party primaries and their outcomes have shaped, reshaped, and impacted electoral politics and governance in Nigeria in profound ways. In Nigeria, a mushrooming literature has emerged in legal theory questioning the involvement of the judiciary in adjudicating disputed party primaries and the outcome of fraudulent/rigged elections (Omoregie 2020; Ugochukwu 2011). The dominant arguments in these

studies de-emphasised the involvement of the court(s) in resolving internal disputes of political parties, noting with emphasis that such disputes are extra-legal and require a political answer, rather than a legal answer, in resolving them. Accordingly, it is non-justiciable. This line of thinking stems from the theoretical postulation of two leading legal theorists, Fuller and Winston (1978) who posited in their concept of ‘polycentrism’¹ (many centred) that disputes such as contested party primaries have multiple dimensions that cannot be resolved using a legal approach.

Drawing on primary and secondary data that include YouTube interviews, the Constitution, the Electoral Act, judicial ruling, media reports, and personal observation, this article argues that to the extent that parties are juridical entities, disputed primary elections are justiciable, hence a legal question to be resolved by the judiciary.

To validate our justiciability claim, the article draws on Raphael’s (1970) notion of universal and compulsory jurisdiction which allows the state to exercise legal jurisdiction within its territory. In doing this, the focus will be on the two dominant political parties in Nigeria, the People’s Democratic Party (PDP) and the All Progressives Congress (APC). Following this introduction, the first section is on the theoretical engagement with the jaundiced perception of political parties. The idea is to elaborate on the view held by pioneering theorists on political parties and their ‘baneful effect’ on democratic politics, and how that resonates with Nigeria’s existential reality. The second section interrogates the nature of party primaries in Nigeria’s Fourth Republic, showing how its undemocratic nature validates the jaundiced perception of pioneering thinkers on political parties. The next section explores the internal mechanisms of resolving crises arising from undemocratic party primaries. The aim is to show how the failure of these mechanisms has necessitated the involvement of the judiciary by aggrieved aspirants. The article concludes with the discussion.

THEORY

The plethora of scholarship that discusses the inevitability of political parties in modern representative government appears oblivious of the heated debate by leading theorists concerning their tendency to bring about disunity in a democracy. This was the view in the 18th and 19th centuries in Western history (England and America). As indicated in the pioneering scholarship of Henry Bolingbroke and David Hume who wrote on the English experience, their perception of political

1 In their work, ‘The forms and limits of adjudication’, Fuller and Winston (1978) used the concept of polycentric to indicate that some matters defy legal approach in resolving them because such an approach will produce an unsavoury outcome.

parties in a free government was mixed. In his *A Dissertation upon Parties*, Lord Bolingbroke engaged the issue of party labelling. In his view, it was an offshoot of the crisis between the Crown and Parliament which eventually birthed the origin of what he referred to as 'faction'. In his words, 'governing by party... must always end in the government of a faction. ... Party is a political evil, and faction is the worst of all parties' (cited in Sartori 1976, p. 5). Herein lies his jaundiced perception of political parties.

In the political party debate, Bolingbroke's polemics introduced the distinction between party and faction. While he considered the latter as the worst evil, he did not mince his words in asserting that neither is desirable in democratic politics as their role obstructs the attainment of the *summum bonum*. From this, it can be inferred that Bolingbroke was unapologetically opposed to government by political party. His distinction became the entry point for other theorists who engaged his thesis. For instance, David Hume, who joined the debate, shared Bolingbroke's view on faction but differed with him on party government. According to Hume, 'factions subvert government, render laws impotent, and beget the fiercest animosities among men of the same nation'. Furthermore, he opined that 'to abolish all distinctions of party may not be practicable, perhaps not desirable' (Sartori 1976, p. 7). From the latter submission, it can be deduced that Hume was diametrically opposed to Bolingbroke's view on parties. These opposing thoughts became the basis of a rich body of literature on party government in the political science of the 20th century, where the winning argument became the inevitability of party government. Before then, the notion about parties in a free government was sustained.

On the other side of the Atlantic, the English experience influenced the founding fathers of America, many of whom were mindful of Bolingbroke's view of the jaundiced role that parties can play in a democracy. George Washington was the first to express this view in his farewell address to Americans. He drew the attention of his countrymen to the adverse effect of parties when he said, 'I have already intimated to you the dangers of parties in the state.... And warn you in the most solemn manner against the baneful effects of party spirit generally' in subverting the political process of the young Republic. Similarly, John Adams ruefully remarked that 'there is nothing I dread so much as a division of the Republic into two great parties, each arranged under its leader and converting measures into opposition to each other', and warned that it should be 'dreaded as the greatest political evil'. Adams' wife, Abigail Adams, also concurred when she declared that 'party spirit is blind, malevolent, uncandid, ungenerous, unjust, and unforgiving. It is equally so under federal and democratic banners.... who disdain to be led blindfold...'. (Adams, 1804).

While amplifying what his comrades had said, Thomas Jefferson dissociated himself from partisan politics when he stated that ‘if I could go to heaven but with a party, I would not go there at all’. James Madison, in his essay *Federalist Papers No. 10*, opined that the art of crafting the American union had many advantages, but ‘none deserves to be more accurately developed than its tendency to break and control the violence of faction’ (in White 2006, pp. 8–9). While he did not state it clearly, it seems that Madison’s aversion is more to faction than to parties. Despite these deprecatory views, Edmund Burke, Voltaire, and other 19th century thinkers have argued to the contrary. For instance, in what appeared to be a reiteration of the Burkean view on political parties, Alexis de Tocqueville posits that political parties ‘are a necessary evil in a free government’. Later in the 20th century, Schattschneider (1942) corroborated this Tocquevillean submission when he argued that representative democracy is unthinkable without political parties.

Throughout the 20th century, the latter views became the winning argument as the global diffusion of liberal democracy continued without restriction. Nevertheless, there has also been renewed scholarship around the issue of ‘parties in decline’ in many of the advanced industrial democracies (Dalton & Wattenburg, 2000). For instance, the expression *parteienverdrossenheit* (dissatisfaction with parties) became a frequently used term in the German political lexicon. It suggests that while party government has become the norm, it retains the apprehension expressed by Bolingbroke. This explains why Scarrow (2002, p. 4) argued that ‘while political experience may have convinced many people of parties’ inevitability and expediency, it was and is less effective in persuading every one of their desirability’. This suggests that the apprehension about the inevitability of parties in free government cannot be easily dismissed. In many ways, the factionalised and divisive nature of political parties in Nigeria and several other transitional democracies, which obstruct the attainment of the *summum bonum*, are good examples. They have been responsible for slowing democratic progress in Nigeria in its previous democratic epochs and have also threatened its survival in the current democratic era.

THE NATURE OF PARTY PRIMARIES IN NIGERIA’S FOURTH REPUBLIC

Nigeria has had a chequered experience with party primaries in colonial and post-colonial times, much of which has been shrouded in manipulations, fraud, and violence. In the current Fourth Republic, which began in 1999, the geography of party primaries has been replete with the same electoral anomalies, beginning with manipulations in the build-up to the transition election in 1999. As Mohammed (2010) and LeVan et al. (2003) remarked, the 1999 primaries were ‘basically a closed affair’. This was the reality in the presidential primaries of

the PDP, ANPP, and Alliance for Democracy (AD). In the build-up to the 2003 consolidation election, more illiberal measures had already been devised by the parties. Once the primaries started, they soon degenerated to using fraud and force, threats, and intimidation by government officials who pressurised delegates to vote for a preferred candidate. The rules of civility were thrown out of the arena allowing force instead to dictate party primaries. Citing the Report of the Justice Development and Peace Commission (JDPC) report on the 2002 party primaries, Egwu (2008) noted that the then ruling PDP gave all its incumbent governors automatic nomination. The governors in turn hijacked the party machinery in order to ensure their re-election as well as that of their loyalists in state and federal elections. This trend was also true for the All Nigeria Peoples Party (APP) and the AD.

Writing on the same issue, Adejumobi and Kehinde (2007) corroborated this submission when they asserted that the number of political parties that held party primaries to nominate candidates for the 2003 general elections were few, and fewer in the 2007 general elections. After three electoral cycles, it became obvious that undemocratic party primaries have been institutionalised by the dominant parties, and they have also become more sophisticated. This growth in sophistication has been captured most poignantly by Jibrin Ibrahim (2011). According to him, party barons compel other aspirants to withdraw from the nomination race and support a particular candidate. Zoning is also used to exclude aspirants, and this is something backed with violence.

As the fragile democracy progressed, it become obvious that what political parties do in Nigeria during primaries is not election, but 'selection', whereby candidates for election are being imposed on the party. In amplifying this assertion, Hamalai et al. (2017, pp. 34-5) averred that 'party primaries and candidate selection are hardly allowed to be truly democratic.... Instead, the moneybags usually hijack the process in favour of "anointed" candidates" often at the expense of a popular candidate'. What we see here is the oligarchisation of the candidate selection procedure by those who own the party.

This illiberal process of candidate selection dictated by men of power and influence within the party has consequences for both the parties and democratic practice in Nigeria. It has generated conflicts, as aspirants whose democratic right has been infringed resort to seeking justice in different ways. One of these is the emergence of factions. This is consistent with the views of pioneering thinkers such as Bolingbroke, Hume, and the founding fathers of America who spoke out against factions and parties. The crisis arising from party primaries has also triggered defections to the main opposition or smaller parties as aspirants move in search of a platform to seek election. The phenomenon of factions arising from disputed primaries has also produced parallel party structures that conduct

parallel primaries, a development that ends up producing two candidates from one party for the same elective office (Ashindorbe & Dajibo 2019; Hamalai et al. 2017; Adejumbi & Kehinde 2007). This created challenges for INEC as it struggles to ascertain who the lawful candidates are. Owing to this illiberal practice by the parties, astute observers have argued that these undemocratic primaries have weakened the party system in Nigeria (Ashindorbe & Danjibo 2019; Ikeanyibe 2014; Omotola 2009) which has affected democratic progress in the country.

Another fallout of disputed primaries is the resort to protracted lawsuits, which has had severe consequences on the conduct of elections. For instance, the International Republican Institute and the National Democratic Institute have noted in their final report on the 2019 general elections that the prolonged lawsuits arising from disputed primaries brought about delays in the production of ballot papers since most of the contested primaries were still in court (IRI/NDI, 2019). This is one dimension of the problem. Another dimension is that in situations where disputed primaries were not resolved and elections were conducted, those unlawful primaries were later reversed by the courts in favour of the lawful winners (Onu 2020). In this context, the judiciary was seen as the bellwether of democracy where the forces of illiberalism sought to truncate it.

Executive absolutism also plays a role in the process of party primaries. In this case, validly nominated candidates are being disqualified from contesting election by the president who, as is the practice in Nigeria, doubles as the leader of his party. This also applies to the governors at the sub-national levels. During his presidency, former President Olusegun Obasanjo demonstrated this absolutist tendency when he eliminated his political enemies and those he considered recalcitrant members of his party from seeking nomination, using the Economic and Financial Crimes Commission (EFCC).² As Adejumbi (2010) noted, some commissioners of the INEC counselled against this, stating that disqualifying candidates from contesting election is an issue that falls constitutionally within the province of the courts, not the presidency or the commission. This shifted the focus onto members of the electoral umpire. According to Adejumbi, the EFCC arrested the INEC commissioners who had faulted the disqualification of candidates by the presidency and summarily leveled trumped-up charges of corruption against them until they acceded, allowing the government to sustain the disqualification before the charges were dropped. This episode reinforces the much-debated issue of a lack of autonomy for the INEC which makes it less confident in carrying out its constitutional mandate.

2 The EFCC is an anti-graft agency in Nigeria that was established by an Act of Parliament in 2003 by the Obasanjo administration to fight financial corruption. Based on its legal mandate, it had no right to screen candidates for election. But given the tense political temperature evidenced by President Obasanjo's desire to neutralise his political enemies, including the then vice president, the EFCC was used for that purpose (Ashindorbe & Danjibo, 2019, p. 756; Egwu 2008, pp. 67-68).

Since the qualification revolved around the electoral legal framework, the president's action and the role of the EFCC generated heated debate in legal circles on where the power to disqualify candidates in an election resides. In his reflection on the issue, Enabulele (2008) pointed out that although the power to disqualify candidate(s) from contesting elections resided with the INEC under the 2002 Electoral Act, that power was transferred to the Courts in the 2006 Act, which is still the case under the 2010 Electoral Act (as amended). In the light of the foregoing, the action of the INEC and the EFCC was a gross violation of the provisions of the law. This issue will be revisited in detail when we discuss the judicialisation of party primaries. However, it suffices to note that executive absolutism and other undemocratic approaches adopted by the parties in conducting their primary elections are signs of severe attack on the 'electoral' component of democracy within the party by men of power and influence, who place themselves above the party rules and guidelines and expect members to do their bidding. It is for this reason that Agbaje (2010) argued that Nigeria does not have political parties worthy of the name. Instead, what it has are 'contraptions' that are nothing but a hurdle to Nigeria's transition to democracy (Agabje, 2010).

While the parties have contributed to the unmaking of democracy in Nigeria, judging from the way they manage their internal affairs, the INEC cannot be absolved. Acting together with the presidency and the EFCC, the INEC has at some point exercised extra-legal powers to eliminate candidates that were validly nominated (Onu 2020, pp. 139-140; Adejumbi 2010, pp. 97; Egwu 2008, pp. 67-68). This also became the subject of litigation. What the Nigerian experience has shown since its democratic rebirth in 1999 is that the judicialisation of pre-election matters occurs largely because the parties have no regard for the rules governing party primaries during candidate selection.

INTERNAL MECHANISMS FOR RESOLVING CRISES ARISING FROM UNDEMOCRATIC PARTY PRIMARIES

After the inauguration of the Fourth Republic in 1999, one thing that has remained constant in Nigeria's party politics is internal crises. These crises have their provenance in congresses and national conventions to select party executives and party primaries during the nomination of candidates for elective office. The framers of the parties' constitutions were far-sighted enough to make provision for measures of resolving internal party disputes. This has been elaborately spelt out in each party's constitution, and it is done in stages. For instance, Section 60 of the PDP Constitution states the appropriate authorities with whom aggrieved members who are dissatisfied with the party's decision on nomination can channel their grievance to within 14 days, and that the national executive committee of

the party shall be the final arbiter of such appeal. Section 61 provides for the right of appeal to a higher organ of the party which shall be determined within 21 days from the date of receipt. Depending on the origin, the appeal shall progress in stages from the local government to the state to zonal, and then the national level. It is only after these channels have been exhaustively engaged without a satisfactory decision that appeals to the candidate, that he or she can seek judicial redress. Section 59 precludes members from seeking judicial remedy on disputed nominations without exhaustively engaging the mechanisms highlighted above. A breach of this provision can attract fine, suspension, or expulsion.

Similarly, the APC has almost the same provision in its constitution, with minimal variations in terms of the number of days to appeal on the party's decision concerning nomination (7 days), and adjudication from the date of receipt of the appeal (14 days) in Article 21. Like the PDP, members who seek legal redress on disputed primaries without exhausting the internal mechanism would be sanctioned with a fine, suspension, or expulsion. In theory, this sounds appealing, but it is problematic. Firstly, given the disposition of the parties in terms of observing rules in the breach, it can hardly be reconciled they would do justice as stated. Secondly, the rules make a pretext of subscribing to democratic norms, but contain draconian tendencies, to the extent that members can be stripped of their constitutional right to seek legal redress with the threat of expulsion. Thirdly, its efficacy in practice has proven to be ineffective.

In the build-up to the 1999 transition elections, the primary elections conducted by the three major parties (PDP, APP, and AD) were fraught with scheming and disregard for the legal framework, including the parties' constitutions (Mohammed 2010; Levan et al. 2003). For instance, Mr Ogbonaya Onu emerged as the APP presidential candidate during its primaries in Kaduna State, North-Central. Chief Olu Falae later emerged as the party's candidate in an alliance with the AD. As both Mohammed and LeVan noted, Falae was secretly selected at a meeting in Ibadan by a small clique. In the PDP, there were more complicated forces at play and the party emerged from pro-democracy agitation against General Sani Abacha's tyranny. The PDP later became the party of retired military oligarchs with war chests, who captured the party structure from the pro-democracy group that had formed the party. Olusegun Obasanjo (himself a retired military general) was their preferred candidate. This left former Vice-President Alex Ekwueme, who was favoured by the founding members of the party, manoeuvred out of the nomination by the military oligarchs (Mohammed 2010, p. 178; Williams 1999, p. 411).

This scheming was not just for presidential nominations. As the study by Levan et al (2003) indicated, it cut across the gubernatorial, senatorial, and other influential elective offices at sub-national levels. Nevertheless, there were no

lawsuits. The reason for this was not necessarily the effectiveness of the internal mechanisms for resolving disputed primary elections. It was mainly because there was a firm commitment to getting the military out of politics, hence the readiness to stomach any electoral injustice in order to complete the transition to civil rule. The primary elections leading to the consolidation elections from 2003 to 2019³ served as a litmus test for how the internal mechanisms of the parties resolved disputed internal primaries. For instance, there is hardly any documented evidence showing that members who appealed undemocratic nomination using the parties' internal mechanisms received justice. However, a careful observation of the outcome of party primaries reveals that members do not believe in the efficacy of the internal mechanisms for justice. This is evidenced in their scathing remarks on the parties' double standards in adjudicating appeals and their predilection for disqualifying and expelling members who resort to legal redress (See Adonu 2021; *Channels TV* 2021). This is the context in which parties become factionalised and weakened as they engage in protracted lawsuits arising from disputed primary elections.

LEGAL BASIS OF JUDICIALISATION OF NIGERIA'S PARTY PRIMARIES

While judicialised elections are common in both established and transiting democracies, the phenomenon of judicialised party primaries is rare. The ubiquity of judicialised party primaries in Nigeria is alarming. According to the chairman of the INEC, the Commission was sued/joined in 600 court cases that were a product of disputed primaries. Additionally, there were 40 court orders compelling the commission to either add or remove candidates, the last of which arrived the day the Commission announced its decision to reschedule the dates of the 2019 general elections due to logistical challenges (Nigerian Television 2019). In legal circles, adjudicating disputed primaries in Nigeria by the courts has sparked legal debates as legal scholars questioned the role of the court. Some of the leading interlocutors in this debate are Omoregie (2020) and Ugochukwu (2011). But it is worth noting that these scholars (especially Omoregie) drew inspiration from the seminal debate in legal theory by two influential legal theorists, Herbert Hart and Ronald Dworkin, to validate their arguments. These intellectuals represent the two contending traditions in jurisprudence: legal positivism and anti-legal

3 Orji and Uzodi (2012) conceptualised two categories of elections since Nigeria's return to civil rule in 1999: 'transition and consolidation elections'. The 1999 election is the transition election while the five general elections between 2003 and 2019 (every four years) fall under the rubric of consolidation election. The reference here is to the party primaries before each of the consolidation elections where the efficacy of the internal mechanism of resolving disputed party primaries was tested.

positivism (Pavone 2014). Hart, the positivist, argues that the role of the judge and the territory of the court is to state the law as it is and abstain from making laws because that is the province of the executive and the legislature. Conversely, Dworkin, the anti-positivist, maintains that where necessary, the judge and the court should exercise discretionary power during adjudication, which becomes a source of law. As (Dahl 1957) argued, when the court does this, it is seen as an institution playing the role of policymaking. This confers on it the status of a political institution, a status that allows it to address questions that are considered political, while it also plays the role of a legal institution. The Hart-Dworkin debate has gained prominence in legal scholarship such it is now referred to as the Hart-Dworkin debate.

In Omoregie's view, the Dworkean view is problematic, especially as it applies to the Nigerian situation. He perceives the role of the judicialisation in adjudicating party primaries as part of the wave of judicial activism that has swept across the Nigerian electoral landscape, and rightly so. Like the positivists, Omoregie argued that the issue of party primaries is extra-legal. By this, he means a matter that is not within the province of the court to adjudicate. To validate his claim, he distinguished adjudicating election and adjudicating party primaries. As he put it:

election is not just a matter of choosing who governs, but a right-based normative issue (electoral justice), it will be difficult to argue against judicial activism..., as all right based claims include the right to seek redress when aggrieved. To this extent, the involvement and intervention of the courts may be inevitable and unavoidable since judicial activism implies upholding the essence of due process and equal protection under the law.

(Omoregie 2020, p. 222)

He submits that a fraudulent election is justiciable to the extent that it infringes on civil rights and political liberties. However, he thinks differently on party primaries because in his opinion the law is not clear. In his words: 'the issue takes a different turn when there are no clear standards for judicial determination or where the electoral dispute is strictly political, with no clear rules to resolve them'. He then counseled that 'where the latter is the case, opposition to judicial activism may not be entirely misplaced', adding that good examples are party primaries which involve the nomination of candidates for election (Omoregie 2020, p. 222). For Omoregie, such dispute is categorised as a political question; hence, it defies a legal solution/resolution.

His position resonates with that of Fuller and Winston (1978), who posited in their concept of 'polycentrism' (many centres) that disputes such as contested

party primaries have multiple dimensions that cannot be resolved using a legal approach. Omoriegie maintains that there are no clear standards for judicial determination of such disputes. On the contrary, there are clear rules without the court necessarily imposing candidates on the party. The court relies on the provisions in the party's constitution for guiding party primaries, and the legal framework, namely, the Constitution and the Electoral Act. For his part, Ugochukwu's (2011) argument is consistent with Omoriegie's, but he seemed to have made minimal concessions on the involvement of the judiciary. According to him, even though there may be enough justification for the judiciary to intervene and settle important political deadlocks in the country, as it has done on several occasions, the preponderance of graft and prebendalism could make such justification a licence for graft. Based on Nigeria's experience in contemporary times, the graft argument is valid (Onapajo & Uzodike 2014); however, it does not invalidate the provisions of the enabling laws which empower the judiciary to adjudicate on such matters.

The argument that precludes the judiciary from adjudicating on party primaries is problematic because it views the parties as non-juridical entities, which is not true. Where the affairs of political parties are not regulated by national laws this would be understandable. For example, comparative literature has shown that party primaries are regulated by national laws in Germany, Finland, Nepal, New Zealand, and the United States (IDEA 2019; Sunberg 1997; Guaja 2006), even though these countries have solid liberal traditions. Section 221 of the 1999 Constitution (as amended) of Nigeria recognises political parties as the only organisations that can canvass voters for their candidates. The aforementioned countries do not have cases of disputed primary elections that have not gravitated to the serenity of the Court despite the regulation by national laws, owing to their strong democratic culture. The situation is different in Nigeria.

Our argument in this article holds that to extent that Nigerian political parties are juridical entities that are regulated by law, this makes their internal affairs that infringe on the civil liberties and political rights of members a legal question that is justiciable. This provision of the law validates our claim. Although there could be a limit to the law, as Fuller and Winston (1978) argued in their notion of polycentric situation; but this applies only when it is explicitly stated in either the Constitution or the Electoral Act. Secondly, we draw on Raphael's (1970) notion of universal and compulsory jurisdiction to validate our claim of disputed primaries as a justiciable matter. According to Raphael, universal jurisdiction refers to the idea that the state has authority over its territorial boundaries extending to air space and territorial waters. This means the authority of the state applies to all humans and organisations within its territorial boundaries. On the other hand,

compulsory jurisdiction holds that once anyone resides within the jurisdiction of the state, they must compulsorily abide by its laws regardless of whether the law appeals to them or not. Accordingly, political parties are juridical organisations that are bound by the laws of the state. The procedure of party primaries and the election of party executives are clearly spelt out in the Constitution, the Electoral Act, and the constitutions of the various political parties, derived from the aforementioned documents. If these procedures are not carefully followed, this could be a justiciable legal question.

The argument about the non-justiciability of disputed primaries in Nigeria has its provenance in the previous democratic epoch that was truncated by the military in 1983 (the Second Republic, 1979-83). Sections 201 and 202 of the 1979 Constitution provided the basis for universal and compulsory jurisdiction as it concerns regulating the affairs of political parties and the extent of the justiciability of disputed nomination. A good example is the *Onuoha vs Okafor* case of the Nigeria Peoples' Party (NPP). The former (Onuoha) won the primary election to vie for the Owerri senatorial election but was replaced with the latter (Okafor) by the party's nomination elections petition panel. The replacement became the subject of a legal tussle when the Supreme Court was approached to nullify the replacement. In its judgment, the Court cited Section 83(2) of the 1982 Electoral Act which states that, 'where there is doubt as to whether a candidate is sponsored by a political party, the Commission [Federal Electoral Commission] shall resolve same by consulting the leader of the political party concerned'. Accordingly, the Court noted that 'the law is therefore certain as to who is to resolve the dispute where two candidates claim sponsorship'. Following from this, the Court ruled that 'real power to make a choice is, in my view, in the political party through its leader', and the judgment was entered in favour of Okafor. Under this legal regime, Fuller and Winston's notion of polycentrism is applicable because the Electoral Act was clear.

What the Court did was to explain the extent of the justiciability regarding disputed primaries as stated in the legal framework. While the parties were regulated by national laws, the 1983 Electoral Act did not allow the Court to meddle in deciding on the candidates the party could sponsor for election. Hence the Court's judgment, declaring the matter a political question to be resolved by the party.

However, this legal regime changed with the 2006 amendment to the Electoral Act. Section 34 of the Act clearly states that a party that intends to replace/substitute a candidate for election must inform the INEC in writing, not less than 60 days before the election, with 'cogent and verifiable reasons'. Furthermore, Sections 33 and 35 of the 2010 Electoral Act (as amended) state that replacement/substitution/changing the name of a candidate whose name has already been

submitted to the INEC can only be done upon the death or withdrawal of a candidate. In the case of withdrawal, it must be in writing and duly signed by the candidate 45 days before the election. There have obviously been significant changes between the 2006 Electoral Act and that of 2010, which is still in use. These changes make disputed primaries justifiable by stating clear standards for adjudication by the Court(s). These provisions of the law provided the grounds on which aggrieved aspirants, whose names were unlawfully removed after a lawful party primary, approached the Court for justice. The contemporary reality in the subsisting Fourth Republic is replete with instances where these provisions of the law have been subjected to a litmus test.

For instance, Ifeanyi Ararume and Rotimi Amaechi, who won the PDP gubernatorial primaries in Imo and Rivers states but were unlawfully substituted by the party, challenged this decision based on these legal provisions, and the Supreme Court served justice accordingly. The lawsuit initiated by former Vice President Atiku Abubakar challenging his disqualification to vie for the office of the president by the INEC at the instigation of then-President Obasanjo also stemmed from this legal provision. In this case Omoregie's line of argument, which claims that there are no clear standards for judicial determination of disputed primaries, or no clear rules to resolve them, is fundamentally problematic. Herein lie the inconsistency of his argument.

Additionally, the law also clearly stated that the Court should adjudicate on the injustices arising from disputed primaries. Section 87(9-10) of the 2010 Electoral Act (as amended) provides that in the event of a political party failing to comply with the provisions of the Electoral Act and the party rules (i.e., the party's constitution and guidelines for party primaries) in the conduct of its primaries, the aspirants whose rights are infringed can seek redress in the Federal High Court, State High Court, or High Court in the Federal Capital Territory. Furthermore, Section 31 of the same Act confers prosecutorial power on the State High Court or the Federal High Court in the event that a candidate submits a false affidavit or any other false document for election. With respect to false documents, the legal tussle that led to the nullification of the governorship in Bayelsa state on account of certificate forgery has its legal basis in the provision of Section 31 of the 2010 Electoral Act (as amended) (Olabimta 2020).

This new legal regime has also shown the universal and compulsory jurisdiction of the state as it relates to adjudicating disputed party primaries. It also ends the era of polycentrism by extending the extent of justiciability, which includes allowing the Court to determine who is the valid and lawful candidate in the dispute. A careful examination of much of the judicialised party primaries in Nigeria shows that the grounds for their justiciability have their origins in

these provisions of the law. A few examples in this regard will suffice. The crisis in the APC in Rivers State created two factions that produced two gubernatorial candidates ahead of the 2019 general elections (Asadu 2018) that were not a product of lawful primaries as provided in Section 87 of the Electoral Act. On seeing this, the PDP (the ruling party in the state) saw an opportunity to force its strong rival out of the gubernatorial election race and asked the Court to declare the primaries null and void. Section 87(2) of the Electoral Act provides that direct and indirect primaries are the procedures for nominating candidates for election in Nigeria. In line with this, the Court ruled in a landmark judgment that the APC had failed to prove that it conducted primaries that were monitored and supervised by its National Working Committee. Hence, it ordered the INEC not to recognise the party's candidates for the 2019 general elections (Yafugborhi 2019).

Similarly, the party was embroiled in crisis in Zamfara State during its primaries in 2018. The party did not conduct lawful primaries for governorship, national and state assembly elections. It literally handpicked candidates by 'consensus',⁴ who eventually won the election. This was challenged by aggrieved aspirants. In a landmark judgment, the Court held that the party failed to conduct lawful primaries. Consequently, it nullified all the elections won by the party in the state and declared runner-up PDP as the winner of those elections (Adesomoju 2019). In these instances, the Court exercised its prosecutorial power to nullify unlawful party primaries. This is consistent with our claim of justiciability in contradistinction to Omoregie's political question/non-justiciability argument.

Lastly, in what appears to be conceding his initial line of argument in the debate, Omoregie states that since much of the problem that gave rise to party primary litigations in Nigeria is a product of intra-party conflict and lack of internal democracy within the party, the courts should focus more on understanding the internal conflicts in the party. This indicates that he is not dismissing unequivocally the role of the judiciary in adjudicating disputed primaries. Instead, he seems to provide an alternative option in dealing with the problem. Nevertheless, it is clear from the judgments that Court entered its judgment with full understanding of the disputes. It critically examined the facts before it as presented by counsels, in line with the provisions of the law, before ruling on the matter. On this basis, it is plausible to argue that the intervention of the judiciary is premised on the provisions of the law to defend rights that have been infringed. Accordingly, this has shaped, reshaped, and positively impacted electoral politics in contemporary Nigeria.

4 While the consensus method is used in a democracy to engender stability, as demonstrated by Arendt Lijphart in his 1969 seminal essay, in Nigeria political parties use it as a way of imposing candidates on the party during primary elections. See also Aziken et al. 2018.

CONCLUSION

The article analysed the judicialisation of party primaries in contemporary Nigeria. The interrogation of this issue became necessary considering the spate of disputed primaries elections that have necessitated aspirants' reliance on an external arbiter (the judiciary) to obtain justice when the internal mechanisms of the party fail. These disputes have created factions within the parties, hence affirming the concerns expressed by pioneering theorists on the baneful effects of party government. In legal theory, scholarly debate questioned the involvement of the judiciary in resolving disputed primaries, referring to it as non-justiciable. Contrary to this, our findings, which drew from the legal framework regulating party primaries, the constitutions of the parties, and Raphael's (1970) notion of universal and compulsory jurisdiction, show that the extent to which disputed primaries election is justiciable varied, due to the legal regime. In the Second Republic, the universal jurisdiction was limited, which meant that there is an extent to which the judiciary can meddle in such disputes. As such, it was a non-justiciable polycentric situation.

However, a change in the legal regime after the 2006 amendment of the Electoral Act extended the universal jurisdiction of the judiciary, which then made disputed primaries justiciable. The law made elaborate provisions for this, allowing aggrieved aspirants to seek redress in the relevant courts, a development which was not well appreciated by the non-justiciability exponents. While adjudicating on disputed primaries before it, the judiciary's role as the bellwether of democracy has seen it act as a legal cum political institution. In the latter sense, it became a policymaking institution that has shaped, reshaped, and positively impacted on electoral politics in Nigeria.

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