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Transitional Justice, Judicial Accountability and the Rule of Law - A Nigerian Case Study

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(LL.B, BL, LLM)

**SUBMITTED IN FULFILMENT OF THE REQUIREMENT FOR
THE DEGREE OF DOCTOR OF PHILOSOPHY**

SCHOOL OF LAW

FACULTY OF LAW, BUSINESS AND SOCIAL SCIENCES

UNIVERSITY OF GLASGOW

JANUARY 2009.

ABSTRACT

This study investigates accountability of the judiciary for its role in authoritarianism as an integral part of accountability in transitions. It argues this is an important but relatively neglected aspect of transitional justice theory and state practice. The thesis of the research is that the judicial institution, as the third branch of government ought to be held accountable for its role in past governance in transitional societies. This is particularly important to obtain comprehensive accountability. It is also relevant to the crucial task of institutional transformation which is a key objective of transitional justice.

The paucity of critical perspectives on the role of the judiciary during a society's troubled period would appear to be because of the view that it lacks a distinct role in governance. This suggests that the judicial function was inconsequential or judicial outcomes were invariably imposed. In view of the acknowledged important role of the judiciary in both liberal and democratising polities all over the world, it is argued that the purview of transitional justice mechanisms should, as a matter of policy, be extended to scrutiny of the judicial role in the past.

There is the need to publicly scrutinise the course of judicial governance in post-authoritarian societies as a cardinal measure of institutional transformation. Following on the recognition that the judiciary in post-authoritarian contexts will be faced with enormous challenges of dispute resolution, restoration of the rule of law, as well as a key role in policy determination and governance, its institutional transformation following a period of siege is critical to the survival of democracy and the rule of law.

The mechanism of choice identified in this research for scrutiny of the judicial function in transitional societies is the truth commission. The research proposes extending the purview of *truth-telling* processes as a measure of public accountability to the judiciary in post-authoritarian contexts. The research adopts a comparative perspective but to contextualise the argument, it focuses specifically on judicial governance and accountability for the past in Nigeria's transition to democracy after three decades of authoritarian rule.

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ACKNOWLEDGEMENTS

It is virtually impossible to pay tribute to those one is lucky to have around in the course of following one's heartfelt aspirations. This is one such case. But it is important to offer a few words to acknowledge the contributions of some of those who supported me in this work. My special gratitude goes to Prof Scott Veitch, my Main Supervisor. My indebtedness remains profound. He is simply the best. What would I have done without him? His research guidance is not only thorough, but delivered in a most inspiring and gentle manner. I benefited and continue to benefit immensely from his pastoral support. In this regard also, I must remain indebted for the supervisory and pastoral support of my second supervisor, Professor Jim Murdoch.

I have also been very lucky to be at Glasgow simultaneously with a post-graduate research team commendably led by Professor Emilios Christodoulidis. His support and continuing role as my 'shadow' supervisor remains one of the treasured 'value-added' (of which there are two numerous to list here), I have benefited from the School of Law, University of Glasgow. I remain obliged. It is equally important to express my gratitude to all the administrative and support staff. Dr. Kay Munro, Mrs Lorna Brown, Susan Holmes, Kirsty Davidson, Claire Manning and Alison Craig deserve special mention. I am especially grateful for the untiring patience and prompt assistance of Rona Cameron.

I received invaluable moral and financial support through the good offices of my former boss, Professor Yemi Osinbajo (SAN) and Ade Ipaye Esq. Don Ferencz of the Planethood Foundation (New York) also came to my aid when financial challenges threatened the actualisation of this research. The School of Law, University of Glasgow Research Scholarship gracefully came in as a final relief from financial worries affording me the opportunity to devote full attention to this research. For this, I remain eternally grateful to Emilios and Scott for encouraging me to apply.

I treasure the moral support of Uthman and Mutiat Adeyemi, Dr. Kaamil Zakariyyah, Prof. Mashood Baderin, Dr. Ismail Ibrahim, Dr. Abdulhakeem Mobolaji, Shafi Elegebede, Micheal Glesson and Yasir Uthman. Their friendship has been invaluable in the course of my studies in the United Kingdom and Northern Ireland.

I thank Khadijah, Aisha and Maryam for their forbearance. To my dear wife Karimah, I remain ever grateful for her constant engagement with me on the theme of this research and her patience and understanding for my long periods of study and sometimes withdrawal from all the little things she treasures. Her support has been unstinting all these years.

Many others contributed to the success of this programme. These include Prof Tom Mullen and the wonderful staff of the School of Law, University of Glasgow. They have all, in one way or the other, made my sojourn in these very cold parts quite a warm one. Others too numerous to mention are not forgotten. Mrs Oyelola, the Chief Librarian of the Rotimi Williams Legal Resource Centre, Lagos, ensured I got all the Nigerian cases adverted to and timely too. I remain forever indebted.

AUTHOR'S DECLARATION

I declare that this research has been carried out and the thesis composed by me and has not been accepted in fulfilment of the requirements of any other degree or professional qualification.

Signed.....

Date.....

INTRODUCTION
TRANSITIONAL JUSTICE, JUDICIAL ACCOUNTABILITY AND THE RULE
OF LAW - A Nigerian Case Study

This research investigates accountability of the judiciary for the past in political transitions from authoritarian rule. The inquiry into the role of the judicial function sets out to demonstrate the relevance of incorporating accountability of the judiciary for the past into the transitional justice project through a public mechanism; the truth-seeking process. This study advances a robust argument that comprehensive accountability in the transition to democracy and the rule of law should be a key objective in transitional societies. It argues that scrutiny of the role of the judiciary for past governance is an important but relatively neglected area of transitional justice theory and state practice. Such scrutiny of the judicial role in the past ought to be pursued as a matter of public accountability. To contextualize the research, it focuses on judicial governance and accountability in Nigeria's transition to democracy after decades of authoritarian rule.

The thesis of this research is that the judicial institution, as the third branch of government ought to be held accountable for its role in governance during the period of authoritarianism. This is particularly important to obtain comprehensive accountability. It is also relevant to the crucial task of institutional transformation which is a key objective of transitional justice.

The research argues that critical scrutiny of the judicial function for its previous exercise of power, specifically in an authoritarian context, is made all the more important by the critical role the judiciary plays in post-authoritarian societies all over the world. This is especially the case with the growing incidence of judicialisation of politics and the increasing visibility of the judicial function in governance.

The paucity of critical perspectives on the role of the judiciary during a society's experience of authoritarian rule may be because of the view that it lacks a distinct role in governance. The lack of focus on accountability for the judicial role during an authoritarian period of a society's history suggests that the judicial function was inconsequential, non-definitive or judicial outcomes were invariably imposed at the time. Yet, in view of the acknowledged central role of the judiciary in both liberal and democratising polities all over the world, it is argued that the purview of transitional justice mechanisms should, as a matter of principle and policy, be extended to scrutiny of the judicial role in the past.

In particular, it will be argued that there is the need in post-authoritarian societies to publicly scrutinise the course of past judicial governance as a cardinal measure of institutional transformation. Such institutional transformation is particularly important because the judiciary in post-authoritarian contexts will be faced with enormous challenges of dispute resolution, restoration of the rule of law, participation in policy determination and governance. In other words, transformation of the judiciary following a period of authoritarian rule is critical to the survival of democracy and the rule of law. The mechanism of choice identified in this research for scrutiny of the judicial function in transitional societies is the truth commission which has become an important feature of most transitional justice processes in post-conflict and post-authoritarian societies.

RESEARCH AIMS

The following are the aims of this research:

- To demonstrate the relevance of incorporating accountability for the judicial role in governance during an authoritarian period into transitional justice processes at times of political change.
- To show that the role of the judiciary in transitional societies is of a nature that can not and should not be ignored.
- To demonstrate that public accountability of the judiciary in transitional societies through the mechanism of the truth-seeking process provides opportunity for securing comprehensive accountability of governance in a society's authoritarian period.
- To demonstrate that across-the-board transformation of state institutions, an important aspiration of transitional processes, would be virtually impossible without incorporating the third branch of government, the judiciary, into the accountability process.
- To make an original contribution to the fledgling but multi-dimensional field of transitional justice and the rule of law.

STRUCTURE

Considering the various meanings the concept of transition evokes, it is germane to clarify what this thesis will not be doing. This thesis is not concerned with transitional justice in the abstract. Rather, it is concerned with evaluating what it means to engage with the judiciary as the third and vital branch of government in

societies experiencing political change. In other words, this study explores the nature of transitions through concrete and time-bound analysis of specific institutional dynamics and social expectations with particular reference to the judiciary. Proceeding on this approach, this study emphasises the point that the judiciary wields considerable power and is an integral part of government in the modern state.

Similarly, it is relevant to clarify the sense in which this study explores accountability of the judiciary. In this regard, it is important to state from the outset that while the relevance of traditional mechanisms for accountability of the judiciary (including congressional hearings, parliamentary sovereignty, appellate jurisdiction, removal of judges, etc) are important to foster the proper functioning of the judiciary, they are not the route explored here. Rather, this thesis proposes a fundamental departure from these institutionalised forms principally on the argument that transitional societies are not normal societies. In any event, a major premise of the thesis is that these traditional mechanisms for accountability of the judiciary (for any of a myriad of reasons) did not, at the time of authoritarian rule, do what they were designed to do. Thus, there is the need to reach beyond them for an effective accountability mechanism in the context of political transition from authoritarian rule.

In similar vein, this thesis will not subscribe to the current transitional justice approach to judicial transformation. This approach, reflected in the attitude of international agencies' to judicial transformation in post-authoritarian and post-conflict societies emphasises training of old and new judges, provision of support infrastructure for courts (human and material), passing of laws and constitutional provisions for judicial integrity and so on characteristic of. It is not the argument that these measures are irrelevant to attaining the objective of institutional transformation. They clearly are required depending on the particular circumstances of the relevant society.

However, the argument pursued here is that the objective of institutional transformation of the judiciary can only be achieved where there has been public accountability, in the first instance, for the specific role the judiciary played as a branch of government in the pre-transition period. Public accountability for the judicial role in governance during the authoritarian period (offered through the truth-seeking mechanism), it is contended, provides opportunity to obtain clarity on the nature of judicial governance in the past. Acknowledgement of the propriety or otherwise of the overall exercise of judicial power, provided through

the truth-seeking process, is a critical step towards institutional transformation in the way it ventilates what went wrong in the past.

The preferred approach of this study is to provide a context to ground the arguments advanced on the salience of accountability of the judiciary in transitional societies for past governance. This approach is adopted because of the position taken in the study that the current attitude to accountability of the judiciary (for the past) in transitional societies is based on traditional notions on the judicial function in liberal democratic systems. Thus, there is a need to draw attention to a specific societal context in which to embed the arguments for the validity of a more critical approach to the judicial role in governance at all times and especially during periods of political change. It is anticipated that the contextual approach draws attention to the needs and expectations of the transitional society which existing paradigms in democratic societies may fail to capture.

In line with the above-stated approach, Chapter One opens with the historical, political, social and economic factors that set the stage for political change in Nigeria. The chapter traces the circumstances that led to the truth-seeking process as part of the transition from military to civil democratic rule in the country. The focus here is on the work of the Human Rights Violations Investigation Commission, (the Oputa Panel) established by the government of President Olusegun Obasanjo shortly after his inauguration in 1999. The chapter examines the formation, mandate and legislation of the truth-commission, the Oputa Panel. The Oputa Panel was established as the main transitional justice mechanism to recover the truth and obtain redress for victims of almost three decades of gross human rights violations committed by successive military regimes in the country. There is specific reference to the role of the press, the conduct of public hearings and the recommendations of the Panel. There is also reference to the *Oputa Panel Case*.

The case challenged the legality and powers of the Oputa Panel as a truth-seeking process. It played a significant part in the eventual refusal of the initiating administration not to implement the Panel's recommendations is highlighted here though dealt with in greater detail later in the study. The chapter also describes the problems that the truth-seeking process contended with as well as the aftermath. Specifically, it speaks to the public reaction to the non-publication and non-implementation of the Oputa Panel's Report. It emerges that the Oputa Panel, in as much as it attempted to establish accountability for gross violations of human

rights in the country, to make recommendations for avoiding a recurrence and to propose important institutional reforms for creating a new society, did a commendable job and was well-received in the country.

However, a significant issue that emerges, and with which there is substantive engagement in this study, is the critical gap in the work of the Oputa Panel. In particular, like virtually every other truth-commission before it (with the notable exception of the South Africa TRC), it failed to engage directly and specifically with the role of the judiciary in the suffering that military rule brought on the Nigerian society. This was despite the fact that the judicial institution was at all times an active participant in governance in the country and the only one with a continuous and unabridged institutional memory or existence in the country's post-independence history which is of temporal relevance in this research.

Ironically, the Oputa Panel itself as a transitional justice mechanism did not get away lightly with its perpetuation of neglecting accountability of the judiciary for the past. The judiciary provided (presumably unwittingly) the excuse for the non-implementation of the Oputa Panel's otherwise laudable work. Thus, critical evaluation of the Oputa Panel's work provides an essential context for the need for new thinking on the significance of integrating accountability for the judicial role in the past into transitional justice processes. Such integration is required to achieve comprehensive accountability and vindicate the right of society to truth.

In Chapter Two, the study moves from the contextual examination of the truth-seeking process in the Nigerian experience to the normative and theoretical consideration of the central theme of the research, accountability of the judiciary for the past. It examines the accountability gap stemming from the lack of focus on the role of the judiciary in the past. The chapter lays out the theoretical basis for the main argument on accountability of the judiciary for its role in past governance in transitional societies. It argues a case for extending the purview of truth-seeking processes to the judiciary in post-authoritarian contexts.

The discussion in the chapter highlights the existence of a tension in the interface between the truth-seeking process and efforts to call the judiciary to account. The tension originates from the view that such accountability normatively undermines the integrity of the judiciary as a key institution of the state (particularly in transitional societies), while the path of non-accountability challenges the viability of the truth-seeking mechanism in achieving transitional justice. It is argued that the adoption of an approach that accords proper appreciation of the transitional context and fundamental principles of international

law (specifically in the area of human rights and humanitarian law) significantly eases the tension. More importantly, the chapter further contends that inherent in this approach is the potential for institutional transformation and re-legitimisation of the judiciary which had become delegitimised by years of acquiescence to authoritarianism.

The chapter goes on to challenge arguments based on traditional notions of judicial independence and allied principles (designed for the proper conduct of the judicial function), advanced to repel the case for accountability of the judiciary for the past. While conceding the relevance of the principle of judicial independence, it is argued this principle (or any other for that matter) should not constitute a shield against accountability of the judiciary in any social milieu. It is further advanced that the principle is especially not sufficient to ward off accountability of the judiciary for its role in governance in formerly authoritarian societies. This is because governance during the authoritarian period brought untold suffering on the society for which full institutional accounts are required at the time of political transition to achieve institutional transformation.

Utilising the earlier stated contextual approach, Chapter Three seeks to embed the theoretical framework for accountability of the judiciary for the past (set up in Chapter Two) in the transition experience of Nigeria. The chapter introduces an additional foundational argument for accountability of the judiciary for its role in a period of authoritarianism by suggesting a constitutional premise for it. This additional premise is principally informed by the deliberate adoption of a written constitution as the fundamental instrument for delimiting the institutional infrastructure of the heterogeneous post-colonial state. Chapter Three also presents critical analysis of the bi-dimensional issues that necessitate accountability of the transition judiciary in the context of Nigeria's political transition. These are of a legal-jurisprudential and sociological nature. The chapter concludes that the accountability gap with respect to the role of the judiciary saddles the transitioning society with an untransformed judiciary. The absence of transformation in the wake of political transition in the country threatens not only the rule of law, but also the transition project as a whole.

Chapter Four reflects an important shift in the focus of this thesis. Up to this point, the focus is on the past. A major premise for the imperative of accountability of the judiciary for the past, it is argued, is the need for comprehensible accountability. The existence and functioning of the judiciary as the third arm of government when accountability for governance is in issue makes

it an indispensable candidate for scrutiny. However, from here onwards, attention is directed to another compelling reason for demanding accountability of the judiciary for the past, namely the effect of unaccountability on the judicial function in the present. To demonstrate the claim in this research that the judiciary plays a critical role in governance, there is an analysis of the role of the Nigerian courts in mediating tensions that have emerged in the post-authoritarian transition period.

The significance of the post-authoritarian role of the judiciary is explored through the analysis of its mediation of crucial constitutional issues attached to the process of political change. Specifically, the chapter examines the jurisprudence emanating from the courts on some serious inter-governmental disputes as well as decisions that touch upon individual and collective rights particularly connected to the transition process. It finds that the judiciary has recently been the focus of both national and international attention as a forum that offers hope for the resolution of ongoing disputes and contestations in the public arena. Has the judiciary been instrumental to furthering or impeding the transition to democratic rule, and respect for human rights and upholding the rule of law? What has been the nature of judicial intervention in ongoing tensions that emerge from the interplay of a centrifugal federalism and dynamics of political transition in a heterogeneous, resource-rich but impoverished polity? These questions constitute the foci of Chapter Four.

There is an incremental resort, by the political branches of government as well as individuals, to the judiciary for the resolution of administrative and policy disputes as well as rights claims in post-authoritarian transitions. The examination of this phenomenon is the focus of Chapter Five. Progressing on the foregoing theme, it is argued that the increasing incidence of direct judicial participation in policy-making, in transitioning polities in particular, further validates the case for institutional accountability of the judiciary (along with other institutions of the state) in a post-conflict or post-authoritarian polity. The argument is made that accountability of the judiciary for the past in transitions is crucial, in view of the increasingly decisive role the exercise of judicial power tends to play in policy-formulation and governance in the present.

Chapter Six presents a critical evaluation of the prevalence of the judicialisation of politics in Nigeria. The chapter highlights public as well as institutional responses to this phenomenon as it takes centre-stage in the country's transition to democratic rule. The Nigerian experience, it is argued, provides contextual

foundation for suggesting the need for more attention by legal theorists to the relevance of public opinion in theoretical analyses of the judicial function. Such closer attention, it is contended, can only enrich the legal academy. This account of the Nigerian experience also suggests that a number of situational dynamics, prominent among which is the ceding of power to the judicial branch by political actors for strategic reasons situate the judiciary as a powerful force for social reconstruction, entrenchment and stabilization of democratic ethos in post-authoritarian transitions.

It is important to make clear that this study does not generally take issue with the propriety of the judiciary taking on overly political questions, as does the work of some leading legal, political and constitutional theorists. If anything, it supports it particularly in the context of transitional societies. What it challenges is the narrower issue of the propriety of the judiciary taking on such a critical role in governance where it bears complicity for the authoritarian aspect of a society's history for which it is not held accountable. As the preceding overview of the research suggests, the challenge derives from moral as well as transformative perspectives. The Nigerian experience of the pre- and post- authoritarian judicial role in governance strongly commends the view that accountability of the judiciary for the past at times of political change ought to form a critical and integral aspect of transitional justice processes. Such incorporation is crucial both for comprehensive institutional accountability and transformation.

Chapter One

**THE OPUTA PANEL: TRANSITION, TRUTH AND ACCOUNTABILITY OF
THE JUDICIARY IN NIGERIA**

1. INTRODUCTION

In many ways, Nigeria typifies the legacy of British colonialism in sub-Saharan Africa. In the region, the country's heterogeneity, deriving from its colonial founding, is unique. Nigeria's huge natural resources have not been translated into development for its teeming population. Despite being one of the first countries to gain independence in West Africa, it has had a severely chequered history of sustained development and democratic governance. Most of its post-independence experience of statehood has been under authoritarian military (mis) rule. Successive military regimes perfected plunder, compromised all institutions of state and generally directed them towards flagrant violations of human rights of the people.¹

At the dawn of its transition to civil rule, the Federal Government of Nigeria attempted to engage with this past. The main mechanism for this purpose was the establishment of the Oputa Panel. A substantive overview of the state of Nigerian society and institutions is required for setting out a situational context for the thesis on the salience of accountability of the judiciary for the past in societies in transition. An examination of the truth-seeking process provides a composite overview of governance in the pre-transition period.

This chapter introduces the background to the truth-seeking process in Nigeria. The discussion draws attention to the formation, mandate and legislation of the Oputa Panel and its work. Special mention is made of the petition on the murder of Dele Giwa. This petition resonated during the life of the Oputa Panel and the litigation that arose from it played a central role in the non-release and non-implementation of its recommendations. The focus then turns to an analysis of the problems that challenged the work of the Oputa Panel. The chapter also provides an evaluation of the aftermath of the truth-seeking process. The discussion concludes that the truth-seeking process, like many others in transitioning polities, did not extend its focus to accountability of the judiciary for its role in past governance. The process thus left a significant gap in the accountability process for which *truth-seeking* was commissioned.

¹ Foreword by the Chairman, *Synoptic Overview Oputa Panel Report: Summary, Conclusions and Recommendations* (2004) available at: <http://www.nigerianmuse.com/nigeriawatch/oputa/> (13 July 2008). The site also has the full report.

2. THE CONTEXT

It has been recognised that complexities of the environment which led to the establishment of any Truth Commission will impact on how that commission addresses its mandate. Andrew argues that Truth Commissions not only produce, but are also products of ‘grand national narratives’ in the first place.² On this view, it is germane to examine the background to the establishment of any truth-seeking process. In the context of this research, an examination of the context of the work of the Oputa Panel facilitates an understanding of the dynamics of the environment within which it carried out its assignment. This understanding is important to the case this research makes for the relevance of the inquiry into accountability of the judiciary for the past in transitioning polities.

Nigeria is a multi-religious and multi-ethnic country.³ It achieved independence from British colonial rule on 1 October 1960. On 15 January 1966, the country experienced a military take over that was followed by another, six months later. The events that followed the second military coup led to a thirty-month civil war from 1967 to 1970. Subsequently, the country was subjected to nearly thirty years of authoritarian rule under seven military regimes and numerous failed coup attempts. Military regimes in Nigeria commonly imposed emergency rule. Human rights abuses were prevalent.⁴ The population suffered repression, state-sponsored murder, restrictions on civil liberties and other forms of human rights violations. There was widespread use of lethal force by security agents and the police against the civilian populace. Cases of public execution in defiance of due process included that of Ogoni Rights activist and renowned author, Kenule Saro-Wiwa and some other members of the Movement for the Survival of the Ogoni People (MOSOP) referred to as the ‘Ogoni nine.’⁵

² M Andrews “Grand National Narratives and the Project of Truth Commissions: A Comparative Analysis” (2003) 25.1 Media, Culture and Society 46.

³ There are reputedly over 250 ethnic groups in the country. See for example J Morris “Nigeria” available at: <http://www.redress.org/studies/Nigeria.pdf> (10 January 2006), United Nations Development Programme “General Information: Nigeria” available at: <http://www.ng.undp.org/modules.php?name=News&file=article&sid=25> (14 March 2006) and C Obiagwu and C A Odinkalu “Nigeria: Combating Legacies of Colonialism and Militarism” in A A An-Naim *Human Rights under African Constitutions: Realizing the Promise for Ourselves* (University of Pennsylvania Press 2003) 211 at 212.

⁴ See generally note 2 supra.

⁵ Amnesty International “Nigeria: Time for Justice and Accountability”. Available at: <http://www.amnestyinternational.org/library/print/ENGAFR440142000> (10 February 2006). For a more detailed account of the judicial murder of the Ken Saro-Wiwa and some members of the Movement for the Survival of the Ogoni People (MOSOP) see A Maja-Pearce *From Khaki to Agbada: A Handbook for the February 1999 Elections in Nigeria* (Civil Liberties Organisation Lagos 1999) 12-17.

The Hobbesian dialectic of the pre-social contract period appeared to have found expression in the country in not a few instances. The rule of law took flight in the emergent breakdown of law and order. The administration of General Abacha (November 1993-June 1998) gained notoriety for been the most brutish.⁶ The rule of law had become so severely compromised that Justice Olajide Olatawura whose judicial career was largely spent under military authoritarian rule, observed that

During the Military regime, the law became weak as a result of ouster and suspensions of the constitution and existing laws which gave us liberty and freedom. The constitutional duty to protect the liberty and freedom of the citizens by the state was regularly breached by those entrusted with that sacred duty...The rights of citizens were not only ignored but trampled on.⁷

Significantly, he made this observation in his capacity as the Administrator of the National Judicial Institute, the body responsible for the continuing professional education of judges in the country shortly after the transition to civil rule in the country. The occasion was the most important annual convocation of Nigerian judges. Thus, the judiciary, as one of those ‘entrusted with that sacred duty,’ as would be argued in this research, was much implicated in and bears complicity for the violation of human rights and misgovernance in the country.

A number of issues call for accountability of the judiciary for its role in governance during the authoritarian period. Thousands of citizens languished in prisons awaiting trials for years on remand warrants signed by judges. The criminal justice administration system, of which the judiciary formed an important part, was in shambles. As will be seen in the admission of the judiciary in some of the cases discussed later in this thesis, civil matters sometimes took decades to get to conclusion.⁸ Many died awaiting justice without official acknowledgment or compensation. Military legislation made in violation of due process and human rights were validated by the judiciary. The military subverted and subjugated the

⁶ P C Aka “Nigeria since May 1999: Understanding the Paradox of Civil Rule and Human Rights Violations in Nigeria under President Olusegun Obasanjo” (2003) 4 San Diego International Law Journal 209, 223.

⁷ Justice Olajide Olatawura, retired Justice of the Supreme Court of Nigeria and erstwhile administrator of the National Judicial Institute, *Welcome Address at the 1999 All Nigeria Conference of Judges’ Conference* (1 November 1999) in National Judicial Institute, 1999 All Judges Conference xxv (2000) quoted in O Oko “Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria” (2006) 9 Brooklyn Journal of International Law 10, 11.

⁸ See *Opata Panel Report Vol.3 Chapter 7*, Oko supra at 39 and O Osinbajo “Lessons Learned about Fighting Judicial Corruption” in *Global Corruption Report 2007: Corruption in Judicial Systems*. (Cambridge University Press Cambridge 2007) 146, 147.

constitution and received judicial sanction in many cases. Thus, the judiciary was meant to respond to these and other allegations bearing on human rights violations and misgovernance. Significantly, the findings of the Oputa Panel supported the jurist's observations yet the former neglected accountability of the judiciary for the past in the truth-seeking process.

On the economic front, the country's dependence on oil had not helped matters. The country's 35.9 billion barrels of proven reserves places it at the vantage position of being the largest producer of oil in Africa and tenth largest in the world.⁹ Seizing on soaring oil prices in the late 1960s and early 1970s, successive military regimes quickly shifted emphasis from agriculture to crude oil exploitation. The government replaced agriculture as the leading foreign exchange earner; a situation which has persisted since then. Crude oil has come to account for over 90% of the country's total foreign earnings.¹⁰ Most of the oil reserves are located within the country's Niger Delta area, in the south. But most of the area lacked basic infrastructure.¹¹ It struggled with a myriad of problems. In order to contain expressions of social discontent, successive military regimes in Nigeria militarised the Niger Delta. Ethnic and regional militia sprung up and have remained in this area especially and the country as a whole. The ethnic militias mainly demand more autonomy for their respective areas in the virtually military unitarised federal polity.

The military hegemony regarded the country as 'conquered territory,' and its vast resources as 'spoils of war.'¹² Under their reckless governance, the country transformed rapidly from one of the richest nations, to one of the poorest.¹³ Although military incursions into power were proclaimed to be in pursuit of economic rectitude, unity and peace of the country,¹⁴ arguably none of these was achieved by the numerous military regimes.¹⁵ Rather, as will be discussed further

⁹ Energy Information Administration *Country Analysis Briefs: Nigeria* available at: <http://www.eia.doe.gov/emeu/cabs/Nigeria/pdf.pdf> (13 July 2008) 4.

¹⁰ World Bank *Nigeria Country Brief* available at: <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/NIGERIAEXTN/0,,menuPK:368906~pagePK:141132~piPK:141107~theSitePK:368896,00.html> (13 July 2008).

¹¹ UNDP- *Nigeria Niger Delta Human Development Report* p.14 (United Nations Development Programme Abuja 2006) available at: <http://hdr.undp.org/>. (7 November 2006).

¹² *Foreword by the Chairman* note 1 supra at 2-3.

¹³ *Ibid.*

¹⁴ See for example the Coup speech that heralded the regime of General Ibrahim Babangida on 27 August 1985 available at [Againstbabangida.org](http://againstbabangida.org/): http://againstbabangida.com/docs/ibb_coup_speech.htm (7 November 2006) and G N K Vukor-Quarshie "Criminal Justice Administration in Nigeria: Saro-Wiwa in Review (1997) 8 Criminal Law Forum 87, 104.

¹⁵ T I Ogowewo "Why the Judicial Annulment of the Constitution of 1999 is Imperative to the Survival of Nigeria's Democracy" (2000) 44 *Journal of African Law* 135, 141

in subsequent chapters, corruption was institutionalised by the military¹⁶ and has remained a formidable challenge to development and good governance in the country.

Quite apart from these internal factors, the Oputa Panel also had an ‘international dimension’ to its establishment.¹⁷ The violations of human rights in the country were incompatible with various international human rights covenants and instruments to which Nigeria was a party. During the military era, the country had ratified the International Covenant on Civil and Political Rights (ICCPR)¹⁸ and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Other international human rights instruments the country had signed up to and ratified included the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Discrimination Against Women (CEDAW), the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Prevention and Punishment of Genocide, the Slavery Convention of 1926 and the Convention and Protocol Relating to the Status of Refugees.

The country’s obligations to investigate and compensate victims of gross violations of human rights derived from the foregoing instruments and others, like the Code of Conduct for Law Enforcement Officers and UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. At the regional level, the country was one of the first to sign and ratify the African Charter on Human and Peoples Rights (African Charter).¹⁹ Nigeria had signed the African Charter in 1982 and enacted it as municipal legislation in 1983. In their combined effects, these instruments require that the country observes the highest standards of respect for individual, child, gender, solidarity and group rights among others. This contrasted sharply with the wanton disregard and violations of human rights that was a permanent feature of successive military regimes in the country.

At various times, the country came under international censure for its appalling human rights record. The UN Commission on Human Rights found ‘fundamental inconsistencies between the obligations undertaken by Nigeria under the covenant

¹⁶ The country ranked as the fifth most corrupt country in a worldwide survey of 85 countries in 1998 during the last few months of military rule. Transparency International: *Transparency International Corruption Index 1998* available at: http://www.transparency.org/news_room/latest_news/press_releases/1998/1998_09_22_cpi (7 November 2006).

¹⁷ *Human Rights Violations Investigations Commission Report* (Oputa Panel Report) Volume 2.

¹⁸ Adopted 16 December 1966 and entered into force 23 March 1976 (1966) 999 UNTS 171.

¹⁹ Adopted 27 June 1981 and entered into force on 21 October 1986 21 International Legal Materials (1982) 58.

to respect, promote, protect and ensure the rights guaranteed under the covenant and the implementation of those rights in Nigeria.’²⁰ From the prevailing state of affairs, the country acquired pariah status with attendant negative economic, social and political consequences.

It is thus understandable that a groundswell of discontent developed against military regimes in the country particularly in the 1990s. In the summary of its Report, the Oputa Panel rightly noted that

It is in the struggle against military rule that the more immediate origin of the Commission is to be sought, for the democratic struggle kept the issue of arbitrary rule and state-sponsored violence, exemplified in many cases by gross violations and abuses of human rights, on the agenda of political discourse in the country...the military leadership and culpable state functionaries must ultimately be held accountable...the transition would be incomplete...if the past was not confronted.²¹

3. THE OPUTA PANEL: FORMATION, LEGISLATION AND MANDATE

The mysterious death of General Sanni Abacha (then military Head of State) in June 1998, translated into a fortuitous opportunity for new beginnings in the country. It led to the emergence of Abacha’s Chief of Defence, General Abdusalam Abubakar as the Head of State. The latter was unequivocal in his plan to return the country to civil rule without further delay. As an important part of the process, General Abubakar retired some prominent members of the military who had held political office and repealed a number of military decrees. The country also adopted a new constitution.

Nigeria returned to civil rule on 29 May 1999, following the successful completion of the transition program initiated by General Abdusalam Abubakar in his less than one year in office. The handover ended years of authoritarian military rule and several aborted civil transition programmes. Chief Olusegun Obasanjo, a retired general and former head of state emerged as President. His election was accepted internationally, though largely criticized at home. It was felt that he was a candidate of the old guard in the military. The election was marred in some cases by fraud and it received knocks from local observer groups and few international ones too. His opponents headed for the courts though his victory was

²⁰ *Oputa Panel Report* note 17 supra. Chapter 3, p. 12. Chapter 6 of the same volume provides concise details of various international human rights over-sight bodies’ findings and recommendations on flagrant human rights violations in the country (at 21-58). See also Economic and Social Council Commission on Human Rights Fifty-third session Items 8 and 10 of the provisional agenda E/CN.4/1997/62 (4 February 1997).

²¹ *Oputa Panel Report* Volume 1 Chapter 2, 24

upheld by the Supreme Court of Nigeria. It would appear the world was however relieved the military was on its way out and thus the relatively high support for the flawed elections.

With the advent of civil governance and democracy, it was only natural that some measures would be required to redress the serious feelings of social discontent in the country. The truth-seeking process was the principal mechanism, the only other measure been the largely symbolic lustration of ‘political’ military officers. One of the very first executive declarations made by President Olusegun Obasanjo was his decision to set up a truth and reconciliation commission. The Human Rights Violations Investigation Commission (the Oputa Panel)²² was established by Statutory Instrument No.8 of 1999²³ under the hand of President Obasanjo. The statutory instrument was made pursuant to Tribunals of Inquiry Act (TIA).²⁴ The Oputa Panel’s mandate as amended was to:

- a) ascertain or establish the causes, nature and extent of all gross violations of human rights committed in Nigeria between the 15th day of January 1966 and the 28th day of May 1996;
- b) identify the person or persons, authorities institutions or organizations which may be held accountable for such gross violations of human rights and determine the motives for the violations or abuses, the victims and circumstances thereof and the effect on such victims and the society generally;
- c) determine whether such abuses or violations were the product of deliberate state policy or the policy of any of its organs or institutions or whether they arose from abuses by state officials of their office or whether they were the acts of any political organization, liberation movement or other groups or individuals;
- d) recommend measures which may be taken whether judicial, administrative, legislative or institutional to redress past injustices and to prevent or forestall future violations or abuses of human rights;

²² This is the official title adopted by the body and under which its report was submitted. Initially styled “The Human Rights Investigation Panel”, it was later renamed “The Judicial Commission for the Investigation of Human Rights Violations in Nigeria”. See *Oputa Panel Report*, note 17 supra at 19.

²³ As amended by Statutory Instrument No.13 of 1999.

²⁴ No. 447, Laws of the Federation of Nigeria, 1990.

- e) make any other recommendations which are, in the opinion of the Judicial Commission, in the public interest and are necessitated by the evidence;
- f) receive any legitimate financial or other assistance from whatever source which may aid and facilitate the realisation of its objectives.²⁵

The Oputa Panel was initially to investigate human rights abuses from 1983 to 1998. This initial mandate was viewed as limited and was strongly criticised by the human rights community, politicians and the public at large. It was viewed as being unduly restrictive for a number of reasons. These included the fact the mandate did not cover the period of Nigerian Civil War. It also excluded several periods of military rule. The Oputa Panel's mandate was extended to cover the period from 15 January 1966 (when the first military coup took place) and 28 May 1999 (the eve of the inauguration of the current civilian administration) itself. Further, the Oputa Panel also requested for the amendment to the original terms of reference that restricted its purview to '...all known or suspected cases of mysterious deaths and assassinations.' The inclusion of paragraphs (e) and (f) above were also at the request of the Oputa Panel. These were with a view to ensuring that it acquired the full-fledged status of a truth and reconciliation commission.²⁶

One important feature of the enabling statute of the Oputa Panel, the TIA, is that it gave the Oputa Panel coercive powers to *subpoena* witnesses and documents. The Oputa Panel also had powers to order the arrest of any individual it determined was or had acted in contempt of the Oputa Panel. These powers, as will be highlighted below and further discussed in Chapter Four, led to contentious litigation against the Panel by former military rulers wary of the accountability process.

3.1 A Truth Commission and Interpretation of its Mandate

At the inauguration of the Oputa Panel on 14 June 1999, President Olusegun Obasanjo declared that it was established to demonstrate his administration's 'determination to heal the wounds of the past... for complete reconciliation based on truth and knowledge of the truth in our land.' He went on to affirm that the government will do 'everything possible to address all issues that tend to bring

²⁵ Statutory Instrument No.8 1999 as amended by Statutory Instrument 9 of 1999.

²⁶ *Oputa Panel Report*, note 17 supra at 29-31.

our country into dispute, or perpetuate injustice, conflict and the violation of human rights.’²⁷

On its part, there is little doubt that the Oputa Panel viewed its status as one beyond a Commission of Inquiry though it was established pursuant to the Tribunals of Inquiry Act. Thus, while addressing the issue of reparation and compensation for victims, it expressly referred to itself as a ‘truth commission.’²⁸ It is to be expected that the mandate of any commission will be pursued in accordance with the perception or interpretation of it by the members. The Oputa Panel viewed its key mandate as Reconciliation. In the words of the Chairman, ‘*Our quo warranto is the search for this reconciliation.*’²⁹

Perhaps as a result of the primacy placed on this reconciliatory posture, the Oputa Panel never invoked its power to order the arrest of any witnesses. It maintained this position even when faced with the defiance of three past military rulers and some of their security chiefs to attend on its summons, a development that tested the will, if not the credibility of the Oputa Panel in the public eye. Ironically reconciliation was not a formal part of the Oputa Panel’s mandate. In its narrow pursuit of reconciliation, the Oputa Panel essentially allowed contempt for its own authority. Commendable as the approach may have been in principle, in practice, it left the process open to criticism regarding its effectiveness and brought to the fore a tension between reconciliation and accountability that plagued the work of the body. The emphasis of the Oputa Panel on *reconciliation* notwithstanding, its terms of reference clearly required it to play a pivotal role in achieving truth and accountability for victims of gross human rights violations during the decades of military authoritarian rule. This aspect of its mandate, in spite of its reconciliatory posture was not lost on the Oputa Panel as reflected in the summary of its report.³⁰

The Oputa panel was expected to suggest measures for deterrence of future violations and foster restoration of the rule of law which had been violently displaced during the years of military dictatorship. This can be ascertained from the broad terms of reference that mandated the Oputa Panel to ‘recommend

²⁷ “Address by His Excellency the President, Commander-In-Chief of the Armed Forces, Chief Olusegun Obasanjo, G.C.F.R at the Inauguration Ceremony of the Human Rights Violations Investigations Panel on Monday 14 June 1999”.available at: http://www.nopa.net/Useful_Information/Presidential_Speeches/14june99.html (26 February 2006) Emphasis mine.

²⁸ *Oputa Panel Report*, Volume 6, Chapter 1, 1.

²⁹ *Synoptic Overview* note 1 supra at 8.

³⁰ *Oputa Panel Report* note 12 supra

measures which may be taken whether judicial, administrative, legislative or institutional to redress past injustices and to prevent or forestall future violations or abuses of human rights.’ In this way, the framers of the mandate expected the Oputa Panel to recommend further investigations of alleged violations, as well as outright prosecution of alleged perpetrators of criminal violations of human rights. It did both, though more of the former than the latter. An analysis of the findings and recommendations of the Panel suggests it was caught between the desire to foster reconciliation - between persecutors and the persecuted - and the desire to achieve justice for victims of impunity, through recommendations of compensation and in some cases, criminal trials.

Expectations were high that the Oputa Panel would contribute extensively to social reconstruction in Nigeria. This was reflected in the Oputa Panel’s mandate which urged it to ‘make any other recommendations which are, in the opinion of the Judicial Commission, in the public interest and are necessitated by the evidence.’ In pursuit of this, the Oputa Panel’s recommendations went beyond investigations of alleged violations of human rights to setting an agenda for transformation of Nigerian society.

The foregoing suggests the truth-seeking process was expected to make substantial contributions to the restoration and promotion of the rule of law in Nigeria following years of due process and human rights violations. The Oputa Panel on its part approached its mandate from a perspective that emphasised a broad and flexible conception of its terms of reference. The Oputa Panel proceeded on the premise that the truth-seeking process provided an opportunity to lay the foundations for social reconstruction and reconciliation. But as would become obvious later, this aspiration was hardly met. With the notable exception of its lack of engagement with the issue of accountability of the judiciary for past (mis) conduct, the most decisive factor for this failure was a lack of sincerity on the part of the initiating regime in setting up the Oputa Panel.

4. THE WORK AND FINDINGS OF THE OPUTA PANEL

The South Africa Truth and Reconciliation Commission,³¹ by the Oputa Panel’s admission, constituted the model for the Oputa Panel.³² But there were

³¹ The South Africa Truth and Reconciliation Commission (TRC) established by the Promotion of National Unity and Reconciliation Act (PNURA) No.34 of 1995. For the view that the Oputa Panel was modelled after the South Africa TRC see for example *Guardian* Editorial, ‘Oputa Panel: Matters Arising,’ *The Guardian on Sunday* Online Edition (Lagos, Nigeria, December 19, 2004)

fundamental differences in their structures. The Oputa Panel did not have the specialised units provided for by the law establishing the TRC, and through which it operated. It also worked as a ‘general purpose’ commission without the benefit of specialised committees. The Oputa Panel was not institutionally designed to play a critical role in the rehabilitation of victims either, though a liberal interpretation of the Oputa Panel’s mandate would have allowed for this. Nor was it granted the power of amnesty. However, a significant feature it did share with the South Africa TRC is the naming of alleged perpetrators of gross violations of human rights.

The Oputa Panel received over 10,000 petitions within a few months of its establishment; evidence, perhaps, not just of the level of rights violations committed during the period of military rule but also of the need of the Nigerian people for a truth-seeking process which would serve as a means for obtaining justice and redress for gross violations of human rights by the state. It also demonstrated the widespread confidence with which people welcomed the Oputa Panel. The nature of the violations disclosed in the petitions centred principally on the right to life, the right to personal liberty and the right to human dignity.³³ In line with these criteria, petitions were further scrutinised to determine whether the alleged infringement was ‘gross.’ What constituted ‘gross violations’ of human rights was nowhere defined in the terms of reference or legislation which established the Oputa Panel. The Oputa Panel had recourse among others to the definition of the term in section 1 of the South Africa TRC Act, international human rights instruments and the Nigerian constitution which guaranteed the rights identified by the Oputa Panel as been in issue.

Constrained by factors like limited personnel, time and financial resources, the Oputa Panel decided to hear only 200 petitions at its public hearings. According to the Oputa Panel, the criteria for hearing the chosen petitions were consideration of the nature of the rights involved and the extent or degree of the infringement(s) alleged.³⁴ There was thus a great disparity between the petitions submitted to the Oputa Panel and those actually heard in public. While the number of cases

and L. Odion “Reconciliation: Between Substance and Symbolism” *This Day Online* (16 November 2004 07:37:22) available at:

<http://www.thisdayonline.com/archive/2002/05/31/20020531ext01.html> (26 November 2005).

³² *Human Rights Violations Investigations Commission Report* (Oputa Panel Report) Volume 2, 34.

³³ *Synoptic Overview* note 1 supra at 41

³⁴ *Synoptic Overview* note 1 supra at 41.

selected for the public hearings was limited, the Oputa Panel heard testimony from some 2,000 witnesses and received 1,750 exhibits related to these selected cases.³⁵

One of the ways the Oputa Panel sought to deal with the large number of violations that occurred during the period of authoritarian rule, was to commission research reports by experts. The rationale for the research reports was the limitations of public hearings as a forum to ventilate the scale of the gross violations of human rights that had taken place in the country in a period covering over three decades. The research work by experts was also expected to provide a valuable background of human rights violations in the country and thus assist the Oputa Panel to contextualise its work. The research reports played an important part in the work of the Oputa Panel. We consider them in some detail below.³⁶

However, it is important to observe that virtually all Truth Commissions in the past and present have been inundated by thousands of petitions through which they sift and most drastically prune down the number they actually take on. The need to eliminate repetitive petitions for more representative and ‘serious’ ones are cited in justification of the process of ‘scaling down.’ Thus discretion, a feature of every criminal justice system in the world rears its head in the truth telling process as well. However, not much of an issue has been made of it by proponents of the latter mechanism.³⁷ In the discharge of its mandate, the Oputa Panel organised public hearings, as the platform for ventilation of various violations of human rights and the misuse of state powers in the years of military rule in Nigeria. It is to these that we should now turn.

4.1 Public Hearings: General

The public hearings of the Oputa Panel were of two types. There was the general or ‘zonal’ public hearing which was geared towards giving a voice to victims of rights violations who may otherwise remain voiceless. These were held in five notable zonal capitals and the Federal Capital Territory, Abuja.³⁸ There were also the special or ‘institutional’ hearings. The sessions of the Oputa Panel

³⁵ ‘Oputa Panel Submits Report, Recommends Compensation’ *This Day* (Lagos Nigeria Wednesday 22 May 2002).

³⁶ See Section 4.4 *infra*.

³⁷ J E Méndez “Accountability for Past Abuses” (1997) 19 (2) *Human Rights Quarterly* 255

³⁸ The others were at Lagos, Port Harcourt, Enugu and Kano. Reference to ‘zonal capitals’ is notional only, as the country has a federal state structure. There were two rounds of public hearings at Abuja, the nation’s federal capital territory (FCT).

were held in public between 24 October 2000 and 9 November 2001³⁹ (its work lasted three years, three weeks and 6 days in total).⁴⁰ There was considerable national coverage of the public hearings of the Oputa Panel by the media. The most popular public and private television stations in the country provided daily coverage of the public hearings shortly after they began. The public hearings acquired the status of a popular national ‘soap,’ generating intense public interest. Nigerians were ‘glued to their television sets five nights a week, stunned by their country’s sordid past dragged before the commission.’⁴¹ Suffice to say that the press coverage was acknowledged and strongly commended by the Chairman as a major contributor to the ‘success’ of the Panel.⁴²

Although the findings of the Oputa Panel on the petitions it heard were contained in its final report, it also made some preliminary findings at its public hearings. These were usually in cases where it demanded further investigations into violations of human rights bordering on criminal culpability of security agencies. Remarkably however, not in one instance did the Oputa Panel engage with accountability of the judiciary in this way.

President Olusegun Obasanjo appeared twice before the Oputa Panel. His first appearance was as a victim. The second was on the summons of the Oputa Panel. He was required to respond to allegations of human rights violations during his tenure as military Head of State. His obvious discomfiture on the latter occasion notwithstanding, it gave impetus to the proceedings of the Oputa Panel.

Victims of rights violations included the first executive president of the country, Alhaji Shehu Shagari. He ruled the country between October 1979 and December 1983.⁴³ It is noteworthy that he was not summoned to appear before the Oputa Panel as no petition was filed against him.⁴⁴ The visibility of the Oputa Panel grew with petitions and testimonies of leading lawyers, former political officer holders (who fell into the bad books of the military), and civil society leaders. Others who came before the Oputa Panel included human rights advocates, leaders of workers unions and students, all of whom were active in the movement against military rule. Many had one experience of gross human rights violations to share.

³⁹ *Oputa Panel Report* Volume 4 Chapter 1, 9

⁴⁰ Guardian Editorial note 31 *supra*.

⁴¹ BBC News: ‘Africa Media Watch’ (Friday, 3 August, 2001, 11:33 GMT) available at: <http://news.bbc.co.uk/1/hi/world/africa/1470177.stm>.

⁴² *Synoptic Overview* note 1 *supra* at 16.

⁴³ *Ibid.* at 50.

⁴⁴ *Ibid.* at 87.

According to the Oputa Panel, the causes of the human rights violations were neither ‘simple’ nor ‘straightforward.’⁴⁵ The violations were allegedly perpetrated by the army, the security agencies and the police.⁴⁶ There were some instances of corporate or individual violations of rights too. In some cases, unpopular economic policies precipitated the deprivation of the right to life. This was manifested in the shooting and killing of demonstrators at public protests, a common incidence in the 1990s, when military rule was at its most atrocious in the country. By the time it left office, the military establishment had instituted a ‘vicious cycle’ of violence exhibited in domestic violence, armed robbery, brigandage, religious riots, impunity and lawlessness in the polity.

4.2 Public Hearings: Special and Institutional

Paragraphs b and c of the terms of reference of the Oputa Panel provided ample basis for institutional hearings along with public hearings that centred on individual complaints. Thus, there were also ‘special’ hearings organised for civil society, human rights groups and specialised professional organisations.⁴⁷ The special and institutional public hearings featured submissions from the National Human Rights Commission, the Armed Forces, the Police, State Security Service, the Nigeria Prisons, about ten civil society and human rights organisations and a few individuals.⁴⁸

The choice of state institutions, with the notable exception of the National Human Rights Commission, may have been informed by the popular view that they constitute notorious sources of human rights violations. The National Human Rights Commission for its part was set up precisely to monitor human rights implementation in various aspects of national life, ironically by the Abacha junta noted for its record of gross human rights violations. In view of their close connection with the judiciary, particularly, the criminal justice system, it is instructive to examine the special hearings on the prisons and the police.

4.2.1 The Prisons

The Oputa Panel’s special hearings on the Nigerian Prisons were based on submissions made by the Prisons Service and non-governmental organisations. The major sources and nature of human rights violations in Nigerian Prisons are succinctly articulated in the submission of the Nigerian Prison Service to the Oputa Panel

⁴⁵ *Synoptic Overview* note 1 supra at 24.

⁴⁶ *Ibid.* at 48-49.

⁴⁷ *Oputa Panel Report* note 42 supra Chapter 1, 3 at 4.

⁴⁸ *Ibid.* at 9-10.

...under the conditions of *chronic prison congestion, perennial neglect* of the *services* and *delay in justice delivery*, certain basic rights of prisoners are violated. The right to life and integrity of the person, to health and respect for human dignity are largely un-guaranteed.⁴⁹

The Nigeria Prisons Service, like many other civil institutions of the Nigerian society, suffered serious neglect during the period of military rule. New prisons were not built for decades. Yet, as mentioned earlier, there was a phenomenal increase in the number of inmates, especially suspects awaiting trial. Prison authorities lacked medical facilities and were required to seek leave of the military authorities before obtaining medical attention for inmates. On many occasions, inmates died before such clearances were obtained.⁵⁰

Illegal detention was the order of the day. Suspects awaiting trial not only outnumbered convicts, but many had to wait for over ten years for trial.⁵¹ Detained persons lacked practically every basic necessity required for day-to-day living.⁵² In addition, juveniles were lumped with adult detainees and suffered similar deprivations.⁵³ The special needs of female detainees were not met. Their reproductive rights were violated in addition to the violations suffered by their male counterparts. Some female inmates had babies in custody. Some were sexually assaulted.⁵⁴

4.2.2 The Police

In similar vein, the special public hearings on violations of human rights by the Police formed an important aspect of the Panel's work. The Oputa Panel found that there is an historical perspective to human rights violations by the Nigerian Police. The Nigeria Police Force was a creation of colonial hegemony. It was designed as an agent of repression and coercion. The research report on the Police found that in furtherance of the colonial divide and rule system, the recruitment policy was to employ individuals to police ethnic groups whose language the policemen did not understand and who were in fact historically hostile to the latter's places of origin.

The inherited recruitment strategy effectively secured the loyalty of the Police as an occupational force, rather than one for social service. At independence, the

⁴⁹ *Oputa Panel Report* Vol.3 Chapter 7, 183, emphasis mine.

⁵⁰ *Ibid.* at 185

⁵¹ *Ibid.* at 190

⁵² *Oputa Panel Report* note 49 supra at 190.

⁵³ *Ibid.* at 192-194.

⁵⁴ *Ibid.* at 194-195.

national government found it expedient to maintain the *status quo*.⁵⁵ This impacted negatively on police-public relations. The Police had continued to act as an imperial force. A careful audit of the petitions on violations of human rights by the Police, notably on extra-judicial killings, revealed that most policemen alleged to have been involved, were indeed from ethnic groups different from those of victims.

Further, the incorporation of some police officers by the early military administrations into governance, as a matter of political expedience, also played a notable role in police violations of human rights. However, the relationship between the military and the Police went awry, with the latter becoming the under-dogs. The Police as an institution was neglected by successive military regimes just as its officers were no longer included in the distribution of plum political positions. The Police was starved of funds, training, promotions and development. In frustration, the Police took vengeance against the civil populace.⁵⁶

Violations of rights by the Police included illegal arrests, detention without trial,⁵⁷ and various forms of torture in the course of investigations to elicit ‘confessions.’⁵⁸ Extra-judicial killings of suspects in custody, hapless motorists, passengers and pedestrians on the roads, were also common.⁵⁹ In the course of the public hearings, the Oputa Panel found the Police were in the habit of killing people unlawfully and in the bid to cover up, they usually alleged such victims were armed robbers.⁶⁰ The Oputa Panel identified several structural factors that predisposed the Nigerian Police to gross violations of human rights.⁶¹ Notable among them were laws which precluded judicial review of executive action, corruption, low qualification requirements for enrolment and deficient training.

4.2.3 Mind the Gap: Whither Accountability of the Judiciary?

As stated earlier, the absence of accountability of the judiciary for the past was a marked feature of the truth-seeking process in Nigeria. Despite the close working relationship between the institutions which were subjects of the special hearings of the Oputa Panel, it did not advert to the need for including the judiciary in those hearings. It is important to note in this regard that there were obvious

⁵⁵ Ibid. at 209-214.

⁵⁶ *Oputa Panel Report*, note 49 at 214-219.

⁵⁷ *Oputa Panel report* note 52 supra at 220-223.

⁵⁸ Ibid at 223.

⁵⁹ *Oputa Panel Report* note 49 supra at 227-228.

⁶⁰ *Oputa Panel Report* Volume 2 Chapter 5, 193.

⁶¹ Ibid. at 228-237.

references to the judicial role by the respective institutions involved in the special hearings.

It was impossible for example to discuss the work of the prisons and the police without reference to the role of the judiciary in the criminal justice system. In fact, as stated above with reference to the Prisons, the hearings revealed that delays in the criminal trial process were implicated in the congestion of the prisons. Awaiting-Trial inmates (in their tens of thousands), far out-numbered convicts and were all remanded on the orders of judges and magistrates. This was largely responsible for prison congestion and in turn, the deplorable state of custodial facilities. It was also a notorious and acknowledged fact that criminal and civil trials (and appeals) went on in many cases for years and sometimes decades, a fact that was readily acknowledged by the judiciary and to which reference will be made later in this research.⁶²

Apart from the foregoing, there are the more fundamental matters of judicial acquiescence to and legitimation of military usurpation of power, constitutional distortions, gross misgovernance and violation of human rights also discussed later in this research.⁶³ Thus, it was logical to expect that the truth-seeking process, on what went wrong in the polity, could only be regarded as complete and objective if it focused on the judiciary as an important institution of governance during the authoritarian period under review.

However, the Oputa Panel scarcely made reference to the role of the courts in the violations of human rights in the country. It failed to engage with the judicial function in governance during the decades of authoritarian military rule. As will be argued later, the judiciary wielded considerable and continues to exercise immense powers in governance as the third arm of government. The lack of reference to, or engagement with the judicial institution in the period of authoritarian rule in Nigeria created a glaring accountability gap with regards to that key institution of state. It is a neglect which has become (with few exceptions), a recurring feature of transitional justice processes. In the Nigerian context, the failure of the Oputa Panel in this regard, in virtually *karmic* style, has continued to haunt the Oputa Panel itself.

Specifically, it is a major factor that has ensured the report of the Oputa Panel remains suspended in an undesirable and undeserved limbo. How this has worked

⁶² See Chapter 6 *infra*.

⁶³ See Chapters Two and Three *infra*.

out will be discussed briefly below⁶⁴ and in further detail in the course of this research.⁶⁵ Beyond the later uncomfortable interaction between the truth-seeking process and the judiciary, it will be argued that the deficit in accountability of the judiciary has continued to haunt the judicial function and its attempts at self-redemption in particular, and the post-authoritarian governance and democratisation in general.⁶⁶

4.3. The Three 'Rs': Reparation, Restitution and Reconciliation

Justice Oputa made the important observation that while establishing the Oputa Panel the government appeared to have been more interested in finding out the truth and facilitating reconciliation. At least, President Obasanjo emphasised reconciliation in his speech at the inauguration of the Oputa Panel. A close reading of the Oputa Panel's mandate clearly envisaged it would focus on discovering the truth and it can be imputed that the remit did not rule out reconciliation measures too. The Oputa Panel however noted that the demands by almost all the victims at the public hearings made it imperative that the government should allocate some resources to the three 'Rs,' Reparation, Restitution and Reconciliation.⁶⁷

In the Panel's opinion, it was not possible to achieve national reconciliation in the complete absence of some measure of reparation. It found that in the aftermath of widespread gross violations of human rights, victims usually demand reparations to assist them to get on with their lives.⁶⁸ A 'modest payment' at least, represents a form of 'acknowledgement' and 'official apology'.⁶⁹ While acknowledging the difficulties associated with achieving reconciliation at the individual level, the Panel outlined at least ten steps that are relevant to the process:

- i. Revealing the truth
- ii. Acknowledging the harm done
- iii. Showing remorse for the pain suffered by the victim
- iv. Apologising for the wrongs done
- v. Holding perpetrators accountable
- vi. Healing the injuries caused
- vii. Rehabilitating those with disabilities

⁶⁴ See Section 5 *infra*.

⁶⁵ See Chapter Four *infra*.

⁶⁶ See especially Chapters 4, 5 and 6 *infra*.

⁶⁷ *Synoptic Overview* note 1 *supra* at 32-33.

⁶⁸ *Oputa Panel Report* Volume 6, Chapter 3, 29.

⁶⁹ *Ibid*.

- vii. Restitution and rehabilitation for wrongs that can not be replaced
- ix. Forgiveness and closure by victims
- x. Preventing future occurrences through establishing institutional reforms.⁷⁰

According to the Oputa Panel, the relationship between reparation and reconciliation is so important that the latter can not be achieved without the former.⁷¹ Beyond this utilitarian function of reparations, the dictates of *justice* for victims require it.⁷² The Oputa Panel noted that reparation is ‘part of what needs to be done to earn justice.’⁷³ It may involve restitution, compensation and rehabilitation, as may be appropriate to the particular circumstances. Another dimension to it is what the panel termed ‘Non-Monetary Reparation’ which is essentially ‘satisfaction and guarantee of non-repetition.’⁷⁴

The Panel examined the law and practice of the right to reparations in several countries.⁷⁵ In affirming the need for reparations, the Panel cited the fact that it is a right recognised and imposed on the state for victims of gross human rights violations under international law. Nigeria had acceded to various international treaties which provide for the right to reparations and is bound to fulfil its contractual obligations under them.⁷⁶ The Panel considered the nature and scope of the duty.⁷⁷ It also noted that Nigerian municipal law (especially torts) and the constitution similarly provide for the prevention, abatement of, and damages for rights violations.⁷⁸

The Oputa Panel presented a ‘policy framework’ for Nigeria’s reparation programme. For the Panel, the wishes of victims ought to be a guide on the form reparations should take. However, while many petitioners stated the relief they sought, a significant number did not.⁷⁹ The Panel further considered whether violators of human rights should be made to pay reparations to victims of gross

⁷⁰ *Oputa Panel Report* note 68supra Chapter 1, 2-3.

⁷¹ *Oputa Panel Report* note 68 supra.

⁷² *Ibid.*

⁷³ *Ibid.* at 6.

⁷⁴ *Ibid.* Chapter 3, 10.

⁷⁵ *Ibid.* at 30-45. These are Argentina, Chile, Guatemala, South Africa, El Salvador, Uganda and Germany.

⁷⁶ *Oputa Panel Report* note 68 supra Chapter 3, 27

⁷⁷ *Ibid.* Chapter 1 at 7

⁷⁸ *Ibid.* Chapter 3, 13-28.

⁷⁹ *Ibid.* Chapter 5. The Report did a commendable job of tabulating the petitioners, injury suffered and relief sought.

violations of human rights.⁸⁰ It however, only recommended that the government should compensate victims.

The work of the Oputa Panel saw it traverse the length and breadth of the country to investigate gross violations. Its activities centred on establishing *the truth* about the people's lives under the military jackboot. During its public hearings, the Oputa Panel actually accepted invitations to mediate in on-going conflicts in the country, achieving some remarkable success in the endeavour. The reconciliation brought by the Oputa Panel to the hitherto intractable, almost century old, internecine dispute between the people of Ife and Modakeke communities in the South-West of the country stands out in this regard. The 'Ogoni Peace Accord' between the two factions in Ogoniland which was widely reported and commended as a 'landmark achievement,' was another good example of this aspect of the Oputa Panel's work.⁸¹

As stated above, the Oputa Panel was greatly assisted by the work of commissioned experts in its bid to obtain a fuller picture of the extent of human rights violations in the country. The reports of the research offer a composite picture of the spread and nature of human rights abuses in relation to specific geographical areas of the country. Their relatively wider reach than the public hearings of the Oputa Panel offered more comprehensive insights into the extent of gross violations of human rights during the authoritarian period in Nigeria. It is thus germane to consider this aspect of the truth-seeking process for the way it strengthens the case for accountability of the judiciary for past governance in Nigeria's transition experience.

4.4 The Research Reports: Giving Voice to the Voiceless

For purposes of the research, the country was divided into geo-political zones. The six zones, North-East, North-Central, North-West, South-East, South- South and South-West (each comprising six states), have since acquired semi-official recognition in the Nigerian polity.

4.4.1 The North-East and North-West

The research report on the North-West and the North-East showed that the nature and pattern of gross human rights violations in the two zones were similar.⁸² There were common incidence of compulsory acquisition of land from individuals and communities by the state and 'powerful' individuals, without

⁸⁰ Ibid. Chapter 1 at 3-4.

⁸¹ See for example 'Editorial: The Ogoni Peace Accord' *The New Nigerian* (Kaduna, Nigeria 16 February 2001)

⁸² Oputa Panel note 68 supra Chapters 1 and 4

consultation or compensation. Unlawful arrests, detentions and extra-judicial killings by the Police and other security agencies of the state constituted the predominant features of rights violations in the two zones.

Arbitrary dismissal and retirement of workers by government without appropriate compensation, discrimination against ‘non-indigenes’ and extortion of peasant farmers by traditional rulers were also frequent.⁸³ The Oputa Panel emphasised the need to thoroughly investigate the cases to establish ‘who played what role’ and the need to either restore illegally acquired land or ensure payment of adequate compensation.⁸⁴

4.4.2. The South-South

The South-South zone covers the states of the Niger Delta. As noted above, the zone produces the oil that constitutes about 90% of the country’s foreign exchange earnings. But it lacked basic infrastructure like electricity, health care facilities, potable water, roads and unemployment was high. As noted by the Oputa Panel, ‘it is this paradox and apparent tragedy that forms the political economy of human rights violations in the area.’⁸⁵ The nature of gross violations of rights in the area varied from the right to life, social rights, cultural rights, to environmental rights. But most human rights violations in the Niger Delta involved communities.⁸⁶ A classic example is the environmental degradation of Ogoniland and violation of group rights in the oil producing community. The situation in Ogoniland attracted international attention and was subject of *The Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria*⁸⁷ a communication to the African Commission on Human and Peoples’ Rights. The applicants alleged that the oil exploration activities of Shell have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.⁸⁸

The research also identified multinational oil corporations as one of the major culprits for the deplorable state of affairs in the Niger Delta. This is especially with regard to ecological devastation and degradation occasioned by their neglect

⁸³ *Oputa Panel Report*, note 51 supra Chapter 1, 11-27 and Chapter 4, 115-120

⁸⁴ *Ibid.* at 26-27.

⁸⁵ *Oputa Panel Report*, note 49 supra Chapter 2, 28

⁸⁶ *Ibid.* at 43-52, chronicles instances of such deprivations.

⁸⁷ African Commission on Human and Peoples Rights’ Comm. No. 155/96 (2001).

⁸⁸ For a discussion of this communication and the issue of economic, social and cultural rights in the area, see H O Yusuf “Oil on Troubled Waters - Multinational Corporations and Realising Human Rights in the Developing World with specific Reference to Nigeria” *African Human Rights Law Journal* (2008) 8 (1) 79.

of international standards in oil exploration activities.⁸⁹ Deep-seated feelings of alienation and neglect led to the emergence of ethnic and minority groups agitating for the rights of the peoples of the area. The response of the Nigerian military-dominated political scene was to unleash repression on the leaders and members of such groups.

The Oputa Panel concluded that the extent of the crisis and human rights violations in the Niger Delta was so profound that it ‘touches on the moral conscience of the Nigerian state.’⁹⁰ Despite the damning situation, researchers confronted apathy from some respondents. There was the preference in some quarters to forget the past. The Oputa Panel’s researchers also confronted the challenge of bureaucratic responses from government agencies and officials and inadequate information in respect of rights violations during the Nigerian civil war.⁹¹

4.4.3 The North-Central

The research conducted on human rights violations in the North-Central zone revealed that contestations over traditional institutions and practices, land, resources, systemic deprivation and discrimination, feelings of marginalisation (indigene, non-indigene dichotomy) and neglect were the major sources of human rights violations. So were the excesses of law enforcement agents and partisanship on the part of public office holders in the discharge of their duties.⁹²

It emerged that strong attachments to traditional institutions and practices were at the root of violent riots and conflict across religious and ethnic divides. There were also numerous cases of discrimination against women, deprivation of child rights, ethnic and tribal minorities as well as other vulnerable groups in various communities in the zone. The researchers also found that due to the dearth of civil society and pro-democracy groups in the zone (agitating for human rights) in comparison with others, there were few cases of state sponsored extra-judicial killings.

However, the zone had its ‘fair share’ of ‘state terrorism’ in the number of military officers and civilians executed for alleged coup plots.⁹³ Uniquely, one of the states in the zone, Kogi, submitted a memorandum to the Panel alleging deliberate neglect and marginalisation by the federal authorities. It demanded a

⁸⁹ *Oputa Panel Report*, note 49 supra at 32-33, see page 55-59 for few examples.

⁹⁰ *Ibid.* 33.

⁹¹ *Oputa Panel Report*, Vol.3, 30-34.

⁹² *Ibid.* at Chapter 3

⁹³ *Ibid.* at 73

ten-year ‘federal equalization development plan’ to redress the situation.⁹⁴ There were many instances of overzealousness and abuse of office by public-office holders in the zone too. A curious instance was the state-ordered arrest of 27 school children for jubilation at the reported death of the country’s most notorious ruler.⁹⁵

4.4.4 *The South-West*

In the South-West, the research reviewed 568 cases of human rights violations. The research report on the zone relied substantially on data garnered from secondary sources. These included media reports, annual reports of official bodies and non-governmental organisations. It also benefited from informal sessions with some human rights organisations.

Violations of the right to life and respect for human dignity, freedom of expression, social and economic rights all featured prominently in the report. Extra-judicial killings and alleged state-sponsored, politically motivated assassinations were markedly common in the zone from 1984 to 1999, the second spell of military rule in the country. Extra-judicial killings were allegedly perpetrated largely by the police and other security agencies in the course of official engagements or otherwise. Politically motivated murder was directed at various leading political figures.⁹⁶ Virtually all such cases remain unresolved to date. In some cases perpetrators have not been identified. In others, they have not been prosecuted, despite identification. In yet others, the prosecutions have been stalled. Notable in this last category is the trial of some very high-ranking military officers for murder and attempted murder of some leading political figures in the zone.⁹⁷

Cases of unlawful arrest and detention as well as inhuman treatment, brutality, torture (sometimes resulting in death) and extortion were also recorded. In the zone, renowned for its vibrant media, freedom of expression came under severe attack during the long years of military rule. The violations in this regard ranged from arrests and detention of journalists, arraignment for serious but unfounded offences, arson attacks on media houses, to proscription of publications.

⁹⁴ Ibid. at 94-95

⁹⁵ Ibid. at 104

⁹⁶ *Oputa Panel Report* note 51 supra Chapter 5, 124-126.

⁹⁷ *The State v. Lt. General Ishaya Baimayi & 4 Ors* (Un reported Suit No. ID78/C/99), Criminal Division High Court of Lagos State. The accused on trial are a former chief of army staff, an ex-state military administrator, a retired state commissioner of police, chief security officer to General Abacha and the head of the late dictator’s mobile police team. In a separate trial following severance of the charge, the former Chief of Army Staff was recently acquitted. K Ketefe “Court Sets Baimayi Free after Nine Years in Detention” *The Punch on the Web* (Lagos Friday 4 April 2008).

Periods of military organised political transition programmes were particularly traumatic in the zone. A crisis was engendered by the death of Chief MKO Abiola in custody in 1998 following the annulment of the presidential election he had won.⁹⁸

On the economic and social fronts, workers were victimised for their membership of workers' unions and some were illegally dismissed. Also, the introduction of high school fees, violations of academic freedom, deterioration in educational facilities, forceful evictions as well as demolition of homes and shelter of the poor without alternative accommodation or compensation, all made the list of violations of human rights in the zone. As in some other parts of the country, many cases of rights violations were not reported for fear of reprisals. This was also due to ignorance, poverty, or sheer apathy.

4.4.5 The South-East

The report on the relatively homogenous South-East zone cited the Nigerian civil war as the major 'backdrop' for analyzing human rights violations in the country in general and the zone in particular. The Oputa Panel noted that the research report on the zone relied mainly on secondary sources (books and panel of enquiry reports), a fact that raised some concerns on its objectivity.⁹⁹

The principal complaints on gross violations of rights in the South-East zone were essentially of a group nature. They were either in connection with the conduct of the civil war, to which the zone was theatre, or the aftermath. A common complaint was that of marginalisation. It was alleged that the federal government actively pursued a programme of exclusion and marginalisation of the zone, in virtually every aspect of national life and socio-economic development.

At the individual level, violations of the right to life and fair hearing were reportedly the most common. On this score, the complaints followed the pattern in the other five zones of the country, principally the South-West. Thus, the report cited a number of cases of extra-judicial killings, unlawful arrests and detentions, extortion and labour related violations.¹⁰⁰

It is important to note that the report of the research experts that worked for the Oputa Panel as incorporated into its recommendations, as well as those arising from the public hearings, have however, hardly been subject of positive

⁹⁸ *Oputa Panel Report*, note 49 supra at 129-132.

⁹⁹ *Ibid.* at 148-149.

¹⁰⁰ *Oputa Panel Report* note 49 supra at 166-171.

government action. This is connected with the Dele Giwa petition which led to litigation that seriously challenged the work of the truth commission in Nigeria.

5. THE DELE GIWA PETITION: TRUTH-SEEKING AND THE JUDICIARY IN NIGERIA'S TRANSITION

It is relevant to comment briefly on the petition on the murder of Dele Giwa at this point. An analysis of the litigation it generated constitutes a case study of a tension that exists between truth-seeking processes, the judiciary, and judicial accountability for the past in transitions. These are issues at the core of our research and will be more fully examined later.¹⁰¹ However, it is germane to examine the public hearing of the petition at the Oputa Panel in as much as it relates to laying out the context of the research. Of all the petitions heard at the public hearings, the Dele Giwa murder-petition was the most controversial. Dele Giwa was a prominent and fearless journalist, editor and publisher of *Newswatch*, a leading newsmagazine in Lagos. He was allegedly murdered by military intelligence through a letter-bomb on the orders of the General Ibrahim Babangida then Head of state, on 19 October, 1986. Efforts by his solicitor, Gani Fawehinmi, to investigate and prosecute those responsible were frustrated by the military.¹⁰²

The struggle to establish the truth about the murder shifted to the Oputa Panel following the inauguration of the Oputa Panel. Fawehinmi submitted a petition against General Babangida and his two security chiefs in which he made a case for the matter to be reopened. The Oputa Panel issued summons for the appearance of the ex-Military ruler and his two security chiefs accused of complicity in the matter. None obeyed. Rather, the trio went to the High Court with an *ex parte* application to restrain the Oputa Panel from summoning them.

This led to the case, *Gani Fawehinmi, Justice Chukwudifu Oputa (Rtd.) and Human Rights Violations Investigation Commission v General Ibrahim Babangida, Brigadier Halilu Akilu and Brigadier Kunle Togun* (the Oputa Panel Case).¹⁰³ The generals sought, among other things, a declaration that the President lacked the powers to act under the existing law to establish a body like the Oputa

¹⁰¹ Chapter Four *infra*.

¹⁰² Despite the frustrations he has met with in his quest to bring the killers of the prominent journalist to book, he has remained undaunted. See for instance, O Ojo "21 Years after Dele Giwa's Murder- Fawehinmi to Govt: Reopen Case" *The Guardian* Online Edition (Lagos Saturday 20 October 2007).

¹⁰³ [2003] M.J.S.C 63. For an extensive consideration of the case, see Chapter 4 *infra* and H O Yusuf "The Judiciary and Constitutionalism in Transitions: A Critique" (2007) 7 (3) *Global Jurist* 1 available at: <http://www.bepress.com/gj/vol7/iss3/art4>

Panel for the whole country. They also asked the court to stop the Oputa Panel from exercising the power to summon them. They claimed it contravened their right to liberty.

Meanwhile, a legal team applied to represent the generals at the Oputa Panel's public hearing. That did not go down well with the Oputa Panel. Fawehinmi and other counsel also opposed their appearance. The contentious issue was whether the Oputa Panel, acting under Section 5 of the TIA, had the power to issue and serve summonses on three ex-military rulers. Could a summoned witness who failed to appear give evidence by proxy, namely through legal counsel? Whether having disobeyed the summons to appear in person, could they be allowed to cross examine witnesses of the Oputa Panel? The foregoing questions tasked the Oputa Panel. The TIA did not provide for proxy representation of witnesses.

If the settled position of the law (at least in common law jurisdictions) on witnesses in civil and criminal litigation can be extrapolated, legal counsel can not take the place of witnesses. In other words, testimony is a personal issue that can not be delegated and stands apart from the right to legal representation. This position is consistent with practice elsewhere. For example Legal Notice No.5 of 1986 in Uganda which created the country's second Truth Commission provides that '*...any person desiring to give evidence to the Commission shall do so in person*'.¹⁰⁴ Not only would it have undermined the rule of law to hold otherwise, it arguably would have amounted to a fundamental contradiction in terms in a *truth telling* process for alleged perpetrators of rights violations to testify by proxy.

In addressing the matter, the Panel framed a single issue to be addressed: whether proceedings before a truth commission constituted a suit at law or a judicial proceeding? The Oputa Panel decided that personal attendance of the summoned generals was required for the proper fulfilment of the Oputa Panel's mandate. Specifically, the Panel in its 'ruling' insisted that witnesses were bound to attend in person in order to be entitled to the rights of legal representation, and (cross) examination.

Although many petitioners or witnesses were represented by counsel, they were in attendance to be examined themselves. Justice Oputa emphasised that military officers were not above the law. The Oputa Panel also took the position that a

¹⁰⁴ See also the one established by General Idi Amin by a Presidential Legal Notice under the Commissions of Inquiry Act 1914. Emphasis added.

proceeding before a commission of its nature did not constitute adversarial proceedings. For failing to appear, the Oputa Panel recommended that the generals be deemed to have forfeited their right to govern the country in future.¹⁰⁵ The strong determination of the generals not to appear before the Oputa Panel introduced a twist to the truth-seeking process in Nigeria from which it never recovered.

Contestations around the legality of the Oputa Panel in various suits and appeals on them, instigated by the generals in their attempt at self preservation, introduced another dimension to the operation of Truth Commissions in transitional societies. They brought to the fore the tensions that may arise between the truth-seeking process and the judiciary in transition. They also offer valuable insights on some of the consequences of the accountability gap for the conduct of its role in the past on the part of the transitional judiciary. The Supreme Court decision in the matter, delivered well after the submission of the Panel's Report, forms the bedrock of government's decision not to implement the recommendations of the Oputa Panel.

The Supreme Court held that the President lacked the powers to set up a body like the Oputa Panel with a remit that extended to the whole country to enquire into human rights violations. Further, it held that the powers of the Panel to summon the Plaintiffs were a violation of their right to liberty. As will be discussed in greater detail later in this study, the decision of the Supreme Court placed premium on the rights of the generals to liberty. This was to the detriment of and disregard for the wider rights of victims of gross human rights violations to truth and acknowledgement of their suffering under the country's laws and its treaty obligations under international law referred to earlier.

6. PERCEPTIONS: THE OPUTA PANEL AND THE PUBLIC

The Nigerian public seemed to have viewed the Oputa Panel as more of a juridical forum, than an unencumbered avenue for investigating the past. This is reflected in the fact that so many petitioners, respondents and witnesses, were represented by legal practitioners at the public hearings. The 'crème de la crème' of the Nigerian legal profession attended the proceedings on behalf of clients.

Thirty three Senior Advocates of Nigeria are on record to have represented petitioners and witnesses at the public hearings. The list included the foremost

¹⁰⁵ *Synoptic Overview* note 1 supra at 87-88.

legal practitioner in the country at the time, Chief Frederick Rotimi Williams. Over four hundred lawyers also appeared before the Panel. Although a few attended on summons of the Panel (some law officers) most appeared on behalf of clients.¹⁰⁶ Even those who took serious exception to participating in the public hearings (sections of the elite who felt threatened by *the truth*) ensured appearance by legal proxy. Prominent in that category were three former military Heads of State and some key military security functionaries.¹⁰⁷ This *juridicalisation* of the truth-seeking process in Nigeria may not be unconnected with the composition of the Panel itself. Not only was it headed by one of the most brilliant and well respected jurists in the country, almost half of its membership were legal practitioners. One of these was a reputable Senior Advocate of Nigeria.

But an overt juridicalisation in appointment to the membership of a truth-seeking process fosters a sense of adversarial contestation. This does little to advance the core function of the truth-seeking process, a search for the *truth*. If anything, it may detract from it. In recognition of the heavy presence of legal practitioners at the public hearings, lead counsel to one of the former military rulers (General Ibrahim Babangida, who defied the summons of the Panel thrice over), observed that ‘the atmosphere at the panel was too adversarial.’¹⁰⁸ This is despite the fact that he did himself appear with a battery of lawyers and made a case to cross examine witnesses, while not presenting his client for similar purpose. Notwithstanding the juridicalisation of the Oputa Panel, it made far reaching recommendations for achieving justice for victims of gross human rights violations, reconstructing the society and restoring the rule of law in Nigeria.

7. RECOMMENDATIONS OF THE OPUTA PANEL

The general tenor of the Oputa Panel’s recommendation was for institutional transformation. This was with particular reference to the Prisons, Police, the security agencies and the Armed Forces. Law enforcement and state security services should be given a re-orientation to recognise and accord citizens their human rights as a matter of course. It called for the introduction of human rights

¹⁰⁶ Dr. Mudiaga Ode, Senior Advocate of Nigeria. This is the highest rank in the legal profession in Nigeria and the equivalent of the British Queen’s Counsel.

¹⁰⁷ Generals Muhammadu Buhari, Ibrahim Babangida, Abdusalam Abubakar, Brigadiers-General Halilu Akilu and Kunle Togun respectively.

¹⁰⁸ BBC News: ‘Ex-Nigerian Military Ruler Snubs Panel’ (Tuesday 25 September 2001 10:41 GMT 11:41 UK) available at: <http://news.bbc.co.uk/1/hi/world/africa/1562397.stm> (25 September 2001)

awareness training for the Police and other security agencies. To combat the appalling human rights record of the Nigerian Police, the Oputa Panel recommended structural reforms in the nation as a whole. As part of the initiative towards institutional transformation, it called on the National Assembly to repeal all obnoxious legislation in the country and facilitate law reform. It advocated institutional reform of the Police and legislative initiative to ‘promote police effectiveness, civility and accountability, and reduce police violation of human rights.’¹⁰⁹

Disturbed by the spate of deaths in custody, the Oputa Panel recommended the establishment of an autonomous inquest system to investigate deaths in custody. This is presently still missing in the prison system. It proposed the establishment or designation of separate detention facilities for persons waiting trial and a powerful autonomous monitoring agency to oversight all custodial centres. The Panel called for a viable prison decongestion programme and provision of adequate medical facilities in the prisons. It concluded that the reformation of the criminal justice system as a whole was the only way to secure the rights of detainees.¹¹⁰

It suggested lustration and disbarment from public office, of those found culpable of gross violations of human rights.¹¹¹ The state should take steps to compensate victims of rights violations, and investigation and prosecution of culpable officials should be undertaken where appropriate. Apart from financial and material reparations, it also recommended that government carries out symbolic reparations for victims. These could take the form of public holidays and establishment of monuments in recognition of the violations they suffered.

The Panel specifically recommended demilitarization of the South-South zone, compensation for victims of rights abuses including families of victims of the civil war and review of the regulatory framework for the oil industry. This was in addition to its advocacy for a ‘locally driven’ comprehensive plan to develop the zone.¹¹²

One of the general recommendations of the Oputa Panel was the need to integrate human rights education into the academic curricula at all levels of education in the country. It called for the promotion of human rights studies to promote inter-ethnic harmony. The Oputa Panel also recommended measures to

¹⁰⁹ *Oputa Panel Report* note 93 supra Chapter 4 at 241.

¹¹⁰ *Oputa Panel Report* note 93 supra Chapter 4 at 202-207.

¹¹¹ *Ibid.* at 45-51

¹¹² *Ibid.* at 64-66.

address the imbalance in Igbo representation at all levels of national life. This was necessary to assuage feelings of discrimination and marginalisation of the zone.

The Oputa Panel further recommended a re-conceptualisation of what constitutes human rights violations in the country. In apparent reference to political and civil rights, it criticised what it viewed as an over-emphasis on ‘elitist- driven’ notions of rights like freedom of speech, association and so on, on the part of rights advocates and activists.¹¹³ It called on human rights activists to devote reasonable attention to the advocacy and defence of economic, social and cultural rights. The call was important considering that social, economic and cultural rights unlike civil and political rights are still non-justiciable in Nigeria. It is relevant to note at this point that apart from the *Oputa Panel Case*, the truth-seeking process in Nigeria, like others, did not go without its fair share of challenges and problems. It would have been unusual otherwise, given its terms of reference on the one hand, and on the other, the tendency for virtually every human endeavour to be subject to challenge.

8. CHALLENGES TO TRUTH

The task of truth commissions involves an interrogation of the past and making value judgments. This expectedly attracts challenges of various types. In the case of the Oputa Panel however, there were some avoidable problems thrown in its way from its inception. This part will examine the challenges faced by the Truth Commission in Nigeria other than the litigation on its legality and powers which will be considered later.

8.1. Composition of the Panel

As stated earlier, the seven-member panel was headed by Chukwudifu Oputa, a retired and respected Justice of the Supreme Court of Nigeria. That from the onset gave the panel much credibility amongst a highly sceptical populace as to the true intentions of the new government. However, the composition of the panel was strongly challenged for been unrepresentative of the heterogeneous nature of the country. Some segments of the country, specifically the Muslims (North and South) felt alienated by the constitution of the membership. Although Rev. Matthew Kukah, a Catholic priest, is a minority Christian from the North, he was viewed as a vociferous, anti-establishment, anti-Muslim socio-political

¹¹³ *Oputa Panel Report* note 51 supra at Chapter 1, 3.

commentator and opinion leader. Oputa himself is a Catholic from the South East and four of the other five members were Christians. The secretary, though not regarded as a member, was a Christian. Only one member was confirmed to be a Muslim. In a country where more than half the population is Muslim, and where religion is a sensitive and divisive issue, that was problematic. Moreover, considering the size of the country, the scope of the mandate and the heterogeneous nature of its population, a seven-member panel was rather restrictive. It was not sufficient to effectively cover the shades of interests in the country.

It is important to note that the Oputa Panel, following pre-commencement deliberations with civil society groups, specifically requested an increase in the number of its Commissioners but this was not implemented.¹¹⁴ Voicing the feelings of the northern Muslim elite, Mohammed Haruna, a seasoned journalist, media and public affairs commentator, faulted the lopsided composition of the Oputa Panel. He dismissed the Oputa Panel as a witch-hunt. The Panel's 'unrepresentative composition,' Haruna argued, was responsible for its highlighting the complaint of some petitioners while neglecting others.¹¹⁵ The Nigerian government did not pay any serious heed to the concerns expressed about the composition of the Oputa Panel.

8.2 Timing, Commencement and Resource Constraints

The Oputa Panel was established by President Olusegun Obasanjo in June 1999 barely two weeks after he had assumed office. This was similar to the Truth Commission in Argentina set up by President Raul Alfonsin a few days after he assumed office in December 1982.¹¹⁶ At the time, President Obasanjo was highly commended by one of his otherwise ardent critics, humanist, playwright and Nobel Laureate, Prof. Wole Soyinka who enthused

Obasanjo has got this one right. Its timing is laudable – human rights commission, truth tribunal or whatever it is as we have repeatedly stressed, is the priority of priorities after the experience under recent

¹¹⁴ *Oputa Panel Report* note 17 supra at 51.

¹¹⁵ M Haruna "The Oputa Witch-Hunt" *Daily Trust* Online Edition (Abuja Nigeria Wednesday 19 June 2002). This was soon after the submission of the Panel's Report in May of that year. Available at:

http://www.nigerianmuse.net/nigeriawaTruthCommissionh/oputa/?u=Haruna_Oputa_wiTruthCommissionh_hunt.htm (10 February 2006).

¹¹⁶ This has been relived in Liberia, see Reuters Foundation Alert Net "Liberia: Truth Commission Now at Work" (5 June 2006 15:28:43 GMT) available at: <http://www.alertnet.org/thenews/newsdesk/IRIN/30483aa7a2e72437b72a6753ad079166.htm> (26 June 2006).

dictatorships.¹¹⁷

With the benefit of hindsight, such optimism now seems misplaced and this early promise by the Nigerian government to facilitate justice and reconciliation through a truth commission now appears suspect. By comparative standards the Nigerian truth commission was a modest undertaking, yet the Oputa Panel was poorly funded. As such, it took over a year before the Oputa Panel began sitting, and at one point it was forced to practically suspend its work because of financial difficulties.¹¹⁸ In fact, it was only able to commence work with a take-off grant of \$400, 000 by the Ford Foundation as the Federal Government failed to make any budgetary allocation for it in its first year of operation.¹¹⁹

Haruna contends that there was deliberate financial strangulation in order to ensure the Panel became a political weapon in the hands of the President against potential contenders for the presidency in the 2003 elections.¹²⁰ Whether the under-funding of the Oputa Panel occurred with deliberate political motives in mind is impossible to establish, however, largely as a result of this lack of funds the Oputa Panel was unable to submit its report until May 2002; barely ten months before the 2003 elections. There may therefore be some substance in Haruna's charge that 'Obasanjo created [the] Oputa [Panel] essentially for politics and vengeance.'¹²¹ The submission of the Panel's report was effected only ten months to the 2003 general elections for which the incumbent had signified his intention to re-contest. At least two notable ex-military rulers had also openly declared their interest in the presidency. These were Generals Buhari and Babangida who had openly contested attempts to have them testify before the Oputa Panel.

Subsequent events in the Nigerian polity seem to support the view that the truth-seeking process was set up essentially as a talk-shop. The Oputa Panel for its part did a commendable and largely well received job. While it is important to

¹¹⁷ "Righting the Wrongs of the Past: Human Rights Panel Investigates the Past with a View to the Future" A Special International Report Prepared by *The Washington Times* Advertising Department <http://www.internationalspecialreports.com/africa/99/nigeria/19.html>. (17 February 2006).

¹¹⁸ "Nigeria 'Truth Commission' Too Poor to Finish Work" *Business Recorder* (10 January 2002) available at: <http://www.paksearch.com/br2002/Jan/10/Nigeria%20truth%20commission%20too...> (10 January 2006).

¹¹⁹ E O Ojo "Human Rights and Sustainable Democracy in Nigeria (1999-2003)" (2006) 13 (1) *Journal of Social Sciences* 15, 23.

¹²⁰ Haruna note 115 supra.

¹²¹ *Ibid.*

note that the work of the Panel assisted the bid to legitimise the post-authoritarian civilian administration, any other successes recorded by the process would appear to have been overshadowed by the failure of the Obasanjo administration to implement its recommendations.

8.3 Doubtful Legal Basis

Unwillingness to cooperate with the Oputa Panel by alleged violators ought to have been anticipated. It has been recognised in any case that prosecuting the military for past human rights violations is fraught with serious difficulties. The associates of the slain journalist, the press and the Nigerian public in general, have insisted on the implementation of the recommendation that the truth on the circumstances of Dele Giwa's death be established, and those involved in the murder brought to justice. Their position has remained fortified by the fact that over two decades after the dastardly act, the witnesses and suspects are all alive.¹²²

Truth Commissions have, as in this case, been known to recommend the prosecution of former military leaders for human rights violations. Such recommendations resulted in the prosecution of erstwhile military officers of juntas in Latin America. This reality has obviously remained stark in the minds of General Babangida, other ex-military leaders in Nigeria and their cohorts hence the resistance to an already shaky attempt to call them to account.

On this issue of shaky legal foundations of the truth-seeking process, it is significant that Justice Oputa made a demand following the inauguration of the Oputa Panel for a tailor-made legislation for the HRIVC. His call went unheeded. It is not clear why he back-tracked on the issue and proceeded on what turned out to be a shaky foundation for such a crucial engagement. The work of the Oputa Panel was affected by the fact that it was not established pursuant to a tailor-made law by the post-authoritarian parliament. Rather, it was established under existing legislation designed essentially for specialised inquiries and which stopped short of the more extensive remit of Truth Commissions. This was probably a trap. The lesson to be learnt is not to proceed with the delicate process of truth-seeking without specific 'made-to-fit' legislation. Such legislation is required to clearly spell out the powers and limits of the process.

8.4 Feeble International Support

¹²² Ojo note 102 supra.

The Oputa Panel did not generate much international interest. While there may have been some international attention in the initial stages of the Oputa Panel, this did not translate into positive advantage for the Panel's work and was certainly not sustained during its most crucial stages. For example, the non-implementation of the final report and recommendations, including reparations for victims, has hardly attracted international censure. Likewise, the Oputa Panel received neither the attention nor support of the official organs of the United Nations, unlike previous domestic truth-seeking initiatives elsewhere. The exception to this international 'blackout' was the financial lifeline extended by the Ford Foundation, which provided the Oputa Panel with a start-up grant when funding from the government was not forthcoming.

Although now a matter for conjecture, it is quite plausible that international attention, monitoring and support for the truth-seeking process in Nigeria may well have changed the course of its work. If the international spotlight had been focused on the work of the Oputa Panel and its constraints, all arms of government, particularly the executive and judiciary, would likely have been more proactive in ensuring the Oputa Panel's success, knowing that it would constitute a litmus test for the commitment and sincerity of the Obasanjo regime to democratic values and the rule of law. Unfortunately, the important moment of transition now appears irretrievably lost.

9. THE AFTERMATH: TRUTH IN LIMBO

The Obasanjo administration garnered positive public acclaim when it set up the Oputa Panel. The work of the Panel has been described as 'so thorough, so profound, so well-conducted, so conclusive and so painstaking that it probably had no rival in the country's history'.¹²³ In similar vein, President Obasanjo commended the Oputa Panel for its job well done, noting that the public hearings had the strong potential to serve as a deterrent to the violations of human rights in the country.¹²⁴

However, till the end of its tenure, the Obasanjo administration refused to publish or implement the Oputa Panel Report. Victims have remained uncompensated. The Obasanjo administration anchored its decision on the Supreme Court in the *Oputa Panel* case mentioned above. The issue of

¹²³ *Guardian* Editorial note 31 supra.

¹²⁴ *Oputa Panel Report*, note 17 supra Chapter 2, 40.

implementation of the recommendations of truth-seeking processes is multi-layered and complex. Nonetheless, the refusal of the government to publish the report of the Oputa Panel (which it had in fact accepted and set up a review committee to work on before the Supreme Court decision) is a singularly significant one. Although the government maintained that it was constrained from taking the Report further as a result of the judgement¹²⁵ it failed to provide a basis for its decision from any part of the judgement. Thus, the premise for the government's position remains vague.

The administration's refusal to publish and implement the Report and recommendations of the Panel attracted widespread condemnation. The action of the government has been described as 'one of the most unfortunate actions' of the regime.¹²⁶ It has also been cited as one of the country's attempts at political reform that has been dumped midstream.¹²⁷ Many groups and individuals have made repeated requests for the release and or implementation of the Report.¹²⁸ The calls for positive action by the government have however been consistently ignored. Critics of the government position have noted that the Supreme Court did not 'bar' the government from releasing the Report.¹²⁹

There is no unanimity on the effect of the Supreme Court judgement on enforceability of the recommendations. While some agree that the decision may have rendered nugatory aspects of the recommendations that related to the plaintiffs, they contend that the Supreme Court judgement was no excuse to 'suppress the truth.'¹³⁰ Others, including the President of the West Africa Bar Association, insist the Supreme Court in fact endorsed the Panel and that its creation was in any case valid under international conventions to which the country is party.¹³¹ Thus the government ought to implement the recommendations. The latter view would appear to be strengthened by the failure of the government to offer an explanation on the specific aspects of the judgement which prohibited it from publishing and implementing the decision. The failure of

¹²⁵ K Oderemi "Reopen Deaths of MKO, Kudirat, Dele Giwa, Others-Oputa Panel's Report" *Sunday Punch on the Web* (Lagos Nigeria Sunday 2 January 2005).

¹²⁶ *Guardian* Editorial note 31 supra.

¹²⁷ K Sanyaolu "The Case against Third Term" *The Guardian* Online Edition (Lagos Nigeria Sunday 5 March 2006).

¹²⁸ See for instance N Ugah "Afeniferere Wants Oputa Panel Report Released" *This Day* (Lagos 9 December 2004) and S Yakubu "Oputa Report: Kukah Tackles FG" *Sunday Punch on the Web* (Sunday December 12 2004).

¹²⁹ *Guardian* Editorial note 31 supra.

¹³⁰ *Ibid.* See also Oderemi note 125 supra.

¹³¹ F Falana "When Will Leaders Pay for their Iniquities?" *This Day* (Lagos Nigeria 20 December 2004).

the Obasanjo administration and the continued silence of the successor government on the matter has been telling. The non release of the Report has been viewed as one of the cardinal reasons for the continued agitation by some segments of the country on a number of issues.¹³²

In the face of government refusal to publish the Report, some civil society groups, including one which consulted for the Oputa Panel, proceeded to publish it on the internet.¹³³ Another coalition known as Civil Society Forum has commenced the publication in bound form with the publication of ‘The Executive Summary, Recommendations and Conclusions.’ The group observes that in all events, the Supreme Court judgement does not bar publication of the Report.¹³⁴ They consider that the people can find other ways of getting the recommendations of the Panel implemented, despite the intransigence of government. Organising a referendum on them is one such way. This informs their determination to ensure the full publication of the Report for mass education and action.¹³⁵

Since 1999, there has been an upsurge in violent property crimes and inter-communal and ethnic conflicts in the country. The view has been expressed in some quarters that not only has the transition to democracy failed to deliver on justice and restoration of the rule of law, but that impunity and state-sponsored violence have remained unchecked, if not increased, in the country.¹³⁶ Hopes for a new dawn in the wake of the transition have gone largely unfulfilled.¹³⁷ The Nigerian government, in jettisoning the *Oputa Panel Report* with its wide-ranging recommendations for accountability and institutional reforms, has likely contributed to the current state of affairs.

On the whole, it can nonetheless be fairly asserted that in the pursuit of its mandate, the Oputa Panel did a commendable job of seeking to establish the *truth* about the course of executive and legislative governance in the pre-transition period in the country. The aftermath of the truth-seeking-process in Nigeria, particularly as it relates to the non-implementation of the recommendations of the

¹³² *Guardian* Editorial note 31 supra.

¹³³ S Olokojobi “We’ll Publish Original Oputa Report- Fayemi of CDD” *The Daily Independent* (Lagos Saturday 11 December 2004).

¹³⁴ Oderemi note 125 supra.

¹³⁵ *Ibid.*

¹³⁶ *Hope Betrayed? A Report on Impunity and State-Sponsored Violence in Nigeria* (CLEEN Lagos & OMCT Geneva 2002)

¹³⁷ Human Rights Watch “A Human Rights Agenda for Nigeria’s 2007 Elections and Beyond (A Human Rights Watch Briefing Paper February 2007) 1 available at: <http://hrw.org/backgrounder/africa/nigeria0207/> (2 March 2007)

Panel, strikes an observer as an inherent defect that undermined its well-received work.

CONCLUSION

The work of the Oputa Panel provides ample justification for its establishment. The popular acclaim it received testifies to its relevance and acceptability as an apposite transitional justice measure in post-authoritarian Nigeria. However, a combination of factors, including poor planning and deficit of sincerity on the part of the government that established it, as well as lack of political will, played out to frustrate transitional justice efforts in the country.

It has been argued that Truth Commissions face two types of challenges: avoidable and inherent. The former derive from issues surrounding their establishment, conduct and follow up, while the latter has to do with the very nature of the enterprise.¹³⁸ The search for truth and reconciliation in Nigeria through the Oputa Panel suffered a fundamental set back in its lack of tailor-made legislation.

One of the crucial issues that ought to be addressed by such legislation, as the legal challenge to the Oputa Panel showed, is the jurisdictional scope of the process within a federal polity like Nigeria. The incident of power-sharing between the central and state governments dictated the need for legislation that validly defined the scope of the powers of a truth commission. This is critical where the truth commission is established by a central government with limited territorial and issue-jurisdiction, characteristic of federal polities. It is significant to note in this respect for instance, that state governments had powers similar to that of the president to establish a commission along the lines of the Oputa Panel in their states under various (though similar) Tribunals of Inquiry Laws.

It will be argued, essentially on consequentialist grounds, that the neglect of accountability of a public nature for the judicial role in the period of authoritarian rule is fatal to the transitional polity. It will be contended later on, that neglecting accountability of the judiciary as an integral part of the transition process is largely responsible for the ensuing state of judicial insensitivity to the dynamics of law and adjudication in such societies. As will become obvious from this study, the seeming *faux pas* in the conduct of the Nigerian truth-seeking process in this

¹³⁸ J D Tepperman "Truth and Consequences" (2002) 81.2 Foreign Affairs 128.

regard, has serious implications for the important role the judiciary plays in a transitioning polity.

The negative impact of the unaccountability of the judiciary for past governance as part of a transitional justice process is more conspicuous in a society seriously challenged by a legacy of dysfunctional institutions. The fragile institutional structures that characterise societies in transition engender substantial reliance on the judiciary as the major force to stabilise and foster the democratisation process and uphold rule of law. Such critical functions can only be appropriately taken up by an accountable and transformed judiciary. It is thus to the case for accountability of the judiciary in transitions that we should now turn.

THE CASE FOR JUDICIAL ACCOUNTABILITY IN TRANSITIONS

INTRODUCTION

The discussion in Chapter One highlighted how the Oputa Panel as a truth-seeking process in the context of Nigeria's transition failed to address the role of the judiciary in the period of military rule. The otherwise laudable work of the Oputa Panel left a critical gap in accountability for misgovernance. While the Panel conducted a laudable enquiry into the activities of the executive and legislature as constituted at various times by a number of successive military regimes, it failed to engage with the role of the judiciary in governance in almost three decades of authoritarian rule. It was almost as if the judicial branch was in complete abeyance or indeed, non-existent in the country during the period. But, even as the special or institutional hearings of the Oputa Panel revealed, this was factually not the case. The current chapter argues a case for the judiciary to be made to give an account of its role in governance in the period of authoritarian rule through a truth-seeking process as part of transitional justice measures. This is based on the position that the judiciary as the third branch of government, participates in governance at all times.

The gap in the conduct of the Oputa Panel earlier discussed raises the relevance of accountability for the judicial role in past governance at times of political change. I intend to critically examine the salience of such institutional accountability in this study. This is partly because the Oputa Panel, as a transitional justice measure, more specifically, truth-seeking process in a post-authoritarian context, is not alone. There is an existing gap in transitional justice research on the role of the judicial institution in governance in post-authoritarian societies. The present inquiry seeks to generate scholarly interest in an otherwise neglected aspect of transitional justice theory and state practice. The paucity of critical perspectives on the role of the judiciary during a society's authoritarian period could lead to the view that it lacks a distinct role in governance. In the alternative, it suggests that the judicial function was inconsequential or judicial outcomes were invariably imposed during the relevant period. The chapter attempts to address the gap in existing transitional justice research on judicial governance in authoritarian societies. It presents a general case for judicial accountability for the past in transitions. Thus, this chapter is conceived as a

theoretical framework for the case for accountability of the judiciary for past governance. The framework developed here will be applied to the analysis of the Nigerian context in Chapter Three.

Historically, Nigeria started out its post-independence existence as a Westminster-type political arrangement but subsequently translated into an American-styled federation. The course of governance (including the judicial) in the country has been shaped not only by its current political leanings, but also, historical antecedents. In view of these factors, comparative insights from both the British and American legal and political experiences are germane to a discussion of Nigeria's judicial institution. Thus, I draw on Anglo-American judicial traditions and experiences in articulating the case for accountability of the judiciary for the past in the context of the country's transition. In this regard it is relevant to add that later parts of this thesis equally benefit from comparative insights.

In articulating a theoretical framework, the chapter considers two critical issues framed as queries. First, to what extent ought the role of the judiciary to be held up to public scrutiny as part of the transitional justice process? In the alternative, should it not be the case that the judiciary is held to account for its role in societal experience of gross violations of human rights and impunity? Secondly, what is the relevance of such inquiry? It is anticipated that the inquiry will unearth the significance of the role played by the judiciary in post-authoritarian societies in particular and rifted societies in general. Further, it should also throw some light on the circumstances underlying judicial choices in the task of adjudication.

The chapter locates uneasiness in the interaction of the truth-seeking process with the initiative to bring the judiciary to account for its role in governance through a public mechanism. The uneasy relationship derives from reconciling the imperative of judicial accountability for the past with the important doctrine of judicial independence. There is the view that public accountability of this nature inherently challenges, if not critically subvert the integrity of the judiciary, one of the important institutions of the state (particularly in transitional societies). On the other hand, there is the position that non-accountability of any institution that was involved in governance, including the judiciary, weakens the viability of the truth-seeking mechanism which in some instances (like the Nigerian situation), is the main agent for achieving transitional justice.

I advance the argument that the adoption of a course of action which takes cognisance of the context of societal transition is the appropriate approach. The

strategy must also incorporate relevant principles of international law, especially rights and humanitarian law. This course of action will smoothen, to a large extent, the rough edges of the uneasy interaction between accountability and institutional independence. Perhaps more importantly, the approach offers opportunity to transform and secure new legitimacy for the judiciary which has become complicit for misgovernance through quiescence to authoritarian military misrule.

Section II examines the nature of state powers and the role of the judiciary in governance. Section III focuses on the implications of accountability of the judiciary for the rule of law. Section IV argues the view that judicial governance constitutes a distinct mode of exercise of power and this provides justification for the imperative of accountability of the judiciary. It advances a case for accountability of the judiciary for its past role in governance in transitional contexts with particular reference to post-authoritarian societies. The analysis brings to the fore that public accountability of the judiciary for the past is a key factor in the aspiration for transformed and sustainable institutions of the state.

2. STATE POWERS AND THE JUDICIARY

Governance has become one of the most complex problems of human existence in modern times. Wesson's view that the complexities of governance constitute 'a monumental short-coming' that threatens all advancement in human development¹ could be regarded as an overstatement of the dilemmas of power-politics. It is nonetheless a view that signposts the intricacies of the phenomenon of power in modern society.

State powers in legal and political conceptions are divided between the three institutions of the executive, the legislature and the judiciary.² According to one prominent way of thinking, government as delegated powers are vested by a collective (the *people*) in the modern state. Thus, government is custodian of the common interest. The *people* however retain 'popular sovereignty' and demand accountability from rulers.³

Any institution or group that has the capacity to influence how others experience the 'vulnerabilities' of existence, both as individuals and groups, Poggi

¹ R Wesson *Modern Government, Democracy and Authoritarianism* (Prentice Hall Incorporated New Jersey 1985) ix

² M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press Oxford 1967)

³ J G March and J P Olsen *Democratic Governance* (The Free Press New York 1995) 151

notes, wield ‘social power.’⁴ This ability to change an existing state of affairs is the cardinal feature of power. It entails the capacity to have others act or refrain from acting in a particular manner. Power in our context is what MacCormick refers to as ‘power-in-fact’ as opposed to mechanical power that inheres in nature like the power of gravity or interpersonal power that is of a more esoteric nature, like charisma.⁵ In the power game, there are different groups in active contest for dominance each utilising specific inherent advantages to achieve supremacy. However, the different power bases in the struggle to undermine the influence of others become constrained in that quest by certain self-limiting factors.⁶

Notwithstanding the ‘self-limiting’ factor of the judiciary, namely that it does not initiate the process for the exercise of its power, contemporary social experience clearly shows it is endowed with the resources with which it can and does influence society. Two contemporary examples lend credence to this view. One is the significant decision of the United States Supreme Court in *Bush v. Gore*⁷ that proved decisive in the election to the coveted position of the US president in rather controversial circumstances. The other is the same court’s decision in *Hamdan v Rumsfeld, Secretary of State for Defense*⁸ in which (by a slim majority of 5 to 4), it decried the Bush administration’s detention of ‘terror suspects’ in Guantanamo Bay. The US Supreme Court declared illegal, the plan to prosecute them before military commissions under the Presidential Military Orders 2001. The first secured George Bush’s entry into the White House on an otherwise shaky electoral victory. The other gave judicial fillip to international clamours for the release of the detainees in ‘Camp Delta,’ Guantanamo Bay. The US Supreme Court’s decision was acknowledged as an important national complement to the finding of the UN Commission on Human Rights that the detention facility was illegal and should be closed.⁹

⁴ G Poggi *Forms of Power* (Polity Press Cambridge 2001) 203-204.

⁵ N MacCormick *Institutions of Law- An Essay in Legal Theory* (Oxford University Press Oxford 2007) 153-154.

⁶ Poggi note 4 supra.

⁷ 531 U.S 98 [2000] the decision was heavily criticised in the media. But the criticism that also trailed the earlier decision of the Supreme Court of Florida (SC.00-2431) in favour of Al Gore (and overturned by the US Supreme Court) highlights the dilemma the judiciary faces in such distinctly political and controversial cases. There is a considerable body of social, political and legal critique on the *Bush v Gore* and related cases. See for instance E J Dionne Jr. & W Kristol (eds.) *Bush v Gore- The Court Cases and the Commentary* (Brooking Institution Press Washington D.C 2001) and J M Balkin “*Bush v Gore* and the Boundary between Law and Politics” (2001) 110 *Yale Law Journal* 1407.

⁸ 126 S. Ct 2749 [2006].

⁹ United Nations Press Release “UN Experts Ask International Community to Aid with Expedient Closure of Guantanamo Detention Centre” (6 July 2003) available at:

It is pertinent to acknowledge that the Bush administration continued the detentions under the Military Commissions Act 2006 (clearly following the lead of the dissenting justices) that substantially validates the actions of the executive in Guantanamo Bay. But, quite apart from ongoing litigation challenging trials under the Act, it is noteworthy that the judiciary left the executive with no choice but to have recourse to the legislature in conformity with democratic principles and the rule of law. Many commentators have hailed *Hamdan* as a victory for the rule of law.¹⁰

Nor are *Bush* and *Hamdan* isolated instantiations of the influence of judicial decisions on the course of societal action or power of the judiciary on society. There are other precedents perhaps with more resonance within American legal tradition in the same direction. Take *Dred Scott v Sandford* for instance.¹¹ The decision has been identified as one of the major precipitators of the civil war in that country, with significant historic consequences.¹² Another is *Roe v Wade*.¹³ It has been noted that support for or opposition to the decision in *Roe* continues to influence, if not define, the political fortunes of aspiring public office holders in the United States.¹⁴

The foregoing highlights the fact that judicial decisions in specific cases affect not only the parties in litigation before the courts. They impact on others in the wider society who, in most instances, will never subject themselves to direct jurisdiction of the courts by way of litigation. Judicial determinations affect civil rights, individual freedoms and property rights (at the micro-level) and influence, or in some cases, dictate outright, the course of political, social, cultural and economic development (at the macro-level). It has been recognised that when judges ‘whisper,’ their voices are ‘transmitted through a thousand amplifiers

<http://www.unhchr.ch/hurricane/hurricane.nsf/0/CDAFC9022C2E0078C12571A30058B866?opendocument> (22 October 2007).

¹⁰ These include American Bar Association “Statement of Michael S. Greco, President, American Bar Association Regarding U.S. Supreme Court Decision in *Hamdan v. Rumsfeld*” (29 June 2006) available at: <http://www.abanet.org/op/greco/statements/hamdan.shtml>, Editorial “A Victory for Law: The Supreme Court Checks the Bush Administration's Attempt to Invent its Own Rules for War” *Washington Post* (Friday June 30 2006) A26. See however D A Martin “Judicial Review and the MCA: On Striking the Right Balance” (2007) 101 *American Journal of International Law* 344 which examined the merits and shortcomings of the decision.

¹¹ 60 US (19 How.) 393 (1857).

¹² For a recent analysis of how the decision impacted on US legal and political history, see generally P Finkelman “*Scott V. Sandford: The Court's Most Dreadful Case and How it Changed the Course of History*” (2007) 82 *Chicago Kent Law Review* 1. (‘...a catalyst in creating the crisis that would lead to Lincoln's election, secession, civil war and the end of slavery’).

¹³ 410 US 113 (1973).

¹⁴ Finkelman note 12 supra at 10.

throughout the system.’¹⁵ In that way the judiciary performs a significant role in governance. It follows that the subversion of the judicial institution by incidence of social dislocations of conflict or authoritarianism, justifies public scrutiny in post-authoritarian contexts not so much as an indictment on the institution, but more importantly, to draw out relevant lessons for desired transformation.

It hardly stands to contest that the executive and legislature exercise political power. In similar vein however, the judiciary, in furtherance of its interpretational role mediates political power. In the mediatory function, the judiciary stands between the executive and the citizen in resolving conflicts in the same way it adjudicates between individuals. The judiciary is empowered to review the actions of the executive to determine their legality.¹⁶ For the most part however, transitional justice research, particularly with reference to institutional accountability, has focused on the role of the executive and the legislature in societies that have witnessed gross violations of human rights and impunity with scarce attention paid to the judicial function. Yet, so critical is the role of the judiciary in the exercise of powers in the modern state that ‘...a government is not a government without courts.’¹⁷

Law, along with politics, according to Loughlin, constitute ‘critical aspects of the normative world that we have assembled for the purpose of living a relatively ordered existence and through which we are able to manage our differences.’¹⁸ It follows that the institution charged with the interpretation of law plays a critical role in society. The nature of the role constitutes the judiciary as a major element in the machinery of the state. In that vantage position, Griffith notes, the judiciary ‘can not avoid the making of political decisions.’¹⁹

In the contemporary period, the judiciary is constitutionally established as a bulwark against executive arbitrariness and legislative excess.²⁰ The powers of judicial review of executive and legislative actions may however be limited by the historical and political specificities of the state. Thus, the normative jurisprudence

¹⁵ Barak “A Judge on Judging: The Role of a Supreme Court in a Democracy” (2003) 116/1 Harvard Law Review 19, 63.

¹⁶ M Gleeson “Public Confidence in the Judiciary” (Judicial Conference of Australia, Launceston, 27 April 2002) available at: http://www.hcourt.gov.au/speeches/cj/cj_jca.htm (7 March 2007) 5.

¹⁷ H M Hart and H Wechsler *Federal Courts and the Federal System* (2nd Edition Mineola New York Foundation Press Inc. 1973) 6

¹⁸ M Loughlin *Sword & Scales- An Examination of the Relationship between Law and Politics* (Hart Publishing Oxford 2003) 31

¹⁹ J A G Griffith *The Politics of the Judiciary* (5th Edition Fontana London 1997) 292-3.

²⁰ Wesson note 1 supra at 48.

of judicial review of executive and parliamentary actions in the federal political context of the United States contrasts with the more restricted approach to judicial review of legislative action in the unitary system of the United Kingdom. The attitude of the courts in the United Kingdom is conditioned by its deference to the principle of parliamentary sovereignty. There is thus, some variation in the extent of judicial policy-making powers or what I choose to refer to as ‘judicial governance’²¹ deriving from historical and political factors.

Judicial power has been defined as the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property.²² Judicial powers are conferred to effect peaceful resolution of disputes and adjudication of rights infringement, public and private. Conflict, with its positive and negative aspects, is endemic in human society²³ and so its resolution is of primary concern. So critical is the role of the judicial institution to society that it has rightly been argued that society ‘can not function’ in the absence of a dispute-resolution institution.²⁴

In recent times, the powers of the judiciary have become incrementally visible, owing particularly to the ‘rights revolution of the twentieth century.’ ‘Courts’ Loughlin affirms, ‘are becoming increasingly more important...their power has increased dramatically.’ The situation has led to concerns about ‘the emergence of government by judiciary.’²⁵ The growth of judicial powers in relation to the other arms of government has become more noticeable in the post-second world war period.²⁶ The growing importance of the judiciary should be expected granted that it is one of the institutions of the state; wielding some of the powers of the state in the task of ensuring ‘effective public regulation, equal liberty and social justice.’²⁷ Such considerable powers impact on all aspects of societal development and interaction. It ought not to be left unaccounted for in the context of transitions.

²¹ This coinage differs ever so slightly from the recent reference to the same issue as ‘judicial government’. See T I Ogowewo “Self-Inflicted Constraints on Judicial Government in Nigeria” (2005) 49.1 *Journal of African Law* 39.

²² *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ. Quoted in M Gleeson “The Right to an Independent Judiciary” (14th Commonwealth Law Conference London, September 2005) available at: http://www.hcourt.gov.au/speeches/cj/cj_sept05.html#fn1 (7 March 2007).

²³ F Ni Aolain and C Campbell “The Paradox of Transition in Conflicted Democracies” (2005) 27 *Human Rights Quarterly* 172, 185.

²⁴ Note “Filling the Void: Judicial Power Jurisdictional Attacks on Judgments” (1977) 87(1) *Yale Law Journal* 164, 182.

²⁵ Loughlin note 18 supra at 212 to 213.

²⁶ Barak note 15 supra at 21.

²⁷ D Held “Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective” (2004) 39.2 *Government and Opposition* 364 at 391.

Ogowewo advocates that the process of development of a state devolves not only on the executive and legislature, but also the judiciary. The executive and the legislature (even if with differing emphasis) have been viewed as prime movers of the process of development and assessed along those lines. But the role of the judicial institution as an integral part of and key contributor to governance and development has been largely unacknowledged and ignored.²⁸ This may be due in part to the contestable notion that it is the least ‘dangerous branch of government.’²⁹ The lack of initiative to exercise its institutional power unless moved by an aggrieved party may be another contributory factor.³⁰ Yet, dependent on socio-political factors, the powers wielded by the courts³¹ may expand in dimensions that substantially ‘diminishes’ powers exercised by the other two branches of government.³²

In a democracy, a correlate of the exercise of powers by any institution is the requirement of accountability. As Theberge argues with reference to the Supreme Court of the United States, the immense powers wielded by the judiciary necessitates its been subjected to similar objective and informed scrutiny applicable to the executive and the legislative branches. This is more particularly pertinent in jurisdictions where judicial tenure is for life.³³

The exercise of power in democratic societies involves a measure of *developing accounts*. Such accounts serve to *define* the past and choices made in the course of it. An important utilitarian function of democratic accounting is the promise it holds for establishing trust between the people and the government.³⁴ Governance through authoritarianism (with the attendant incidence of egregious violations of human rights and the rule of law) results in social displacement and distortions between the government and the governed. It is accordingly arguable that *comprehensive accountability* in the transition to democracy and the rule of law is a key requisite for addressing the resultant disequilibrium in society.

²⁸ Ogowewo note 21 supra at 39.

²⁹ For an interesting discussion of this notion see W Berns “The Least Dangerous Branch, But Only if...” L J Theberge (ed.) *The Judiciary in a Democratic Society* (Lexington Books D.C Heath and Company Massachusetts 1979) 1-17.

³⁰ B O Nwabueze *Judicialism in Commonwealth Africa-The Role of the Courts in Government* (C Hurst & Company London 1977) 49

³¹ Throughout this chapter I use the terms ‘court’ and ‘judiciary’ interchangeably.

³² R K Winter Jr. “The Growth of Judicial Power” in L J Theberge (ed.) note 29 supra, at 29.

³³ Theberge note 29 supra at 176. (Emphasis added).

³⁴ Theberge note 29 supra at 46.

Pound's³⁵ concise but incisive contribution on the concept of judicial power is as apt today as it was over eight decades ago when it was made. For him, the principle of separation of powers does not require a water-tight compartmentalisation of the three arms of government, even in a federation like the United States. In spite of this, commenting on what the role of judges ought to be in society, he insisted that 'Courts cannot be made tame cats either of the executive or the legislative power except as they themselves yearn for a warm place by the fire.'³⁶ Such 'yearning', even where reasonably suspected, ought to be subject of some accounting, much as executive and legislative (mis) actions are.

In discussing judicial accountability, the system of appeals to superior courts no doubt constitutes a form of accountability of the judiciary, and some argue an adequate one at that.³⁷ Appeals as a form of accountability may be sufficient in societies where the rule of law is entrenched with a well developed democratic culture. This is particularly the case in view of the existence of other forms of public accountability like congressional hearings, professional censor and critical media focus. All of the foregoing no doubt play crucial roles in ensuring public engagement with the judiciary in particular and government in general in advanced and stable democracies.³⁸

Some factors may however militate against appeals as an adequate form of judicial accountability. The complex web of legal processes, social and economic costs of litigation,³⁹ absence or inadequacy of legal aid, and the limitations of educational development in developing countries in general (by and large the sites of transitional justice processes) and Nigeria, in particular suggest the need for an alternative system of checks directly and easily accessible to the public at *transitional moments*. Further, it is plausible to argue that the fundamental premise of the appeal paradigm as well as the other forms of judicial accountability referred to above, is the presumption of democracy and good governance, the absence of which is precisely in issue in post-authoritarian

³⁵ C W Pound 'The Judicial Power' (1922) 35 (7) Harvard Law Review 787.

³⁶ Pound note 35 supra.

³⁷ D C Prefontaine Q.C and Joanne Lee 'The Rule of Law and the Independence of the Judiciary' (Paper presented to the World Conference on the Universal Declaration of Human Rights, Montreal, Canada, 7, 8 and 9 of December 1998) available at: <http://www.icclr.law.ubc.ca/Publications/Reports/RuleofLaw.pdf> (Last accessed 9 February 2007).12-13.

³⁸ H K Prempeh "Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa" (2006) 80 Tulane Law Review 1239, 1307-1308.

³⁹ O Oko "Consolidating Democracy on a Authoritarian Continent: A Challenge for Lawyers in Africa" (2000) 33 Vanderbilt Journal of Transnational Law 573, 611.

societies. Authoritarian rule is not noted for tolerating such refined and sophisticated mechanisms for accountability. Mechanisms for the accountability of state institutions were either muted, barely in existence or completely absent. Given that state of affairs, it is apposite in the context of transition to adopt other mechanisms like the truth-seeking process to secure accountability for the judicial role in the past.

3. JUDICIAL ACCOUNTABILITY AND THE RULE OF LAW

The ability of citizens to enforce their rights against the state (as well as other individuals) is critical to the modern conception of the rule of law.⁴⁰ The case for accountability of the judiciary is reinforced by this need since the judicial function is central to the realisation of the right. There must be no doubts as to the integrity and commitment of the judicial institution to ensuring the rule of law in furtherance of the public interest and popular sovereignty.

Under the concept of popular sovereignty, the three arms of government hold power as agents of the people.⁴¹ The US Supreme Court in the classic formulation of this view of sovereignty in *Marbury v Madison, Secretary of State of the United States*⁴² asserted that the people possess an incontestable right to determine the course of their future governance.⁴³ The will of the people is not only supreme but dictates the powers of the different arms of government and delineates the limits of those respective powers.⁴⁴ The foregoing understanding of the rule of law adopted in this study, as against other contending views,⁴⁵ assumes a more relevant position in societies in transition from an authoritarian past, where there is predictably, a common aspiration for societal rebirth. There is usually an urgent need for across-the-board reconfiguration of state institutions and public

⁴⁰ Loughlin note 18 supra at 209.

⁴¹ Ibid. at 2.

⁴² (1803) 5 U.S 5 (1Cranch) 137. But c/f W J Watkins Jr. "Popular Sovereignty, Judicial Supremacy and the American Revolution: Why the Judiciary Cannot be the Final Arbiter of Constitutions" (2006) *Duke Journal of Constitutional Law and Public Policy* 159 [Online Edition]. He argues, through a review of a number of earlier decisions of state courts, that the power of judicial review predicated on popular sovereignty had in fact been laid much earlier. ('*Marbury* did not tread on virgin territory when it grounded its authority in the people's will as manifested by the Constitution... Viewed in its proper context, the holding in *Marbury* falls far short of radical') at 95.

⁴³ *Marbury* note 42 supra at 251.

⁴⁴ *Marbury* note 42 supra at 215.

⁴⁵ See on varying conceptions of the rule of law, R Peerenboom "Human Rights and the Rule of Law: What's the Relationship" (2005) 36 *Georgetown Journal of International Law* 809 and D Tolbert and A Solomon "United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies" (2006) 19 *Harvard Human Rights Journal* 29.

participation in social reconstruction to forestall a return to authoritarianism or even conflict.

Transformation of the judicial agency is central to the repositioning of rule of law as a beneficial rather than exploitative principle for the organisation of society as a whole. It is certainly the case that some understandings of the rule of law were deployed by erstwhile tyrannical regimes in the exercise of power. This was certainly the case in Nazi Germany, apartheid South Africa and authoritarian military regimes in Africa and Latin America. In each case, specific instrumental understandings of law were deployed to foster morally and democratically unacceptable policies of discrimination and gross violations of human rights. Discrimination laws for example were institutionalised in Nazi Germany and apartheid South Africa and held out as legitimate.

It would appear that a conception of the rule of law that emphasises or relies on ‘people-power’ or in more formal terms, popular sovereignty holds strong promise for enduring fundamental changes aspired for in transitioning societies. The American transition from colonialism, struggle for independence and the pivotal role of the people in its constitutional development in the late 18th century in particular, provide strong precedent for societies seeking to assert popular power in transitioning states.⁴⁶

Proceeding on our adopted view of the rule of law, a publicly accessible process of scrutiny offered by the *truth-seeking* mechanism, can be expected to restore some measure of judicial credibility and public confidence in the judiciary in such post-authoritarian contexts. To insist otherwise namely that any institution is beyond public scrutiny conducted in a *plainly public* manner afforded by a truth-seeking process amounts to conceding to the judiciary ‘a real omnipotence.’⁴⁷ This is precisely a privilege the judiciary has been all too ready to deny the political branches of government through the instrumentality of judicial review. More crucially, such a proposition is tantamount to a direct inversion of popular sovereignty and the imposition of ‘judicial supremacy.’⁴⁸

4. THE CASE FOR ACCOUNTABILITY OF THE JUDICIARY IN TRANSITIONS

Murray Gleeson, Chief Justice of Australia, while discussing the theme of public confidence in and criticism of the judiciary observed that

⁴⁶ L D Kramer *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press Oxford 2004).

⁴⁷ *ibid* at 178.

⁴⁸ Watkins Jr. note 41 *supra* at 257.

...we live in an age when the attitude of the general community towards authority, and institutions, is more consistently questioning, and even challenging, than the past. This is a good thing. *It is better that people who exercise authority feel uncomfortable than they feel complacent.*⁴⁹

Implicit in Murray's position is the recognition of judicial governance. His observation on current trends on accountability is even more apposite in transitional contexts where there is explicit recognition that there has been a systemic dysfunction in society. Yet, this imperative faces the challenge of an extant tension between it and the principle of judicial independence, another imperative of the rule of law.⁵⁰

In setting a normative framework for reckoning with the past in transitional contexts, Crocker rightly identifies unveiling truth, accountability and punishment, pursuing institutional reform and long-term development as well as providing the opportunity for public deliberation as some of the central goals of transitional justice.⁵¹ But as Oko has noted, democratic transitions usually focus on establishment of formal structures with scarce attention to ridding transition societies of 'anti-democratic' attitudes that had taken root during years of authoritarian rule. This neglect threatens the whole transition process.⁵²

The commonly articulated transition reform agenda focused on the political branches of government at the expense of attention to the judicial situation in transitioning polities, is one of the marked failures of the current transition paradigm.⁵³ It can be argued that institutional accountability for past misconduct with a view to strengthening weak or transforming derelict state structures is one of the fundamental ways to foster the viability of democracy and the rule of law. Such accountability facilitates acknowledgement of institutional shortcomings crucial to achieving transformation of state institutions. It also constitutes a definitive progression to democratic governance and movement away from repression.⁵⁴

⁴⁹ Gleeson note 22 supra at 4. Emphasis mine.

⁵⁰ O Oko "Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria" (2006) 9 Brooklyn Journal of International Law 10, 60.

⁵¹ D A Crocker "Reckoning with the Past: A Normative Framework" in C A L Prager and T Govier, (eds.) *Dilemmas of Reconciliation: Cases and Concepts* (Wilfrid Laurier University Press Waterloo Ontario 2003) 39.

⁵² Oko note 39 supra at 614-617.

⁵³ Prempeh note 38 supra at 1299.

⁵⁴ Ni Aolain and Campbell note 23 supra at 184, 207.

In general terms, an accountability relationship exists where a group or other entity demands an agent to report on the agent's activities.⁵⁵ It has also been considered to be the right to hold an agent 'to answer for performance that involves some delegation of power.'⁵⁶ Accountability issues commonly evolve from the delegation of power in the public context by virtue of legislation. Both public and private actors are similarly obliged, through various instrumentalities, including contractual agreements, to render accounts.⁵⁷ Political accountability proceeds on the precept that individual or institutional actors who act on behalf of the community and are funded from public resources, be accountable to the ordinary citizens.

The democratic accountability process requires a record of not only individual and institutional roles in governance, but also, responsibility for the results achieved and the means deployed in the process.⁵⁸ The judiciary as one of a tripod of state institutions can not be excused from accountability. This is certainly the case if it is conceded that the judicial function is exercised in a general sense as a form of delegated power from the people. But while accountability in the case of the political branches may be individual as well as collective, what is been advocated in this study is institutional (or collective) accountability of the judiciary.

A number of mundane objections may be canvassed for the futility of a case for accountability of the judiciary, especially considering the level of education in developing countries that form the bulk of transitional societies, particularly in Africa. One is that a sizeable number of the population are excluded by a legal system that is at once culturally alien and commonly conducted in a foreign language. Related to this is the fact that the intricacies of the merits of the jurisprudence to which the judiciary subscribed in particular cases is typically beyond the grasp of the generality of the people (even those who have an appreciable level of education). Thus, the outcome of the accountability process

⁵⁵ R O Keohane "Global Governance and Democratic Accountability" in D held and Mathias Koenig-Archibugi (eds.) *Taming Globalization: Frontiers of Governance* (Polity Press Cambridge 2003) 130, 157.

⁵⁶ B S Romzek and M J Dubnick "Accountability" in J M Shafritz (ed.) *International Encyclopedia of Public Policy and Administration* (Westview Press Boulder 1998) quoted in M Koenig-Archibugi "Transnational Corporations and Public Accountability" (2004) 39 (2) *Government and Opposition* 234, 236.

⁵⁷ C Scott "Accountability in the Regulatory State" (2000) 27 (1) *Journal of Law and Society* 38, 39.

⁵⁸ March and Olsen note 3 supra at 150.

may only be accessible to a privileged class of, largely, legally trained technocrats.⁵⁹

In response, it can be posited that avenues for public education and enlightenment by those who can access the information to overcome the barrier can be created to further the course of the fundamental objectives of transitional justice and accountability. In any case, it can not be the argument that the incidence of language barriers should be allowed to deprive a people of their rights. On the contrary, the opposite may be the more plausible argument- namely that the existence of language barriers is reflective of the denial of such rights.

Another possible objection is the perspective that the judiciary was itself victim of the socio-political system that disempowered the institution in the face of a sovereign parliament. I will deal with this below in the context of what I consider to be institutional objections. A further objection is the need to maintain and protect the collegiality of the judiciary in the period of transition. At the heart of the collegiality argument is the need to maintain a rancour-free atmosphere for judicial officers who had served in the old order (and are, at the least, tainted with complicity for human rights violations) and those newly appointed by the post-authoritarian government following transition to ensure institutional cohesion and stability.

In countering this objection, it is possible to argue that the narrow objective of individual collegiality ought not to be allowed to frustrate the wider claims of the society at large to institutional rectitude and transformation that accountability is expected to foster. If anything, the need for such accountability becomes acute when it is considered that untransformed elements of the old order can negatively impact on the new and expectedly, progressive elements appointed as part of the transition process. Having disposed of what I refer to above as mundane objections, it is relevant to examine in some detail, the institutional objections to the case for accountability of the judiciary in transitional contexts.

4.1 Judicial Independence⁶⁰

The need for judicial independence constitutes a potent argument for critics of a call for public accountability of the judicial role. However, the call is based on what can be regarded as an overarching and implied legitimate political

⁵⁹ Prempeh note 38 supra at 1300.

⁶⁰ The themes of judicial independence and judicial accountability have attracted (and continues to attract) considerable scholarly interest of both legal writers and jurists alike. This is evidenced by the works documented in A B Atchison and L T Liebert & R K Russell “Judicial Independence and Judicial Accountability: A Selected Bibliography” (1999) 72 South California Law Review 723

expectation of the people within the legal and political paradigm of popular sovereignty as developed by Locke.⁶¹ The people are empowered to demand an account from their agent as constituted by the government of which the judiciary forms a part. In any event, as Karlan notes, ‘Judicial independence is... not an end in itself;’⁶² rather, as one of the most renowned English jurists admitted, it confers great responsibility on judges.⁶³

It is conceded that the principle of judicial independence is crucial to the judicial function. The principle is enshrined in most modern constitutions and in countries with unwritten constitutions, like Britain, the principle has by convention been entrenched sometimes over centuries of practice.⁶⁴ The nature of judicial independence, it has been asserted, sets it ‘a place apart’ in the scheme of state institutions. The principle is supported by ‘a solid historical foundation and a fine edifice.’⁶⁵ The critical question however is whether that privileged position and strong foundation ought to shield the institution (or even individual judges) from public scrutiny? The principle, in all of its importance for the adjudicatory role, and dispensation of justice, ought not to be allowed to override the need for accountability for powers conferred on any institution of state in terms of the process and outcomes of the exercise of such powers.

Justification for the foregoing position includes the fact that judicial independence is not a perquisite of judicial office. It is commonly recognised that respect for courts is essentially directed at the institution and not the person of the individual judge. In its conception, the principle is, like judicial power itself, designed for the benefit of citizens.⁶⁶

Respect for and compliance with judicial decisions is fostered by the belief in the impartiality of the judiciary. It is not designed to cast a sanctimonious cloak around individual judges. This is central to any power the judiciary can aspire to have in society. It accords with the warning of the late Thurgood Marshall of the

⁶¹ Loughlin note 18 supra at 162-175: ‘Locke makes an important innovation in asserting that political power rests in individuals and that this power is delegated through their consent to an institution (whether monarch or parliament or both) which, in some form or the other, can be taken to be representative of the people.’ (at 165)

⁶² P S Karlan “Two Concepts of Judicial Independence” (1999) 72 Southern California Law Review 535, 536.

⁶³ Denning L J “The Independence of Judges” in B W Harvey *The Lawyer and Justice* (Sweet and Maxwell London 1978) 55, 63

⁶⁴ Ibid.at 55-102.

⁶⁵ M L Friedland “Judicial Independence and Accountability-A Canadian Perspective” (1996) 7(3) Criminal Law Forum 605, 637.

⁶⁶ Gleeson note 22 supra at 1

U.S Supreme Court to the judiciary that ‘We must never forget that the only real source of power we as judges can tap is the respect of the people.’⁶⁷

The fundamental doctrinal basis of the principle of judicial independence is the desire to obviate potential constraints to the exercise of the judicial function. Institutional independence is necessary to secure the role of the judiciary as the institution charged with protection of the individual from oppression.

So profound is the consensus on the need for judicial independence that it has become ‘all but universally recognised as a necessary feature of the rule of law.’⁶⁸ The principle, guaranteed not only by national but also a considerable number of significant international human rights instruments,⁶⁹ entails both ‘negative’ and ‘positive’ aspects. The negative conception of the principle turns on the need to pre-empt all sources of coercion that may interfere in the adjudicatory process and are by nature beyond the individual judge’s control. Judicial officers in the course of their duties are to be protected from all external constraints that may constrain or influence the judicial function. Such protection includes measures to secure their physical safety, freedom from pecuniary worries, apprehensions on career advancement and job security. It further includes freedom from political considerations in systems where judicial office is elective.

The positive aspect relates to the facilitation of the judicial officer’s ability to freely come to a decision based on personal conviction about and understanding of the law.⁷⁰ The main constraints to judicial independence on the positive view of the matter are jurisdictional doctrine and judicial precedent; products of the judicial system itself. Thus, it is of an internal nature. Both principles help to ensure certainty in the law in some way but could also constrain lower courts in the *proper* exercise of their discretion.⁷¹ Thus the two sides consist of measures designed to afford the judge ‘freedoms from’,⁷² external constraints and ‘freedoms to’,⁷³ follow their conscience in their *just* adjudication of disputes.⁷⁴

⁶⁷ “Judges Must Strive for Neutrality” *Chicago Tribune* (Chicago August 15 1981) p.7

⁶⁸ *Independent Jamaica Council for Human Rights (1998) Ltd & Ors v Marshall-Burnett* [2005] UKPC 3, 12. Cited in Gleeson note 22 *supra*

⁶⁹ See Friedland note 65 *supra* at 622-629 for a discussion of some of these conventions, declarations and statements of principles. They include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Montreal Declaration on the Independence of the Judiciary, the European Convention on Human Rights, the American Declaration of the Rights of Man and the African Charter on Human and Peoples Rights.

⁷⁰ Karlan note 62 *supra*

⁷¹ *Ibid.* at 548-557.

⁷² *Ibid.* at 537

⁷³ *Ibid.* at 548

⁷⁴ *Ibid.* at 537-548

Delgado's sceptical appraisal of judicial independence⁷⁵ similarly fortifies the argument for non-immutability of the concept and advances a case for judicial accountability of a public nature advocated here. He argues that there is a sense in which exponents of judicial independence have sought to weave an impenetrable mesh around judges to the detriment of other professions, groups and organisations in society. This is not only unfair but essentially to the purpose of 'legitimizing a myth.'⁷⁶ He raises several challenges to the normative view of judicial independence as a sacrosanct doctrine for the preservation of the judiciary in a democracy.

Delgado contends that judicial independence has been utilised to distract attention from many other inbuilt factors (within the judicial institution) that detracts from a purist perspective of the doctrine. Some of these factors, including race, class and gender, influence to some extent, the decisions of individual judges, a fact he contends, has attracted little attention. He further argues that '[T]he entire structure of the legal system, from *stare decisis* to judicial demography to judicial ethics and socialization'⁷⁷ prevents judges from acting independently. He notes that the concept may be viewed as a 'platitude' and (like all platitudes) can be 'perfectly indeterminate.' Whereas 'real judicial independence' provides judges the latitude to decide cases outside of what may be considered as the conventional, or what Delgado refers to as 'structural due process', they rarely do.⁷⁸

In another assessment of judicial independence within the context of contemporary American society, Zemans makes the point that traditional notions of judicial independence that precludes judges from public accountability have been and continues to be progressively eroded. 'Political scrutiny of judges' he confidently asserts 'will also continue if not increase, at least in the immediate future.'⁷⁹ While his specific focus was on elected state judges, he considered the arguments as largely apposite to the situation of non-elected (federal) judicial officers. He affirms that accountability of the individual judge and the judiciary constitute the best guarantee for (rather than an affront to) judicial independence.

⁷⁵ R Delgado "Rodrigo's Committee Assignment: A Skeptical Look at Judicial Independence" (1999) 72 Southern California Law Review 425.

⁷⁶ Delgado note 75 supra at 433.

⁷⁷ Ibid. at 448.

⁷⁸ Ibid at 450.

⁷⁹ F K Zemans "The Accountable Judge: Guardian of Judicial Independence" (1999) 72 South California Law Review 625, 655.

Judges, in order to assure society they are ‘appropriately accountable’ and worthy of independence required for fostering the rule of law, have to take on a pro-active and public role in performance of the judicial function.⁸⁰ Zemans further makes the crucial point that while public accountability of the judiciary may carry with it some form of institutional restraint (and this is not altogether undesirable), it does not necessarily interfere with decisional independence that has to be maintained in the interest of judicial integrity.⁸¹

In his reflections on the situation in England, Stevens draws similar conclusions. He argues that judicial independence, much like academic freedom, is not absolute. It must ‘defer to judicial accountability.’ Public accountability of the judicial function he notes has been increased by various administrative reforms.⁸² There is thus recognition of the need for continued scrutiny of the role and legitimacy of judicial action in democratic societies (with the marked absence of serious social upheaval) and calls for reform. The need for scrutiny for the judicial function is even more so in transitional societies.

The implication of the right to accountability as belonging to citizens is that it is in the nature of a public right. There is judicial support for the proposition that public rights, unlike private rights, provided for in the constitution can-not be waived. *R. Ariori & Ors. v Muraino B O Elemo & Ors.*⁸³ a Nigerian case provides judicial support for this proposition. In the case, parties purported to waive their right to speedy hearing of the title to land, which was in issue in the matter. The Nigerian Supreme Court held that speedy trial, a component of the constitutionally guaranteed right to fair hearing, was in the nature of a public right. It rejected claims of waiver by consent of the litigating parties on the premise that it fell outside the ambit of their private rights or prerogatives.

The position of the law on public rights as stated above was recently reaffirmed in the decision in *Rt. Hon. Rotimi Chibuike Amaechi v Independent National Electoral Commission (INEC) & 2 Ors.*⁸⁴ Citing *Ariori* with approval, the Supreme Court reiterated that

A right that inures to the benefit of the entire public can never be waived. *Nobody, not even the state can waive the right entrenched in*

⁸⁰ Zemans note 79 supra.

⁸¹ Ibid at 629-630.

⁸² R Stevens “The Independence of the Judiciary: The Case of England” (1999) 72 South California Law Review 597, 607-608.

⁸³ (1983) 1 S.C 13, and (1983) SCNLR 1, 18-19. (Noting that fair hearing was in the nature of a public right and all such rights could not be voluntarily or impliedly waived by a party to litigation in any way).

⁸⁴ (2008) 1 S.C. Pt.I 36, 293-294. Emphasis mine.

statutory or constitutional provisions which have been made in favour of the whole country. It is clearly not Pro Publico, but Contra Publico to introduce the doctrine of waiver to such right.

In the same way, the right to public scrutiny or demand for accountability of the judiciary being in the nature of a public right, can not be interfered with nor waived. It is a right vested in society at all times and arguably ought to come into sharper focus in transitional contexts. The right to accountability being a public one, any institutional attempt at, or claim to waiver of the right is not only counterintuitive but ought to be rejected for being patently unconstitutional and in violation of the rule of law.

The security of tenure, a near-universal feature of appointive judicial office (and thus the exercise of judicial power), save in the cases of lustration of judicial officers (as witnessed in Bosnia Herzegovina and the German Democratic Republic post-reunification),⁸⁵ ensures the continuance in office of judges who have been part of an old order with which there is much dissatisfaction. This unique feature of judicial power reinforces the imperative for accountability of the judiciary to ensure *judicial transition* and that the third realm of the estate moves along the lines of societal aspirations. Notwithstanding transition to democratic rule, the judiciary may in practice remain static and in the state of *injudicious* ineptitude where deliberate and far-reaching efforts are not instituted to set it on the part of rectitude through an accounting of its role in the period of conflict or authoritarian rule.

The Nigerian judiciary, in which judicial offices normally hold office until a constitutionally stipulated retirement, is again a reference point. The adoption of the pre-transition constitutional arrangements coupled with the absence of an interim constitution (which could have stipulated otherwise) ensured that judges appointed in the period of authoritarian rule continued in office by default. One consequence of this has been that the judiciary has been criticised for a jurisprudential outlook that continues to accord an instinctive, ‘spurious and simplistic’ recognition and validation of authoritarian rule and the legacy of decrees made by the military despite the transition to civil rule and in spite of the untold suffering and distortion authoritarian rule has foisted on the country.⁸⁶

⁸⁵ E Blakenburg “The Purge of Lawyers after the Breakdown of the East German Communist Regime” (1995) 20 (1) Law and Social Inquiry 223.

⁸⁶ T I Ogowewo “Why the Judicial Annulment of the Constitution of 1999 is Imperative to the Survival of Nigeria’s Democracy” (2000) 44 Journal of African Law 135, 166. Ogowewo’s position appears to be vindicated by current efforts to produce a new constitution. See for instance

Law as a tool of ‘social engineering,’⁸⁷ constitutes a medium for the achievement of other social goals. On this view of the role of law, the judiciary is required to dissociate itself from the formalist interpretation of judicial independence as an impregnable fortress that sets the institution on a pedestal beyond the reach of society. The normative account of judicial independence that seeks to oust the judiciary from public accountability for its role in authoritarianism should be rejected. Such an approach to the function or purpose of the principle runs contrary to transparency in governance, an essential democratic value.

Barak argues that while it is pertinent the judiciary earn and retain public confidence that objective is not to be pursued through the type of accountability process required of the legislative and executive branches of government. It is to be achieved through - to use Dyzenhaus’ terminology, ‘fidelity to the law’⁸⁸ rather than seeking to ‘bring about a result the public desires.’⁸⁹ Premised on the distinct character of the judicial function and the manner of composition of its offices which advises more circumspection in matters (including accountability) relating to the judiciary, Barak’s observation is well made. However, Barak fails to articulate what constitutes *law* that the judiciary is expected to uphold. Would the judiciary be in breach of its duty when it refuses to apply law lacking substantively in morality though enacted in compliance with procedural requirements? It can be argued that law would only be *law* if it reflects the moral conscience of society.

In the pursuit of judicial accountability, it is useful to approach the matter on the premise that the institutions of state are bound by law which stands outside of and above all institutions. The political branches are to be held up to scrutiny through the instrumentality of democratic accountability. The judicial branch on the other hand is to be held up to scrutiny through its allegiance to law. This is what the judicial oaths of office require. This comes through in the insight offered by Dyzenhaus on the legal hearings of the TRC in South Africa. What is to be considered as law and fidelity, to which judges are bound, is an approach that accords recognition to reciprocity between the rulers and the ruled.’⁹⁰

C Isiguzo “Ekweremadu: Nigeria Gets New Constitution Next Year - Senate to Begin Zonal Consultation Soon” *This Day Online* (Abuja Sunday 2 September 2007).

⁸⁷ D Lloyd *The Idea of Law* (Penguin Books Middlesex 1991) 210.

⁸⁸ D Dyzenhaus *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing Oxford 2003) 183.

⁸⁹ Barak note 15 supra at 60.

⁹⁰ Dyzenhaus note 88 supra at 183.

Law must be in accord with the *will* of society and the judge can only be true to the discharge of his duty if he is not withdrawn from society while maintaining an objective distance from it in his judicial determinations. Again, Barak seems to have conceded this point (albeit in a limited sense) when he states that ‘there should be no wall between the judge and the society in which he operates.’⁹¹ The challenge would appear to be what constitutes appropriate distance.

The point then is that judicial independence ought not to serve as a shield against giving public accountability of the judicial role for its conduct during an authoritarian period. An account of the judicial role during the period provides opportunity for an assessment of whether the judiciary did maintain its independence at the relevant time. In other words, was the judicial function performed in a manner that accorded primacy to law as required by judicial (oath of) office? Or, in the converse (and this is the crux of the matter), did any extraneous but contextual factor intervene to compromise judicial independence *properly* conceived? The necessity for this would appear self-evident.

Judicial immunity is closely tied to the independence of the judiciary and is usually regarded as an integral part of the latter. I consider it separately to allow for more focus on why it should not stand in the way of judicial scrutiny in transitions.

4.2 Judicial Immunity

Judicial immunity from suit probably represents the boldest measure for securing the independence of judicial officers. Although judges are not the only officers of state invested with immunity from suit for official acts, the ramifications for judges are the most extensive taking into consideration their near permanent and all embracing dimensions. The nature of judicial immunity from suit has led to the view in some quarters that it is in tension with the rule of law.⁹² This may well be an overstatement of the matter. However, there is cause for certain concern underlying the position.

In this regard, it serves to recall that members of the executive and legislature are almost always liable to prosecution (at least on expiry of their electoral mandate) for corrupt practices in office. But judges are usually permanently immune from prosecution or civil suits in the conduct of their office and exercise of their judicial powers. This is attributed to the need to extinguish any threat of

⁹¹ Barak note 15 supra at 60.

⁹² R C Waters “Judicial Immunity vs. Due Process: When Should a Judge be Subject to Suit?” (1987) 9 (2) Cato Journal 461, 462.

litigation on the judge for performing the normal functions of the office. The position is based on the proposition that the appropriate remedies for judicial misconduct are ‘structural,’ namely through appeals and in extreme cases, dismissal from office.⁹³

In essence, the nature of the judicial function confers a duty on judges that requires an independence of ‘mind’ that addresses itself to ensuring justice according to *law*. It rises above the whims of individuals as well as institutions and particularly one that trumps the common weal. However, the allegation that the judiciary has been complicit in the violations of human rights by the state (to which I return later) under an illiberal regime, supports a case for accountability for what could well amount to judicial abdication of its role. By this is meant a situation where the judges had deviated from keeping faith with their judicial oaths of office which required the discharge of the functions of their high office in a manner that upheld the constitutional values of the country as against the wishes of authoritarian rulers. Whether this is factually the case or otherwise has to be tested through a process of public accounting, at the least, to set the records straight.

Scrutiny of the judiciary through a *truth-seeking* process during a period of fundamental political change as proposed in this study is distinct from subjecting individual judges to the indignity of civil suits for their judgements. The positive values of judicial immunity (and more broadly, independence) notwithstanding, an absolutist interpretation of it could seriously undermine other equally important societal values.⁹⁴

Accountability for the role of the judiciary in governance during an authoritarian period is also relevant because of certain standards and societal expectations of the institution. Where such expectations are not met, it leads to the lack of public trust and confidence in the judicial system which is fatal to societal cohesion, peace and development. Since the judiciary commands neither the money controlled by the legislature nor the force at the service of the executive, public confidence is at the heart of obedience to judicial decisions.⁹⁵ In particular, the dynamics of transitional justice lends itself to Karlan’s argument that the claim to judicial independence must be balanced against actual judicial outcomes.⁹⁶ In the event there is some measure of consensus that the judicial function has been

⁹³ Karlan note 62 supra at 539 and Waters note 90 supra at 470.

⁹⁴ Karlan note 62 supra 539.

⁹⁵ Gleeson note 22 supra at 1-2.

⁹⁶ Karlan note 62 supra at 558, emphasis added.

conducted in some inappropriate manner, the need to reach beyond the shield of judicial immunity assumes an imperative. It is hardly a task undertaken to establish such a state of affairs in transitional societies that had laboured under authoritarian rule, war, institutionalised discrimination like apartheid or other forms of substantial social displacement.

The jurisprudence of transitional justice revolves around the restoration of rights, justice and the rule of law. Teitel has noted that one of the key features of transitional societies is a fundamental inquiry into the legitimacy of existing and inherited societal institutions including the judiciary.⁹⁷ Such an inquiry is not the least bit compelling where any of the institutions is viewed as victims of the authoritarian period.

4.3 The Judiciary as Victim

The judiciary as an institution, much like other arms of a democratic society, may be a victim of authoritarian rule in the same way political institutions (executive and legislative) were displaced by military rule in Africa and Latin America. It may even suffer in more individualised ways like the fate of judicial officers in Rwanda in the course of the genocide in that country. As a result, it is possible to take the position that the judicial institution ought to be excused from accountability in transition as a victim. But the victim-argument quickly loses force when it is considered that a truth-seeking process is basically designed in part (if not essentially), to ease the burden of victims- individuals and groups (it is not been suggested that institutional victims are precluded) - of rights violations by providing a forum for a narration and acknowledgement of their sufferings.

Further, where the choice of the truth-seeking process is made to establish a credible record of violations of human rights violations and subversion of the rule of law with a possible view to social acknowledgement, reconciliation, reparation, and fostering rule of law, no institution of state, least that avowed to upholding the rule of law, should be insulated from scrutiny. This is imperative, if only to ascertain that the judiciary, like other institutions that have functioned under abnormal conditions⁹⁸ is returned to the aspirations of society in the transition from authoritarianism to democracy.

An inquiry into the propriety of the judicial role or the judiciary being required to *tell its truths* in a transition process is germane to obtaining a *complete* record

⁹⁷ R G Teitel 'Transitional Jurisprudence: The Role of Law in Political Transformation (1997) 106 (7) Yale L.J 2009, 2030.

⁹⁸ Teitel note 97 supra at 2079.

of a period of gross violations of human rights and impunity in a nation's history. It could possibly achieve more. Such endeavour has the potential to ascertain the justification (some insist in the face of insurmountable constraints) for the course of judicial governance in the period. This perspective is relevant in view of the concession by a notable protagonist of the relevance of truth commissions in transition that 'moral or meta-ethical debates feed directly into jurisprudential questions about whether and to what extent law- even in domestic systems- provides meaningful guidance for the judges who implement it.'⁹⁹

What is the role of judges in authoritarianism or dictatorship? Are they 'unconstrained moral actors or bureaucratic functionaries effectively bereft of discretion, because the law tells them what to do and leaves them no choice to do otherwise?'¹⁰⁰ Should the judicial function be insulated from the dictates of changes in society? Or should the judicial role be in a state of flux, subject to the vagaries of its environment?¹⁰¹ These are by no means easy questions to answer and there have been ongoing debates on them and related issues on the judicial function, all emphasising the crucial role of the judiciary in society. A process of scrutiny is arguably well positioned to address these concerns.

Scrutiny of the role of the judiciary in the period of democratisation has the potential to promote the realisation of institutional transformation at the heart of the transition process. The South Africa transition process attempted such scrutiny. Happily, the precedent set by the South Africa Truth and Reconciliation Commission (TRC) in this regard is the subject of an incisive evaluation by Dyzenhaus. In his aptly titled book, *Judging the Judges*,¹⁰² he has addressed the response of the judiciary to the truth-seeking process that was at the centre of the country's efforts to recover justice for victims and achieve reconciliation in its transition to popular democracy.

4.4 Judging the Judges?

The South Africa TRC blazed the trail in requesting the judiciary in a transitional society to give a public account of its institutional role in the period of its mandate. That attempt was all but roundly rebuffed by the South African judiciary. Unlike the various professional bodies representing lawyers (barristers, advocates and solicitors) no serving judge, despite repeated requests, turned up at

⁹⁹ K Asmal 'Truth, Reconciliation and Justice: The South African Experience in Perspective' 63 (2000) *Modern Law Review* 1, 2.

¹⁰⁰ *Ibid.* at 5.

¹⁰¹ Barak note 15 *supra* at 25.

¹⁰² Dyzenhaus note 88 *supra*.

the scheduled three-day public ‘Legal Hearing’. The judiciary contended in the written memorandum submitted- ostensibly on its behalf- by Justice Michael Corbett (then Chief Justice of the apartheid era), that the proposition was plainly unworkable and in outright violation of the much-coveted principle of judicial independence. The argument was further advanced by the judiciary that a past-focused enquiry threatened progress and could disrupt the march into the future. Thus, the judges stayed away and their failure to attend was strongly deprecated by Dyzenhaus who described it as the ‘most conspicuous feature’ of the special three-day public hearings.¹⁰³

It was also argued for the judiciary that it was impracticable for the TRC to embark on the exercise that would require a case-by-case assessment of records in the absence of counsel. In all events, the record had been impressive particularly in view of parliamentary supremacy. ‘There was little to be gained from lamenting the past.’¹⁰⁴ This position, canvassed by Chief Justice Corbett, Dyzenhaus notes, is clearly in ‘tension’ with the reliance on the same records by Corbett as the basis for his contention that public accountability of the judiciary in South Africa was not necessary since they reveal that the judiciary had in fact performed creditably.

The TRC Legal Hearings were regarded by the Commission itself as the most crucial of a series of special hearings in view of the place of law under apartheid. Lawyers and the judges were brought under scrutiny for their role in applying apartheid law. Lawyers and more so judges, it was alleged, failed to exercise their discretion when they could have in their interpretation and daily application of discriminatory laws. For Dyzenhaus, the judges had no excuse for upholding unconscionable apartheid laws. He challenged the view, canvassed in the written submission of the judiciary, that judges were ‘disempowered’ in the face of parliamentary sovereignty.

Support for the position of the judges is located in the plain-fact approach to judicial interpretation. The plain fact approach as an interpretive approach to law states that ‘the judicial duty when interpreting a statute is always to look to those parts of the public record that make it clear what the legislators, *as a matter of fact intended.*’ In other words, judges are to determine the law on the letters ‘without permitting their substantive convictions about justice to interfere.’¹⁰⁵

¹⁰³ Dyzenhaus note 88 supra at 30.

¹⁰⁴ Ibid. at 46.

¹⁰⁵ Dyzenhaus note 88 supra at 16.

Judges who subscribed to this view under the principle of *the plain fact* rule of interpretation were guilty of 'judicial dereliction of duty.' He insists that the duty of judges is to maintain the rule of law that requires justice to be done at all times. Faced with the option of participation as against rejecting or relinquishing judicial office, he takes the position that opting out of the judicial function by reformist (liberal minded) judges was not to be preferred.

According to Dyzenhaus, it is the duty of judges to uphold 'moral ideals'¹⁰⁶ even in the event that they may have their decisions overturned by appeals or trumped by countermanding legislation. That was in reality, the practice of the legislature during the apartheid era. Nonetheless, judicial resistance to apartheid laws through a purposive approach that gave primacy to common law principles of equality, equity and fairness could at least place the government in a very uncomfortable position though it was most unlikely to alter government policy. Such conscientious objections had the potential to place the government in a position where it would, through legislation have had to admit it was operating outside rather than within the confines of the rule of law.

Countermanding judicial decisions by legislation, a potent challenge to judicial conscientiousness in this way, he insists, would have better exposed the system of apartheid for what it really was; the antithesis to the rule of law. It amounted to a lack of 'fidelity to law' to enforce discriminatory legislation which were against morality or good conscience because that would be antithetical to *law*. This is the proper course for judges to follow even in the face of obvious defiance by the other arms of government, if judges were to be loyal to their oaths of office and the course of justice.

Dyzenhaus argues further that where the historical record strongly suggests judges have failed in upholding their oaths of office to maintain fidelity to law (and his conception of law is one indivisible from morals), they ought to be called to account for their failure. He posits that in such situations, recourse can not be had to judicial independence as a shield. Independence of judges he maintains will not be compromised by an 'account... of conduct which compromised their independence.'¹⁰⁷

¹⁰⁶ Ibid. at 161

¹⁰⁷ Dyzenhaus note 88 supra at 59.

Interestingly, the truth commission in Ghana¹⁰⁸ (one of the immediate successors of the Oputa Panel in truth-seeking in Africa) did hold special hearings for the Legal Profession. The country's experience provides support for the proposition that whether or not the judiciary is considered a victim of gross violations of human rights in conflicted societies should not preclude an examination of its role in governance in the period of conflict or authoritarian rule.

While it is largely true that the specifics of the experiences of no two societies are exactly the same, it is significant to note that Ghana shares more than a passing similarity with Nigeria in many ways. These include the fact of heterogeneity characteristic of many of post-British colonial states. There is also the fact of the experience of authoritarian rule for the better part of its post-independence period. Close scrutiny further disclose similar political and social conditions as well as justification advanced by the military class for political intervention in the two countries.

Providing additional empirical bases for analytical comparison, Ghana's judicial and constitutional arrangements during the period were not only similar to Nigeria's, the judiciary in both countries faced similar challenges of adjudicating in the context of military authoritarian rule for extended periods.¹⁰⁹ Like the Nigerian truth-seeking process, the nine-member commission was chaired by a retired Supreme Court Justice, K. E. Amua-Sekyi. That Commission made the significant finding that the judiciary at some points in the country's post-independence history was intimidated into giving up its role in restoring the violated rights of citizens.¹¹⁰

In sum then, it is useful to clarify that what is being advocated on public accountability of the judiciary is a full account of their judicial role in the past. Even as a close reading of Dyzenhaus on the Legal Hearings of the TRC shows, the inquiry is not sought on an accusatory or judgemental premise. It is not so much to '*judge the judges*' as been wrong in their actions or judgements (even

¹⁰⁸ Established as the National Reconciliation Commission by the National Reconciliation Commission Act of 2002 (Act 611), entered into force on January 11, 2002.

¹⁰⁹ Prempeh note 38 *supra* at 1244. See also F Oduro "Reconciling a Divided Nation through a Non-Retributive Justice Approach: Ghana's Reconciliation Initiative" (2005) 9 (1) *The International Journal of Human Rights* 327, 334-339. See also C Ogbondah "Democratization and the Media in West Africa: An Analysis of Recent Constitutional and Legislative Reforms for Press Freedom in Ghana and Nigeria" (2004) 6 *West Africa Review* 1.

¹¹⁰ Report of the National Reconciliation Commission (Ghana) Volume Chapter 2, 77, 83 (October 2004) hereafter Ghana NRC Report.

though there may be many or some instances of these). Rather, the objective is to achieve two important aims in the context of transition. The two objectives marginally appear correlative but are indeed distinct.

The first is to obtain a record of judicial activity during a period of misgovernance and gross violations of human rights as an institution of state. In this regard, obtaining an account of the judicial role serves to provide ‘as complete a picture as possible’ of past governance. This may of course disclose in part that the judiciary itself was a victim of violations of human rights and the rule of law and such disclosure is itself relevant. But it is only an accounting in the first place that can lead to such a finding and not an *a priori* position that the state of victim-hood should be assumed or justifies unaccountability of any institution of the state, in this case, the judiciary. The second aspect is the potential for the scrutiny of the judicial role in the past to facilitate transformation of the institution in the context of a new resolve to move society in the direction of change and new beginnings. While this second aspect of the matter may be incidental (at least, indirectly) to the first point, it is a separate one. The one looks at the past, the other projects reflexively, into the future. Thus, that there is ‘nothing to learn’ from the past does not detract from the societal right to know in the present. But an important dynamic is that when the two issues are taken together, judicial accountability for past conduct can be considered at being directed at strengthening, rather than undermining judicial independence, as argued by objectors to a public accountability of the judicial role as advocated in South Africa.

CONCLUSION

The purview of accountability in transitions ought to be extended to the judiciary in recognition of its role in governance as the third arm in the tripod of state institutions. Public accountability ensures comprehensive accounts of governance in post-authoritarian societies that is essential to charting a transformative agenda for all the institutions of state. Institutional transformation is at the heart of the aspiration to reinstitute the rule of law in post-authoritarian contexts. Further, it is recognised as a component of the right to restitution for victims of gross violations of human rights in post-authoritarian and post-conflict societies.

Traditional notions of judicial independence gird objections to public accountability of the judiciary, setting it apart in the accountability paradigms

applied to the other arms of government. Objections to judicial accountability are rooted in conceptions of the judicial function in liberal democracies (distinguished by the absence of social upheavals) to the neglect of the dynamics of law and justice in transitional contexts.

In view of the concession that the interpretive role of the judiciary is not immune to the vagaries of time and place but rather contingent on it,¹¹¹ fixation on a univocal judicial paradigm for all climes and periods is misplaced at best. The case for public accountability of the judiciary is further accentuated in transitional societies where there is (as is usually the case) direct, or implicit complicity on the part of the judiciary for gross violations of human rights violations. A study of the judicial function in such societies serves to advance our position on the salience of accountability of the judiciary for the past in such societies. The Nigerian transition to civil rule after decades of military authoritarianism provides just the context for such a study.

¹¹¹ Barak note 15 above at 25.

JUDICIAL ACCOUNTABILITY IN POLITICAL TRANSITIONS: THE NIGERIAN CONTEXT

INTRODUCTION

It is utopian to expect that the judiciary is capable of curing all the ills of society.¹ Conceding the reality does not detract in anyway from its potential role as an important agent for social change. It is highly unlikely that any of the other branches of government can independently cure every ill of society. It is also doubtful that the collaboration of the three branches can (even with the best intentions) lead to the realisation of that aspiration considering the complexities of social arrangements in contemporary society. However it should be safe to posit that effective cooperation of all three branches would likely enhance the quality of individual and collective social well-being.

A critical assessment of judicial impact on the course of governance and the exercise of state powers ensures that the judiciary is confronted with its role in governance and facilitate its institutional transformation where required. In Chapter Two, I argued a case for the relevance and merits of accountability for the judicial role in previous governance in transitions generally. The basic premise for that argument is the proposition that the judiciary as one of the institutions of the state participates in governance at all times and in transitions where accountability of governance is pursued, it should extend as a matter of principle to the judiciary.

In this chapter, I evaluate the impact of the judicial function on governance utilising some of the theoretical principles set out in Chapter Two. The utilitarian value of such assessment lies in ensuring that ‘the judiciary takes its fair share of the credit’ for the state of affairs in society. The judicial ‘fair share’ on close scrutiny could be on the debit side.² More than that, it provides the basis for articulating a programmatic transformation of the judicial institution, where such is established, in line with the recognised need for societal reconstruction of

¹A Barak “The Supreme Court, 2001 Term- Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy” (2003) 116 (1) *Harvard Law Review* 19, 46. But Compare O Oko “Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa” (2000) 33 *Vanderbilt Journal of Transnational Law* 573. He argues with much vigour, the rather suspect proposition that lawyers are ‘well suited to solve the problems that the transition from authoritarianism presents.’

² T I Ogowewo “Self-Inflicted Constraints on Judicial Government in Nigeria” (2005) 49 (1) *Journal of African Law* 39.

complicit pre-transition state institutions.³ To contextualize the argument, I focus on judicial governance and accountability within the paradigms of Nigeria's transition to democracy after decades of authoritarian rule. I analyse specific issues that necessitate accountability of the judiciary in the context of Nigeria's political transition. It has been stated earlier that there were unresolved allegations of complicity for violations of human rights against the judiciary in Nigeria because the Oputa Panel omitted to engage with that aspect of accountability for the past in its work.

The judiciary like any other institution ought not to loathe taking the credit for its positive contributions to the course of governance and the exercise of state powers. In the same way, basic principles of equity and commonsense dictate that it should submit itself to criticisms for its failures. Accountability of the judiciary is relevant at all times. However, it assumes the nature of a compelling obligation in transitional contexts, particularly where there is substantial basis to adduce *complicity* to the judiciary for a situation of subversion of democratic governance, sustained, gross violations of human rights and impunity on the part of the state.

In proceeding, I set out a legal premise for accountability of the judiciary for the past in the Nigerian context. I then discuss the accountability gap in judicial governance in Nigeria's transition. This is followed by an examination of the judicial function in authoritarian contexts. I then move on to analyse the bi-dimensional issues that necessitate accountability of the judiciary in the context of Nigeria's political transition. These are of a legal-jurisprudential and sociological nature. I conclude that the accountability gap with respect to the role of the judiciary saddles the transitioning society with an untransformed judiciary. The absence of transformation in the wake of the political transition in the country threatens not only the rule of law, but also the transition project as a whole.

2. THE TRANSITION JUDICIARY: A LEGAL PREMISE FOR ACCOUNTABILITY

Scott has noted that in discussing accountability issues, it is germane to address three distinct questions. These are identification of who is to be held accountable, to who is it due, and for what?⁴ Call these the 'premise or basis for accountability.' The case for accountability of the judiciary in transitional contexts benefits from the adoption of Scott's model. Failure to delimit the scope

³ F Ni Aolain and C Campbell "The Paradox of Transition in Conflicted Democracies" (2005) 27 Human Rights Quarterly 172, 181.

⁴ C Scott "Accountability in the Regulatory State" (2000) 27 Journal of Law and Society 38, 39-40.

and process of desired accounts potentially impedes the clarity of the discussion. Thus, perhaps by far the most challenging aspect of accountability of the judiciary in the context of transitions is delineation of what is to be accounted, by whom and for what? There is yet little by way of state practice to assist the formulation of conceptual responses to the foregoing critical issues.

That said, however attractive it may seem, in the age of globalisation, to articulate a universal model for accountability of the judiciary, prescription of a model for such accountability in societies in transitions is potentially a difficult endeavour. Societies in transition from one form of troubled past or the other predictably have varied experiences. Local dynamics and national specificities do not encourage prescriptive models for accountability of the judiciary for the past in transitional contexts. Experiential accounts of the implementation of prescriptive economic ‘restructuring’ programmes like the Bretton Woods institutions imposed Structural Adjustments Programmes in Africa as against Asia aptly demonstrates this point.⁵ Clearly, the development of international norms and standards are commendable. They establish benchmarks of best practices and set out evaluative standards for national development. However, in addressing transitional justice issues, it has been recognised and conceded at the highest level of the international system, that the imposition of ‘model’ approaches to the neglect of contextual peculiarities may be counter-productive.⁶

Further, the complexities that attach to the judicial institution suggest prescriptive or imposed models may unravel, rather than advance the quest for accountability of the judiciary for its past role in governance. It is arguable that the role of the judiciary and the constraints it may have had to operate with in large-scale and high-intensity armed conflict like a civil war (as was the case in Liberia and Sierra Leone) may significantly differ in a low-intensity armed conflict in apartheid South Africa. The dynamics of both cases may yet be different from the judicial circumstances under authoritarian regimes in Latin America, Ghana and Nigeria for instance. The fact of genocide in Rwanda (which also targeted the judiciary and the legal profession as a whole) would likely impact in a marked way on judicial accounts in that country. Notwithstanding

⁵ A A Ali “Structural Adjustment Programs and Poverty in SubSahara Africa 1985-1995” in T Mkandawire and C Soludo (eds.) *African Voices on Structural Adjustment* (IDRC/CODESRIA/Africa World Press Ottawa 2002).

⁶ UN Security Council Document No.S/2004/616, Report of the Secretary –General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies 1at17* available at: <http://www.daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement> (10th October 2005). See ‘Summary’ and pages 6-7.

these problems, general principles may be outlined for the contentious process. One such key principle should be that the approach to be adopted for accountability of the judiciary be context-driven rather than a 'one-size-fits-all' model.

Related to the above is that judicial accountability of a public nature ought to take in to consideration the level of development of the legal institution in relation to other arms of government. Here, the training of judicial officials, the reliance or otherwise of the citizenry on judicial processes, available judicial resources, the operative judicial environment, the tenure of judges, etc, could have some resonance for judicial output and the role the judiciary played (or was incapacitated from playing), in authoritarian and conflicted societies. Was there judicial independence (or an appreciable level of judicial independence)? Were judges adequately trained? Was the judiciary adequately funded and judges secure in their tenure? All of these are issues relevant to the disposition of the judicial function. Setting evaluative criteria *a priori* for otherwise largely context-driven dynamics can be as problematic as to be unproductive.

It may not be impossible to determine or ascertain the state of relevant factors in a pre-accountability environment. However, the point remains that a relativist approach may better serve the process of accountability in general and judicial accounting in particular. It is plausible to suggest that relevant factors to be considered in an inquiry in to the judicial role ought to include the incidence of wide spread corruption, lack of independence, legitimation of authoritarian, despotic or discriminatory rule (as was the case in South Africa), all of which were the norm for the most part of Nigeria's post-independence history.

In view of the centrality of constitutions in articulating socio-political and economic reconstruction in democratisation and transition arrangements, constitutional supremacy commends itself as a viable basis for accountability of the judiciary for the past. In the Nigerian context, constitutional supremacy provides a functional approach to the issue of judicial accounting for its role in governance during the pre-transition period. The basic premise for this is the centrality of the constitution to the existence of the country as a *nation* state. In reality, the Nigerian polity is a *nation* of 'nations.' Like many other post-colonial African countries, it is an amalgam of largely historically independent, sometimes hostile ethnicities within a geographical territory involuntarily 'united' by British

colonial power.⁷ Thus a viable basis for normative accountability of all state institutions must be neutral in both origin and content to ground and sustain its legitimacy.

In terms of its constitutional history, the Independence Constitution of 1960 in particular (and its successors in varying degrees) aspired to provide a rallying point for establishing a functional state comprising heterogeneous ethnic identities and diverse interests. Specifically, fears of domination by ethnic minority interests led to the setting up of the Sir Henry Willinck Commission in 1956, its recommendation and ultimate inclusion of fundamental human rights in the Independence Constitution of 1960.⁸ It similarly led to the adoption of a federal political arrangement.⁹

Nigerian society has always expressed a foundational preference for express constitutional guarantee of rights, justice and accountability. This is reflected in a preference for constitutional supremacy as soon as the country attained republican status in 1963. It could be hardly otherwise, given the absence of a historical sense or culture of shared nationhood which could have generated or institutionalised political and legal conventions for a modern state.

In this regard, it is significant to note that in the political transition away from authoritarian military rule, the judiciary, particularly at the highest levels, has had constant resort to the concept of constitutional supremacy. In several cases (some of which are discussed subsequently in this study), the Supreme Court has asserted the supremacy of the constitution as a fundamental principle for resolving inter-institutional conflicts in the Nigerian state.¹⁰

Thus, in addition to the principle of comprehensive accountability enunciated in Chapter Two, the arguments here adopt constitutional supremacy as the legal basis for judicial accounts for past judicial conduct in the country in the country as part of transitional justice measures. As stated earlier, this is in recognition of the

⁷ F R A Williams "Fundamental Rights and the Prospects for Democracy in Nigeria" (1967) 115 (7) University of Pennsylvania Law Review 1073, 1074-1076.

⁸ P C Aka "Nigeria since May 1999: Understanding the Paradox of Civil Rule and Human Rights Violations in Nigeria under President Olusegun Obasanjo" (2003) 4 San Diego International Law Journal 209, 215-216.

⁹ IDEA *The Role of State Constitutions in Protecting Minority Rights under Federalism: Dialogues in Support of a Democratic Transition in Burma* (International Institute for Democracy and Electoral Assistance) 46-52.

¹⁰ See for instance *Attorney-General of Abia State & 2 Ors v Attorney-General of the Federation & 33 Ors* (2006) 7 NILR 71, 1 available at: <http://www.nigeria-law.org/LawReporting2006.htm> and *Attorney-General of Ondo State v Attorney-General of the Federation* (2002) 6 S.C Pt I, 1. In both cases the Supreme Court affirmed the centrality of constitutional provisions as the normative precept for ensuring legitimate exercise of power by the respective levels of governance and institutions in the country.

primacy of constitutional supremacy as a fundamental foundational and organisational principle of governance in pre-and post-authoritarian military period in Nigeria. It must be acknowledged though, that the very concept of constitutional supremacy, central to Nigerian post-independent statehood and subsequent republicanism, was violently displaced and distorted by military adventurism and authoritarian rule. The operations of state institutions, including the judiciary, came to be defined in terms of the prevailing socio-political displacement. This, it will be argued below, was done with the acquiescence of the judicial institution. Significantly however, the rehabilitation of the principle (alluded to above) as an integral part of the political transition invests it with considerable promise as a basis for accountability of all state institutions.

3. THE JUDICIARY IN AUTHORITARIAN CONTEXTS

The judiciary can to some extent be insulated from the vagaries of institutional displacement that result from authoritarian rule. The regular if not immediate casualties of military rule in democratic states are the executive, the legislature and popular sovereignty.¹¹ The continued existence of the political branches is incompatible with military intrusion into governance. To a large extent, the military leaves the judiciary nominally intact, but usually severely compromised.

Why do military usurpers of the democratic-will sack the executive and legislature but leave the judicial institution intact? Two factors can be advanced for this. The first is the legitimating function that the judiciary accords military usurpation of power.¹² The self-serving motive has been aptly described by Mahmud

Usurpers appear to recognize that judicial pronouncements about the nature and merits of the change and quantum of their legislative capacity have an impact on the legitimacy of the new regime, because words like “law” and “legality” function as titles of honor...*Securing judicial recognition appears to be the key to gaining political legitimacy.*¹³

Conscious of the constitutional breach its claim to and hold on political power constitute, ruling military elites are usually anxious to secure some measure of popular acceptability in order to gain a semblance of legitimacy and mitigate their wanton illegality. Legitimacy is central to governance. From dual perspectives,

¹¹ Ogowewo note 2 supra at 42. See also D O Aihe “Fundamental Human Rights and the Military Regime in Nigeria: What did the Court Say” (1971) 15(2) *Journal of African Law* 213, 214-215.

¹² Ogowewo note 2 supra at 43. See also T Mahmud “Jurisprudence of Successful Treason: Coup *d’etat* & Common Law” (1994) 27 *Cornell International Law Journal* 49, at 103.

¹³ Mahmud note 12 supra at 103-104. Emphasis mine.

normative and descriptive, legitimacy is crucial to the ability of the ruling elite to make valid political decisions and orders as well as to the societal acceptance of such orders and decisions.¹⁴ Thus even the military class in its foray into governance is obliged to secure a veneer of legitimacy for the effective exercise of political power.

Besides the aspiration to legitimacy is the rather unavoidable necessity for the judicial institution. It is arguable that in contrast to executive and legislative governance, the more nuanced requirements of adjudication or judicial governance are well beyond the disposition or capacity of military adventurers in power. The incapacity on the part of the military to administer the judicial function dictates the need to retain the judiciary in governance. This specialised nature of the judicial function constitutes a positive force which the judiciary ought to have utilised in the quest to maintain its institutional integrity, uphold human rights and the rule of law irrespective of the *duress* constituted by authoritarian military rule.¹⁵

According to Mahmud, there are four possible options for the judiciary faced with the challenge of a *coup d'etat*. The options are (i) validating the usurpation, (ii) declaring the usurpation unconstitutional and hence invalid, (iii) resignation, thereby refusing to adjudicate the legality of the demise of the very constitution under which the court was established or (iv) declaring the issue a non-justiciable political question.¹⁶ The Courts in Nigeria chose the option of validating and legitimating the rebellious act, a choice Mahmud has asserted is only pragmatic in the circumstance of military authoritarianism.¹⁷ Ogowewo shares this view, insisting though on a *post hoc* judicial invalidation of legislative and constitutional acts of military usurpers.¹⁸

Military regimes, perhaps more than any other form of government, invariably desire a judiciary that is 'pliant and which remains attentive to their interest.' Despite that, military autocrats 'in order to be able to project an image of legitimate political order' aspire that the judiciary as well as judges 'be seen to be independent and to be operating at one remove from politics.'¹⁹ Thus it may be

¹⁴ M Zurn "Global Governance and Legitimacy Problems" (2004) 39 (2) Government and Opposition 260.

¹⁵ T I Ogowewo "Why the Judicial Annulment of the Constitution of 1999 is Imperative to the Survival of Nigeria's Democracy" (2000) 44 Journal of African Law 135, 157-159.

¹⁶ Mahmud note 12 supra at 100.

¹⁷ Ibid. at 72-73.

¹⁸ Ogowewo note 15 supra at 153-158.

¹⁹ M Loughlin *Sword & Scales- An Examination of the Relationship between Law and Politics* (Hart Publishing Oxford 2003) 62-63.

rather simplistic to justify judicial acquiescence to military authoritarianism (as some constitutional law scholars have sought to do) on the basis of the latter's complete control of the powers of coercion and perceived self-sufficiency.²⁰ The recurring preference of usurpers for preserving the judiciary in virtually all instances of military incursion into power in post-colonial commonwealth states²¹ suggests the self-sufficiency claim is at best overrated. Following this situational analysis of the judiciary in authoritarian contexts, we should now turn attention to the judiciary in Nigeria's transition.

4. THE ACCOUNTABILITY GAP

In spite of the precedent set by the South Africa TRC and its aspiration to be seen as modelled after it, the Nigeria truth-seeking process, the Oputa Panel, neglected to focus attention on the judiciary. Through that failure (with the seeming acquiescence of civil society), human rights groups, the legal profession and the Nigerian public missed the opportunity to develop the theme of establishing the *truth* about judicial governance in the country. The failure of the Oputa Panel in this regard is rather intriguing, considering the Panel held special hearings for the Police and the Prisons Service; institutions that constitute an integral part of the criminal justice system.

As noted in Chapter One, the Nigeria Police Force and the Nigeria Prisons Service had the legal profession, lawyers, magistrates and judges, to contend with in the execution of their duties. With regard to the notorious phenomenon of prison congestion as stated in Chapter One, the Nigeria Prisons Service was quick to point out that it was a hapless victim of the remand orders of magistrates and judges. Notwithstanding, the Oputa Panel (presumably to investigate petitions alleging gross violations of human rights of detained individuals in the various prisons), summoned the Prisons Service to give an account of its role in the violations of human rights in the country. Yet the judiciary and the broader family of the legal profession were not.

Was it the consensus that the judiciary was also a victim of military authoritarianism? Could it be a deliberate attempt to shield the constituency of the majority of the Panel's members including the chairman, from possible unsavoury public scrutiny? This last, suggesting the possibility of institutional loyalty or bias on the part of the panel members appears unlikely, in view of the unquestioned

²⁰ Mahmud note 12 supra at 104.

²¹ See generally, Mahmud note 12 supra where he examines seven incidents of military incursions into power in six countries in Africa and Asia.

integrity of the members as a whole and the chairman in particular. There is the additional fact that at inception, the Oputa Panel held consultative forums with diverse interests in the Nigerian society including human rights and non-governmental organisations to articulate an agenda for its work.

From a comparative perspective, it is relevant to recall that the chain of events leading to the South Africa TRC Legal Hearing was set in motion by the submission made to the TRC by a human rights lawyer alleging injustice on the part of the judiciary in the apartheid era.²² No petition or submission of similar purport directly challenging the judiciary is on record to have been made to the Oputa Panel. But should the omission on the part of the Oputa Panel be excused? This is an important question considering that the Ghana National Reconciliation Commission (instituted after the Nigerian process), as alluded to earlier, held a Legal Hearing similar to the South Africa TRC. The Ghana NRC Legal Hearing was conducted without a petition of the nature that spurred the latter's inquiry.

It would appear the Oputa Panel maintained a deafening silence on judicial governance as a deliberate policy. It may have felt satisfied that the report of an earlier inquiry on the state of the Nigerian judiciary constituted sufficient scrutiny of the institution.²³ The inquiry, instituted by the late dictator, General Sanni Abacha was headed by another respected retired Supreme Court Justice, Kayode Eso, with the report named after him. It did expose some unsavoury details about the judicial institution in the country. Suffice to say however that the inquiry was about the *state* rather than the *role* of the judiciary during years of military authoritarian rule in the country. It was by no means an attempt at public scrutiny of the judiciary for its past conduct. In any case, the latter remit was temporally beyond the purview of the Eso Panel that was constituted by and conducted under military rule. Thus, *satisfaction* on the part of the Oputa Panel in this regard could be regarded as misplaced and out of tune with transitional justice considerations.

It could also be argued for the Oputa Panel that there was not in fact a public demand for the inclusion of the judiciary in the truth-seeking process. This is however due, not so much to the fact that the judiciary enjoys a reputation of probity. Nor is the exclusion a definitive indicator of public satisfaction with the existence of judicial independence, its accountability or lack of complicity for the suffering inflicted on the Nigerian society by decades of authoritarian rule.

²² D Dyzenhaus *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing Oxford 2003).

²³ The Panel in fact recommended full implementation of the report that again remains unheeded till date.

Rather, the absence of such a public challenge or demand for the truth-seeking process to involve the judiciary would appear to be connected (at least in part) with the origins of the predominant segment of the institution (the common law courts) and perceptions of it in Nigerian society.

To the average citizen, the judiciary, to a large extent, constitutes one of the most prominent symbols of a colonial heritage. It is usually considered as being at some remove from the regular day-to-day activities of the common folk. Even in the post-authoritarian period in Nigeria (as elsewhere in Africa), the courts continue to suffer from a serious ‘social legitimacy’ deficit enjoying recognition within a much circumscribed segment of society²⁴ and certainly much less than the two political branches of government. The judicialisation of politics (discussed later)²⁵ would appear to have generated a newfound bonding between the ‘ordinary’ citizen and the judiciary. But as will become evident, the turn to the judicial moderation of the turbulent political process has been largely a matter of expedience. From a pragmatic point of view, there is no other institution to turn to in order to salvage the polity from descent in to chaos. The fear is rife in the country that socio-political chaos will provide an excuse for the military to return to power. In any event, the current recourse to the judicial intervention in the political process does not account for the judicial years of the locust in which the judiciary was largely a distant institution from the man on the streets, enforcing laws that were considered at best alien to the majority.

Beyond localised and society-specific perceptions of the judiciary as an alien-imposed elitist institution, the failure of the Oputa Panel to focus on the judiciary may be situated within the trend of political transition agenda in general. There is a general tendency to elide the critical issue of accountability of the judiciary in political transitions. State practice and to some extent, theoretical conceptions of democratic transitions in post-authoritarian societies in particular (where the judiciary survives military or one party rule), project a ‘let-the courts-be’ attitude. As far as the proper functioning of the judiciary in the post-authoritarian period is concerned, proponents of the democratic agenda usually content themselves with making textual constitutional provisions stipulating (or in cases where such had existed in suspension like Nigeria, reaffirming) judicial power and independence.

²⁴ H K Prempeh “Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa” (2006) 80 *Tulane Law Review* 1239, 1301.

²⁵ See Chapter Six *infra*.

They do so in the belief that such steps are adequate for the judiciary to take on the enormous challenge of upholding the constitution.²⁶

The practice of incomprehensive accountability as described above is similarly discernible in the approach of international bodies whose remit commends efficient and independent judicial practices. Their institutional focus compels, or at least, encourages them to get involved in judicial reformation as part of institutional restoration processes required in transitional societies. An apposite case in point is the ongoing collaboration of the United Nations Office on Drugs and Crime (UNODC) with the Nigerian judiciary and law enforcement agencies. The UNODC programme being implemented for ensuring judicial integrity and capacity in the country has conspicuously neglected accountability of the judiciary for past misgovernance.²⁷ The approach is rather ironic because careful reflection on the judicial record, both operational and jurisprudential, discloses several issues that justify a public accounting for the judicial role in governance during the period of authoritarian rule in the country to achieve the laudable aims of the programme. Thus, the accountability gap remains. The issues around the accountability gap can be broadly categorised into two. One is the legal-jurisprudential dimension. The other is socio-political in nature.

5. LEGAL-JURISPRUDENTIAL DIMENSION

5.1 Legitimising Military Rule

In constitutionalism, judicial review of legislation is usually conceived of in terms of its restraint on legislative and executive action. But there is also the crucial aspect of its legitimation of laws and decisions of the political branches of government. Absent judicial declarations of unconstitutionality of such acts in legal challenges to them, they are contra-wisely invested with constitutional validity by the courts.²⁸ In that respect, judicial review is potentially a double-edged sword.

In Nigeria, the highest court, the Supreme Court (the Court) maintained an ambivalent attitude to the legitimacy of military rule, right from the onset of military intervention in the country's politics. The judiciary had legitimised military adventurism at the earliest opportunity to pronounce on the rebellion that

²⁶ Prempeh note 21 supra at 1299.

²⁷ See for instance UNODC *Strengthening Judicial Integrity and Capacity in Nigeria Progress Report # 2* (Anti Corruption Unit Abuja and Vienna 2003).

²⁸ H K Prempeh "Africa's 'Constitutional Revival': False Start or New Dawn" (2007) 5 (3) *International Journal of Constitutional Law* 469, 504-505.

brought the military to power in 1966. This it did in *Isaac Boro v Republic*²⁹ the first case that tested the waters of judicial attitude towards military rule. It came before the Court in December 1966, barely six months after the second military coup³⁰ in the country.

In the subsequent case of *Council of the University of Ibadan v Adamolekun*,³¹ the court decided *inter alia* that the mutiny that resulted in the military usurpation of executive and legislative powers was a ‘military take over of the Government of Nigeria.’ Significantly, it went further to hold that the take over was of a nature that kept ‘the Constitution of the Federation alive *subject to the suspensions and modifications made by the Decree.*’³² It thus legitimised the unconstitutional, purported ‘transfer’ of power by the Council of Ministers to the mutinous soldiers who had murdered some key political figures including the Prime Minister, Abubakar Tafawa Balewa.

The foundations of judicial obeisance to authoritarian military rule in the country, which became an imprimatur of most judicial decisions bearing on the constitutionality and legitimacy of military rule in the country, was however irretrievably laid by the Court’s decision in *E O Lakanmi and Kikelomo Ola v The Attorney –General (Western State), The Secretary to the Tribunal (Investigation of Assets Tribunal) and the Counsel to the Tribunal (Lakanmi Case)*.³³ The substantive issue in the *Lakanmi* case was the constitutionality of Decree No. 45 of 1968- Forfeiture of Assets Validation Decree- promulgated by the Federal Military Government (FMG). It had among others, directed the forfeiture of the assets of the Plaintiffs/Appellants for alleged corruption in public office. The Plaintiffs contended that the decree was null and void for been in violation of their property rights guaranteed by the 1963 Republican Constitution operative in the country at the time.

The Attorney-General argued on behalf of the Defendants that the events of 16 January 1966 that brought the FMG into power amounted to a revolution of the Kelsenian type that destroyed the legal system. The FMG had then become the supreme legislative authority in the country and its legislative powers could not be

²⁹ (1967) Nigerian Monthly Law Reports 163 (decided 5 December, 1966). See further on this Mahmud note 12 supra at 70-72.

³⁰ The first military coup took place on 15 January 1966 and dissensions within the military led to the second *coup d’etat* in July 1967. For an in-depth socio-political evaluation of military rule in Nigeria see E Osaghae *Crippled Giant: Nigeria Since Independence* (Hurst and Co. Publishers Ltd. London)

³¹ (1967) S.C 378 (decided 7 August 1967)

³² Emphasis mine.

³³ (1971) University of Ife Law Reports 201.

assailed in any way. The Attorney-General placed much store on the provisions of Decree No.1 of 1966- Constitution Suspension and Modification Decree, that provided inter alia that ‘the Federal Military Government shall have powers to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever.’ He further relied on section 1(1) of the Decree which modified the 1963 Republican Constitution in these terms

This constitution shall have force throughout Nigeria and if any other law...is inconsistent with the provisions of this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void. *Provided that this Constitution shall not prevail over a decree, and nothing in this Constitution shall render any provision of a decree void to any extent whatsoever.*³⁴

The Court agreed with the submission of counsel for the Plaintiffs that it was vested with powers of judicial review of executive action. It rejected the purported ouster of its jurisdiction by the decree, declaring it a piece of legislative judgement. But the Court, per Chief Justice Adetokunbo Ademola, nonetheless accorded recognition to the Federal Military Government not only as one deriving from ‘necessity’ and thus a ‘constitutional government’ within the contemplation of the 1963 Republican Constitution, but also affirmed the FMG was ‘the Supreme Legislative body’ in the country. This recognition was in spite of the fact that it rejected the argument of the Federal Military Government that it had come into power through a revolution.

Although the Court mustered some *courage* to insist on judicial review of the executive and legislative actions of the federal military government in the *Lakanmi* case, it capitulated in *Adejumo v Johnson*.³⁵ In *Adejumo* the Court implicitly overruled even the limited recognition it had accorded the military usurpation of power in the *Lakanmi* Case. In its place, the Court substituted an unqualified acknowledgement of the events of January 16 1966 as a revolution. The decision in the *Adejumo* case was sequel to the promulgation by the FMG of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No.28 of 1970,³⁶ barely two weeks after the decision in the *Lakanmi* case. Thus, the Court adopted and went on to retain, the *plain-fact* jurisprudence in the interpretation of military decrees in much the same way as the courts in apartheid

³⁴ Emphasis mine.

³⁵ (1972) 1 All Nigeria Law Reports 159.

³⁶ This presaged the pattern which subsequent military usurpers adopted in the country. Every other coup *d’etat* in the country was declared along with the passage of not only a Constitution Suspension and Modification Decree but also a (Military) Supremacy and Enforcement of Powers Decree.

South Africa did apartheid laws.³⁷ The decision in the *Adejumo* case gave effect to the provisions of not only Decree No.28 but that of Section 1(1) of Decree No.1 of 1966 that it had hitherto partly rebuffed in the *Lakanmi* case.

The plain-fact jurisprudential approach adopted by the judiciary was applied to its interpretation to all manner of legislation promulgated by successive authoritarian regimes in Nigeria. The duplicitous effect of the plain-fact jurisprudence came to the fore in the interpretation of military decrees that sought to suspend parts of the constitution, curtail fundamental human rights and oust the jurisdiction of the courts by subsequent military administrations in the country. The legitimation of military usurpation of power underlies the jurisprudence of the Nigerian judiciary in the judicial review of the fused executive and legislative action of the military throughout their authoritarian hold on power.

Mahmud rightly rejects this conflation of a revolution with a *coup d'état*. According to him, a revolution leads to a complete disintegration of existing societal structures and the establishment of a new legal order that is 'autonomous' of the previous order. A coup d'état on the other hand has the limited aim of capturing political power within the framework of the existing legal structures but in an illegal manner. It proceeds to seek legitimacy and recognition within or from the (pre) existing order.³⁸

Mahmud's position on the nature of revolutions as against *coup d'état* ought to be preferred on cursory assessment of political experience of authoritarianism. It has been demonstrated by the attitude of military usurpers in Africa, Asia and parts of the Middle East over time, notably in the common practice of leaving the judicial institution intact and seeking judicial approbation of its legitimacy. It is further reflected in lip-service claims to upholding the rule of law and constitutional arrangements (with certain *caveats*) by even some of the most notorious dictators.

No doubt the question of the appropriate judicial approach to military authoritarianism is a much contested one. The merits or propriety of one or the other approach constitute contentious issues that have attracted scholarly attention. The fine points of the complex debates involved are outside the scope of this work. It is relevant to note in this regard that even Dyzenhaus cautioned in further reflections on the role of judges in the apartheid legal order that 'one must be careful not to err on the side of over- or underestimation' of what judges can do

³⁷ Dyzenhaus note 19 supra 16-17, 83-86.

³⁸ Mahmud note 12 supra at 102 to 103.

within an unjust or authoritarian legal order.³⁹ In the case of authoritarian military regimes, there is little doubt the response of the military as indeed demonstrated by the enactment of the ‘Supremacy Decree’ following the half-hearted decision of the Nigerian Supreme Court in the *Lakanmi* Case, is to override such decisions. However, that state of affairs does not detract from the case for accountability of the judiciary.

Providing an account of judicial governance accords popular supremacy to the people and promotes the rule of law by demonstrating that the judiciary itself is subject to law. It also reflects the responsiveness of the judiciary to societal sensitivities both of which are critical to its institutional viability. Events in Pakistan in 2007 where the public rallied behind the Chief Justice, Iftikhar Muhammad Chaudry as a symbol of democracy against the usurper, General Pervez Musharraf demonstrates the point quite well.⁴⁰

The question of judicial accountability in transitions seeks the *production of a record of judicial governance* to highlight the nature, course and impact of the judicial function in the period of social displacement occasioned by authoritarianism or violent conflict. It may include considering such questions as: Is it not the case that the judiciary served to perpetuate subversion of the constitution that established it and to which it was sworn to protect? What considerations conditioned the jurisprudence of the courts? In the Nigerian context, the question can be raised as to why for instance did the Supreme Court not give consideration to the question of the origin or nature of its judicial powers in the foregoing cases? Why did it jettison the supremacy clause in the constitution?

According to Mahmud, any court that evinces a serious inclination towards ‘strict constitutionalism’ in the aftermath of a coup d’etat is *ab initio* obliged to consider the source of its own powers to determine whether they are derived from the ‘old’ or ‘new’ constitutional arrangement.⁴¹ Following on Mahmud’s position, it can be argued that consideration of the basis of judicial powers after the military putsch may have proven decisive to the course of jurisprudence in the period of authoritarian military rule in Nigeria. This is particularly important when it is considered that the Republican Constitution of 1963 in operation before military

³⁹ D Dyzenhaus “‘With the Benefit of Hindsight’: Dilemmas of Legality” in E Christodoulidis and S Veitch (eds.) *Lethé’s Law: Justice, Law and Ethics in Reconciliation* (Hart Publishing Oxford 2001) 65, 80-82.

⁴⁰ M I Khan “Judge Row Prompts Pakistan Democracy Question” BBC News (Monday 12 March 2007, 17:47 GMT)

⁴¹ Mahmud note 12 supra at 125.

incursion into governance in the country (unlike the South African apartheid constitutions) had an unequivocal constitutional supremacy clause as the first substantive provision.

The supremacy clause has been replicated in all subsequent constitutions in the country. Significantly, unlike the case in Ghana and Pakistan that similarly witnessed military incursions into governance, justices of the Nigerian Supreme Court (and for that matter, all other judges in the country then) were not required to take new judicial oaths by successive regimes of military usurpers to retain their offices. In that way, their personal offices were hardly threatened and they were thus saved the moral dilemma of the propriety of publicly examining the basis of their power.

No doubt writing from the vantage position of the pinnacle of a judiciary that was established and continues to operate within the most controversial and longest ongoing conflict in the post-second world-war era, Barak asserts that

The democratic nature of a regime shapes the role of all branches of the state. It also directly affects the judiciary...the character of the regime affects the interpretive system that the judge should adopt...With a regime change, the view of the judge's role and the way it is exercised also change.⁴²

On this view, the absence of democracy impacts on the role of the judiciary and its institutional claims to independence. The truth-seeking process in the context of the political transition in Nigeria provided an opportunity for exploring the workings of the legal order and the judiciary. It provided a viable forum for the clarification of the legal or other considerations that conditioned the jurisprudence of the courts in jettisoning the supremacy clause in the constitution at the relevant period. But the opportunity for public accountability of the course of judicial governance was frittered away. This missed opportunity raises the important issue of the place of popular sovereignty in the adoption of accountability measures in transitional contexts.

5.2 Imperatives of Popular Sovereignty

Section 14 (2) (a) of the Nigerian constitutions of 1979 and 1999 (the latter constitutes the *transition* some critics insist *interim*, constitution of Nigeria) lend constitutional support to the case for accountability of the judiciary in Nigeria to the people. Both constitutions, fairly representative of the dynamics of constitutionalism in the Nigerian polity in the post-independence period,

⁴² Barak note 1 supra at 24-25.

specifically entrench popular sovereignty, providing that ‘sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority.’ The illegality constituted by the subversion and impairment of the popular will of the people as embodied in the constitution, through the use of ‘superior force’, by the military according to Ogowewo, alters their expressed wishes on how they prefer to be governed.⁴³

Further, the unequivocal provisions of the constitution provide support for the proposition that all institutions of the Nigerian state owe a duty of public accountability to the people, the source of all governmental powers. This is implicit in the specific vesting of sovereignty in the people of Nigeria by the 1979 constitution which Ogowewo argues is the legitimate and validly subsisting constitution of the country⁴⁴ and the *transition* constitution of 1999 now operative in the country.

It may be the case that there is a need to protect the judiciary from been made pliant to unbridled subjection to *common* public opinion and that it maintains some respectable *distance* from the flux of (sometimes indeterminate) *popular opinion*. It is however in the interest of the judiciary that such autonomy be conditioned by the realities of the society from which it derives authority if it hopes to establish and maintain relevance or even more fundamentally, legitimacy. The demands of the period of transition when the need for social restructuring is more imperative than at any other are the most momentous for the exercise of such recognition. As stated above, a legal basis for accountability of the judiciary in the Nigerian context can be located in constitutional supremacy and with reference to Scott’s paradigm set out earlier, it is owed to the people. Such accountability which requires all institutions to be equally made to answer to the people is what Smulovitz and Peruzzoti refers to as ‘societal accountability.’⁴⁵

In the Nigerian situation, the case for accountability of the judiciary is made stronger by the fact that judicial officers are unelected. They are thus immune from the democratic check on public office-holders characteristic of the executive and legislature. The public is precluded from directly participating in and imposing sanctions on perceived improper or perverse use of power by the judiciary in the way it generally does with politicians in the executive and

⁴³ Ogowewo note 15 supra at 152.

⁴⁴ Ogowewo note 15 supra at 140-141.

⁴⁵ C Smulovitz and E Peruzzoti “Societal and Horizontal Control: Two Cases of a Fruitful Relationship” in S Mainwaring and C Welna, *Democratic Accountability in Latin America* (Oxford University Press Oxford 2003) 309-332.

legislative branches of government through elections, recall, judicial review, etc. Even military adventurers in power have been known not to be completely immune from one or the other form of public sanction or accountability, as the trials of Haile Mengistu and Hissen Habre of Ethiopia and Chad respectively have shown. Such trials reinforce the imperative of popular sovereignty in accountability for the exercise, or more appropriately, abuse of power.

6. SOCIO-POLITICAL DIMENSION

6.1 Corrupt and Compromised

There is consensus within and outside legal circles in Nigeria that the judiciary had been palpably corrupt. It had become a notorious fact that in the period of authoritarian military rule in the country, justice was available for sale to the highest bidder. The situation in the courts had become so bad that ‘Trials often turn into charades where powerful litigants, aided by unethical lawyers and faithless judges, manipulate the judicial process to achieve pre-ordained outcomes.’⁴⁶ Reflecting on the disturbing level of corruption in the Nigerian judiciary, Justice Oputa who was later to head Oputa Panel, had lamented rhetorically, almost two decades earlier

What is it that in present day Nigerian society tarnishes, desecrates and disfigures the solemn, sacred and beautiful image of justice and the judiciary? The answer is not far to seek. It is the cancer of bribery and corruption...one is faced with the stark and naked reality that some judicial officers are corrupt.⁴⁷

The judiciary itself is aware of this continuing unwholesome state of affairs. Two leading judicial officers recently warned of dire consequences awaiting judges who engage in corruption in the discharge of their duties.⁴⁸ The perception that corruption exists in the judiciary has not changed though a recent assessment suggests it has been reduced.⁴⁹

⁴⁶ A A Olowofoyeku “The Beleaguered Fortress: Reflections of the Independence of Nigeria’s Judiciary” 33 (1) (1989) *Journal of African Law* 55, 67-68 and O Oko “Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria” (2006) 9 *Brooklyn Journal of International Law*, 9, 14-17. I have drawn extensively from this latter research which comprehensively focuses on the state of the Nigerian judiciary in the pre and post transition to civil rule in Nigeria. Like the author, I also take benefit of my several years of practice experience at the public and private bar in Nigeria.

⁴⁷ C Oputa *The Law and the Twin Pillars of Justice* (Government Printer Owerri 1981) at 9.

⁴⁸ “Abdullahi’s Timely Warning” *Daily Independent Online* (Lagos Wednesday 16 May 2007).

⁴⁹ O Osinbajo “Lessons Learned about Fighting Judicial Corruption” in *Global Corruption Report 2007: Corruption in Judicial Systems*. (Cambridge University Press Cambridge 2007) 146.

Apart from corruption, by several accounts, the judiciary had become severely compromised in the important task of upholding human rights.⁵⁰ The nature of military rule in the country led to severe haemorrhaging of human rights of citizens. It is relevant to recall Justice Olajide Olatawura's comments referred to earlier, on how the law became weak as result of military ouster clauses.⁵¹ The observation justifies the case for some form of accountability by the judiciary, at the very least, to highlight whether there was dereliction on the part of the institution entrusted with the duty of enforcing those rights.

The need for public judicial accounting for the past in the context of Nigeria's transition is also heightened by the fact that the military scarcely showed interest in the enterprise of law reform, notwithstanding the plethora of decrees it passed in the course of its hold on power. Although a law reform commission was established for the country, this was in form rather than substance. Not only was it poorly funded, proposals for reforms in existing legislation were largely ignored. As a result, the country was saddled with considerable obsolete and anachronistic laws even in vital areas like criminal law, evidence and commercial law. Thus for example, a 1987 survey discovered that pre-1900 'received' English statutes numbering 195 were still applicable in Nigeria.⁵² Laws governing matrimonial causes, probate, litigation practice and procedure hardly fared better. In not a few instances, the laws remained (with cosmetic amendments in few cases) in the form they were inherited from the colonial period. These were laws designed for the imposition of colonial authority⁵³ and well suited to the command-structure governance of military rulers. The judiciary in the period of authoritarian rule and beyond has been party to the enforcement of laws many of which are in clear violation of human rights and the spirit of successive constitutions of the country in the post-independence period. The situation, yet to be satisfactorily remedied, was lamented in recent times by no less a legal personage than a recently retired Chief Justice of Nigeria.⁵⁴

One reason for the persisting judicial attitude to authoritarian legislation is the adoption of the English common law jurisprudence of legislative supremacy in the interpretive function of the courts, even in legal systems (like Nigeria) with

⁵⁰ Olowofoyeku note 46 supra at 59. See also UN General Assembly A/51/538 (22 October 1996).

⁵¹ See Section 2, Chapter One supra.

⁵² Oko note 1 supra at 623, note 250.

⁵³ Prempeh note 21 supra at 1264.

⁵⁴ V Efeizomor "Nigeria's Laws are too Archaic, Cumbersome, Says Belgore" *The Daily Independent* (Lagos Nigeria 12 July 2006). The Honourable Justice Salihu Modibbo Alfa Belgore retired in March 2007.

express constitutional-supremacy provisions. This is itself rooted in the training of Nigerian lawyers and judges in the Anglo-common law tradition which conceives a limited role for the interpretive role. It is a heritage that sometimes constitutes a burden for an activist and transformative judicial agenda desirable for transitioning societies.⁵⁵ The clear preference of the jurisprudence of that legal tradition for the plain-fact interpretation of statutes has assisted, if not the imposition, but certainly the sustenance of a 'rule by law state' as against the ideal of a 'rule of law state.'⁵⁶

Successive military administrations foisted untold hardship and suffering on the mass of the people.⁵⁷ What role did or could have the judiciary played in that suffering? This ought to have constituted an important thematic focus of the truth-seeking process in Nigeria in view of its broad terms of reference. Part of its remit was to 'identify the person or persons, authorities, institutions or organizations which may be held accountable' for gross violations of human rights and determine the motives for the violations or abuses.

The empirical record of the Nigerian judiciary in the period of authoritarian rule commends the imperative of accountability for the performance of the judicial function. The finding of the Oputa Panel that the courts, faced with decrees ousting their jurisdiction in many cases, had become 'toothless bull dogs' in the years of military rule,⁵⁸ strengthens the case for accountability of the judiciary. It ought to have led to an enquiry on why the judiciary took to the path of compromise when their judicial oaths of office require fidelity to law as stated by the Constitution rather than military legislation. It is significant for instance that the judicial oaths of office were contained in the Constitution at all times. All the constitutions, as stated above, contained supremacy clauses. No judge was sworn on military legislation. The compromised status of the Nigerian judiciary is further exacerbated by a legacy of questionable appointments characterised by nepotism and prebendalism.⁵⁹ The compromised and corrupt judicial function generated a lacklustre attitude within the public for recourse to due process of law in the resolution of disputes.

6.2 Public Apathy for Due Process of Law

⁵⁵ Prempeh note 21 supra at 1310-1317.

⁵⁶ Ibid. at 1262

⁵⁷ *Synoptic Overview Oputa Panel Report: Summary, Conclusions and Recommendations* (May 2004) available at <http://www.nigerianmuse.com/nigeriawatch/oputa/> (13 July 2008).

⁵⁸ Ibid. at 39.

⁵⁹ Oko note 44 supra at 48-54.

Public mistrust of the judiciary constitutes a danger to societal cohesion and respect for the rule of law. Citizens may resort to self help rather than have recourse to the law and the judicial institution to resolve disputes. The effect of resultant distortions for the choice is fraught with serious negative consequences for hitherto authoritarian societies. Oftentimes, a considerable number of citizens are already confronted with the challenges of coming to terms with the harm they have suffered in the past that still remain with them.

Calls for transformation of the judiciary as a measure to check public apathy for due process of law is important for the transitioning society. Thus, calls for reform of the judiciary have been particularly strident from stakeholders even in the transition period. Voicing the concern of civil society groups, Joseph Otteh, Executive Director of Access to Justice, a leading non-governmental organisation focused on the justice sector, stated that the judiciary required a ‘full turn around maintenance’⁶⁰ in view of the perversion of the rule of law occasioned by structural deficiencies of that branch of government. His observations explain the considerable public mistrust of the judiciary and the whole institution of law in the country.

Cynicism about the role of judicial governance had developed in Nigeria. This was due in part to the dysfunctional judiciary that was steeped in corruption.⁶¹ In turn, the public attacked the judicial institution. Judicial decisions became highly suspect sometimes without justification but owing to the persistent institutional reputation for corruption. The perception has been carried over into the transition period.⁶² How did the judiciary come to such infamy as a largely failed institution in the Nigerian polity? This is a critical issue that should have been given a hearing by the truth-seeking process in the country.

It has been recognised that public accountability ‘... helps to insure that judges perform their duties disinterestedly and conscientiously.’⁶³ This is in itself necessary for building, restoring or ensuring public confidence in the judiciary. It is also needed to promote individual recourse to law rather than self-help. Ensuring such trust is reposed in the judiciary can only be negotiated away with dire consequences for a fragile polity as obtains in a transitioning society.

⁶⁰ A Ahiante “Government Urged to Reform Judiciary” *This Day* Online Edition (Lagos Nigeria 7 November 2003).

⁶¹ Oko note 44 supra at 24-31.

⁶² Ibid. at 19-20, 26, 31. See also M Brown “Election Petitions and the Judiciary” *The Guardian* Online Edition (Lagos Friday 1 June 2007).

⁶³ M L Friedland “Judicial Independence and Accountability-A Canadian Perspective” (1996) 7(3) *Criminal Law Forum* 605, 606.

An account of the circumstances under which the judicial role was performed is required not only for its historical value though this may be value enough. Rather, it ought to be produced for its potential of providing a viable prognosis for the way forward in the quest for justice and reinstatement of the rule of law in the emerging democratic society. Transitional justice theory recognises the right of individuals and society to the reform of compromised and deficient institutions. The right to transformation of afflicted institutions can only be properly realised where opportunity is provided for developing and scrutinising accounts of the conduct of the institutions in the troubled period. This remains the case even where the concerned institution can be considered a victim of the period.

6.3 Unacknowledged Victims?

It is something of a paradox that the Oputa Panel neglected to hold a hearing on the legal profession and the judiciary for an account of its governance during the period of military authoritarian rule in Nigeria. This is the case because the judiciary itself could be considered a victim of military rule. The paradox is heightened by the poignant description of the institution during the military era as a 'beleaguered fortress.'⁶⁴ That description notwithstanding, could it be that the judiciary felt itself under such a heavy burden of complicity for misgovernance which surpassed (and thus precluded) any sense of victim-hood during the decades of military authoritarian rule? A host of questions regarding the course of judicial governance in the authoritarian period in the country remain unaccounted for.

The experience of the judiciary during the years of authoritarian rule in Nigeria was quite different from that of South Africa in a number of ways. Unlike the South African judiciary, the judges in Nigeria could themselves be considered, though in a limited sense, victims of human rights violations. As Dyzenhaus pointed out, post-appointment, South African judges were secure in their tenure during the apartheid era and they enjoyed relatively comfortable conditions of service. In Nigeria, the security of tenure was breached and judges were unceremoniously dismissed or retired in a good number of cases during the years of military rule sometimes without any reason given.⁶⁵ A good case in point was in 1975 when the Chief Justice of the country, Justices of the Supreme Court, the

⁶⁴ Olowofoyeku note 46 supra at 71.

⁶⁵ Olowofoyeku note 46 supra at 59-62.

Western State Court of Appeal and High Court Judges were removed by the military government.⁶⁶

Judicial pay was poor⁶⁷ particularly when compared with the salaries paid to military officers in executive positions. The tenure of judges was on many occasions violated in contravention of the *Basic Principles of the Independence of the Judiciary*⁶⁸ and the *Montreal Declaration on the Independence of Judges*.⁶⁹ They lacked proper housing, worked under strained conditions, took notes in long hand, administered justice in ill-equipped court rooms and chambers, worked with ill-trained and unmotivated support staff, etc.⁷⁰ Cases of violations of judicial tenure must however be qualified in one respect. The military regimes were not noted for interfering with the tenure of judges on the basis of (adverse) judicial review of executive (and or legislative) actions. Rather, judicial purges were invariably premised on allegations of corruption, even if, as in many other aspects of military conduct of power, such purges were carried out in breach of due process.

It is nonetheless plausible in the Nigerian context to contend (like Dyzenhaus did in the case of South Africa) that the people were entitled to know why ‘men in so privileged position, with such an important role, and with so much space to do other than they did, made the wrong moral choice’ in the performance of their duties. This is the case because like in South Africa, Nigerian judges could have maintained fidelity to law (and it is again crucial to note that a few did), ‘without fear of serious personal repercussions’ since they were not required to follow the orders of the power-usurpers.⁷¹

⁶⁶ K Eso *Thoughts on Law and Jurisprudence* (MIJ Professional Publishers Limited Lagos 1990) 25.

⁶⁷ Olowofoyeku note 46 supra at 64. It is worth noting that the situation has changed dramatically since the transition to democracy in the country. Judges are now some of the best paid public officers in the country though they still lag behind members of the executive and legislature of the state and federal governments.

⁶⁸ Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁶⁹ Adopted at the First Plenary Session of the World Conference on the Independence of Judges held at Montreal Canada, 10 June 1983.

⁷⁰ Oko note 44 supra at 42-48.

⁷¹ Dyzenhaus note 19 supra at 89-90.

In manifestation of what has been referred to as ‘the strange irony that sometimes characterizes the conduct of public affairs in Nigeria,’⁷² the post-transition period has witnessed alleged threats to the safety and well being of some judges in the conduct of their legitimate judicial functions.⁷³ In contrast, for all of the reported cases of state-sponsored murder during various military regimes, not even in the case of the most notorious Generals Babangida and Abacha⁷⁴ were judicial officers targeted. Nigerian judges are thus obliged to account for why they sought ‘a warm place by the fire’⁷⁵ rather than uphold *the law* for which they were specially prepared by their training and entrusted by their oath of office.

Curiously, no judge is on record to have petitioned or attended the public hearings of the Oputa Panel. The reason for the non-participation remains unclear given that even military officers who had either participated in governance (and took active or passive roles in the gross violations of human rights) not only petitioned the Panel on violations of their rights but were at the centre of some of the most dramatic sessions of the public hearings. The public hearings on petitions by General Oladipo Diya, (formerly No.2 man to General Sanni Abacha), General Abdul-Kareem Adisa (one of his key ministers), General Abacha’s Chief Security Officer, Major Hamza Al-Mustapha and a good number of mandarins in that regime readily come to mind.

So why didn’t the judges come forward as victims? Did they feel it was below their office to do so? Could it be a result of some resentment and contempt for the truth-seeking process, similar to the response of the judiciary in South Africa to the TRC? One thing is for sure, judges in Nigeria have now dropped their lethargy to combat perceived unjust treatment in the hands of the executive that was at play under military authoritarian rule. Unlike in the past when dismissal and retirement of judges went virtually unchallenged, in the wake of the transition to democratic governance, a number of judges have challenged their perceived wrongful dismissal or retirement from the bench in the courts of law. At least in one instance, a dismissed judge has been ordered reinstated following successful legal

⁷² Aka note 8 supra at 216.

⁷³ See for instance I Sayo “Judge, Others Allege Death Threats over Ruling on Ekiti Speaker” *The Guardian* Online Edition (Lagos Tuesday 24 July 2007).

⁷⁴ Aka note 8 supra at 222-223.

⁷⁵ C W Pound ‘The Judicial Power’ (1922) 35.7 Harvard Law Review 787.

challenge of his sack for corruption almost three years on.⁷⁶ In all events, that dismissed judicial officers seemed to have resigned to ‘fate’ under military rule in the past speaks volumes of their self-perception and the institution of the judiciary at that period of Nigerian socio-political and legal history.

In view of the of foregoing discussion, the failure of the Oputa Panel to call the Nigerian judiciary to account for its role in governance in the period of authoritarian military rule in the country can by no means be regarded as a *faux pas*. Even if arguably there is a good case to be made for the judiciary as victim of authoritarian rule, the truth-seeking process in Ghana clearly demonstrates that such a finding does not preclude the conclusion that the judiciary was complicit for executive (and sometimes legislative) actions that deprived citizens of their fundamental rights.⁷⁷ Thus, there is the need to publicly scrutinise the course of judicial governance in post-conflict societies as a principal measure for institutional transformation. It has been recognised that the judiciary in post-conflict contexts will be faced with enormous challenges of dispute resolution.⁷⁸ Institutional transformation of the judiciary following a period of siege is critical to the survival of democracy and the rule of law. This applies with equal force to post-authoritarian societies.

CONCLUSION

The iconography of Justitia, the familiar symbol of law and justice, is one of the few that has continued to survive Renaissance art. Both the citizen and the state remain in obeisance to the image of the female, regally-robed and impersonal goddess. The reason for this, as succinctly stated by Loughlin is

...a rather functional one. The fact of the matter is that the State remains in need of a corps of officials able to enforce and authorize the imposition of violence over its citizens. Although politics, broadly conceived involves a process of world-building, the State ultimately exists to maintain a particular form of order, and the special task of the judge lies at the sharp end of that process. As the consequence of the decision of a judge, citizens lose their liberties, their property and their children. This is indeed an *awesome power*...⁷⁹

⁷⁶ L Ughogbe “Govt Reinstates 'Bribe-for-Verdict' Judge, May Appeal” *The Guardian* Online Edition (Lagos Friday 10 August 2007)

⁷⁷ Report of the National Reconciliation Commission (Ghana) Volume Chapter 2, 77, 83 (October 2004) hereafter Ghana NRC Report at 131.

⁷⁸ J Widner “Courts and Democracy in Post Conflict Transitions: A Social Scientist’s Perspective on the African Case” (2001) 95 (1) *The American Journal of International Law* 86. See also Chapters Four, Five and Six, *infra*.

⁷⁹ Loughlin note 16 *supra* at 61-62. This ‘*awesome power*’ of the judiciary is recognised under international law. The preamble of the *Basic Principles on the Independence of the Judiciary*

While Loughlin's position is arguably more apposite in a democratic society, it nonetheless has resonance in authoritarian societies as the Nigerian experience has shown. The military at no point in the course of its hold on political power in the country lay claim to judicial capability in the way it was quick at emphasising its *leadership* abilities derived from military training in justification of its hold on power where the political class had failed. This state of affairs constituted a potent weapon for the defence of the rule of law and human rights by the judiciary and for our purposes, stronger justification for insisting that the judicial institution maintain an unwavering fidelity to law *in all circumstances*.

Some scholars insist there are grave limitations to or even no latitude at all available for affecting the state of affairs against a military regime bent on having its way.⁸⁰ While this may be tenable in certain circumstances, I have argued (like Dyzenhaus) that the 'tales of disempowerment' such a position portends may not be adequately represented in the totality of judicial experience in illiberal regimes. In any case there is much to be said for the need for accountability of the judiciary in the post-conflict period for the tacit admission of complicity in governance inherent in the position.

The crux of Dyzenhaus' position on the Legal Hearings of the TRC appears to be that the institutionalisation of apartheid and the violation of human rights of a large segment of South African society which violations were aided by the judiciary, made accountability of the judiciary in South Africa a moral, if not a legal imperative, in the country's transition to popular democracy. It can similarly be argued that the existence of a nascent democracy in post-colonial Nigeria cut short barely six years after independence by mutinous soldiers whose adventurism led to the subsequent take-over of power by the military leadership (that was in turn) legitimized by the judiciary, also justifies a requirement for public accountability of the judiciary in the country's transition to democracy.

The case for such a process is arguably stronger if it is considered that the Nigerian judiciary was a creation of a *democratic* constitution.⁸¹ The antecedents of the Nigerian judiciary impose a heavier *moral burden* of public accountability on it. This is because of its key role in legitimising what in retrospect, was to be a

provides in part that 'judges are charged with the ultimate decision over life, freedoms, rights, duties and properties of citizens.' Emphasis mine.

⁸⁰ See for instance A Ojo "The Search for a Grundnorm in Nigeria: The Lakanmi Case" (1971) 20 (1) The International Comparative Law Quarterly 117.

⁸¹ This is the case only in so far as we refer to Nigeria as an independent nation and disregard the colonial institutional heritage. The discussion in this chapter wholly depends on that presumption.

string of authoritarian regimes that committed a range of atrocities on the people. The military thus legitimated by judicial sanction, deprived Nigerian society of the right to determine how they were governed for about three decades. In this way, the judiciary played an indirect but critical role in legitimising the military's plunder of the country's resources in the process of which the later left not a few in misery.

The Nigerian experience of military authoritarianism has not been one of physical decimation of the judiciary. Rather, the judiciary acquiesced (with few notable exceptions)⁸² to the rule of force in many cases and to the suspension, abridgement or outright abrogation of human rights and constitutionalism by successive military regimes. Years of military dictatorship thus bequeathed the country with a conservative and compromised judiciary. The versatility of the judiciary in making an expeditious transformation could have notable impact on the course of democracy, human rights and the rule of law in transitional societies. In this regard Ogowewo has noted that

....the true test of the judiciary does not lie in its approach to the rule of law when democracy is not under attack; instead, the test will be its approach when democracy is severely assaulted by usurpers- when the challenge to the rule of law is greatest.⁸³

It is widely accepted that 'an independent judiciary is a central pillar of the rule of law and in many ways a guarantor of fundamental rights of individuals and groups.'⁸⁴ But the very proposition presupposes an *independent* judiciary, not one that acquiesces to the subversion of the rule of law, a charge at the door of judiciaries that give effect to military authoritarian rule like the Nigerian experience.

The judiciary demonstrated a lack of independence in the pre-transition period. This has arguably continued to feature in its recognition of questionable decrees (now styled Acts) including those introduced on the very eve of the hand-over that were unconnected to the hand-over, but instead dealt with the regulation of the capital market. In other words, the military were purporting to legislate for the civilian government, a few hours before the civilian government took over. The courts in true fashion never questioned this.⁸⁵ Such judicial posturing constitutes

⁸² See for example the decision in *Governor of Lagos State v Ojukwu* (1986) 1 NWLR pt.18 621.

⁸³ Ogowewo note 2 supra at 45

⁸⁴ D Tolbert and A Solomon "United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies" (2006) 19 Harvard Human Rights Journal 29, 45-46.

⁸⁵ T I Ogowewo *The Market for Corporate Control and the Investments Securities Act 1999* (British Institute of International and Comparative Law London 2001).

eloquent testimony to the need for public accountability as a tool for effecting institutional transformation of the judiciary in the ensuing political transition.⁸⁶

The retention of repressive authoritarian legislations in the post-transition period, as Prempeh notes, is not peculiar to Nigeria. The neglect to effect required changes as part of the transition process has now, rather ironically, placed a disproportionate burden on the judiciary to sustain constitutionalism and human rights.⁸⁷ Ogowewo on his part advocates a radical judicial delegitimation of such statutes. This is no doubt an uphill task in the Nigerian situation where they constitute a sizeable component of the statutes in the books.⁸⁸ Barak supports the more nuanced approach of judicial substitution of the legislative intent of the ‘undemocratic legislature’ in such statutes with that of the ‘*democratic legislator*.’⁸⁹ Whatever approach is to be adopted, it can be asserted with some measure of confidence that only an accountable, credible and progressive judiciary would be strategically positioned to discharge the onerous responsibility of judicial governance. The peculiar circumstance of transitioning states with its common incidence of ‘democratic deficit’⁹⁰ and tenuous political representation strongly suggests the need for a transformed judicial institution to secure the transition in the public interest.

The failure of the truth-seeking process to challenge the judiciary to *tell its truths* in governance during the period of authoritarian rule in Nigeria constitutes a major flaw in the otherwise laudable conduct of the truth-seeking process represented by the Oputa Panel. In the aftermath of that failure, there is much to be said for the apprehension that the Nigerian judiciary, still considerably staffed and controlled by judicial officers appointed by successive military regimes, remains untransformed in the transition from authoritarian rule. As noted above, an ambivalent disposition suffused judicial attitudes to repressive legislations in Nigeria during the era of military authoritarian rule.

⁸⁶ Not a few observers regard the country as still being in a process of transition to democracy and concede only the fact of *civil* as opposed to military but not *democratic* rule. See for instance E Madunagu “Reviewing the Past, Facing Tomorrow” *The Guardian* Online Edition (Lagos Thursday 17 May 2007) “By the term transition...I meant that its foundations been weak, the administration would be an unstable regime which would move more or less rapidly towards either popular democracy, neoliberal democracy, fascism (or neo fascism , if you wish), or anarchy.’ See also Aka note 8 supra.

⁸⁷ Prempeh note 21 supra at 1316-1320.

⁸⁸ Ogowewo note 15 supra.

⁸⁹ Barak note 1 supra at 80.

⁹⁰ A Moravcsik “Is there a ‘Democratic Deficit’ in World Politics? - A Framework for Analysis” (2004) 39 (2) *Government and Opposition* 338.

Critics have asserted that in the aftermath of the transition to civil rule in the country, ‘The Nigerian judiciary is still in disarray.’⁹¹ This is due at least in part, to the yawning accountability gap on judicial governance in the period of the country’s experience of authoritarian rule. That gap is still a threat to democracy and the rule of law in the country. It is a critical failure that currently constitutes a veritable challenge to the transition in the country. The process of transition requires an independent and formidable judiciary to deepen democracy and rule of law, after decades of authoritarian rule. The neglect may continue to haunt the Nigerian society in the foreseeable future. Worse still, it could engender a reversal of the landmarks achieved in the country’s transition. The accountability gap identified in the foregoing analysis has had a marked effect on the judiciary in the post-authoritarian period. The impact of the gap in accountability of the judiciary for its role during the period of authoritarianism on judicial governance in Nigeria in the political transition will be evaluated in subsequent parts of this study.

⁹¹ Oko note 44 supra at 46.

Chapter Four

THE JUDICIARY AND CONSTITUTIONALISM IN NIGERIA'S TRANSITION

INTRODUCTION

In previous chapters, this study focused on accountability of the judiciary for its role in governance and gross violations of human rights during the period of authoritarianism in Nigeria. It has been argued that this ought to form part of the transitional justice measures in the process of political change in the country. I sought to show that unaccountability for the judicial role in the past has created a gap on its institutional exercise of power during the period. However, from this point, attention shifts to the impact of the judicial accountability gap on the judicial role in the present and (presumably), the future. The remaining chapters will discuss the resonance of the gap on the judicial function which, in the context of the political transition, it will be argued, has become quite strategic.

In this chapter, I critically analyse the role of the Nigerian courts in mediating tensions that have emerged in the post-authoritarian transition period. In doing this, I examine jurisprudence emanating from the courts on some serious inter-governmental disputes as well as decisions that touch upon individual and collective rights particularly connected to the transition process. The dynamics of democratic transition in Nigeria after decades of military rule, dictate the inevitability of these disputes. The military left a legacy of institutional distortion and dysfunctions the result of which is a series of ongoing and formidable challenges to the transitioning society. The societal distortions and dysfunctions extend beyond the economic, social and political sectors to the constitutional and legal order. This is due in part to the nature of military rule with its legendary disregard of the rule of law, constitutionalism and due process.

The Nigerian experience is complicated by the predilection of military rulers for a unified command-structure approach to governance in a heterogeneous society. Rhetorically, successive military governments paid lip-service to the preservation of the *federal character* of the country¹ but in practice, the command-structured

¹ That is with the notable exception of the short-lived regime of Major-General John Thomas Aguiyi-Ironsi from January-July 1966 that pioneered military incursion into governance in Nigeria. He abolished the regions and the federal structure of the country. His unification policy was one of the major causes of the rebellion by officers from the Northern part of the country, a bloody coup leading to his death and Nigeria's four-year civil war. See A Ojo "The Search for a Grundnorm in Nigeria: The *Lakanmi* Case" (1971) 20 (1) *The International Comparative Law*

governance that characterised military rule saddled it with a caricature federation. Analysts have noted that such unification or ‘high degree of uniformity in the nature of political arrangements’ is second nature to authoritarianism.²

The military legacy has predictably generated considerable tension between the federal (central) government and the states. The tension has brought about critical consequences for constitutionalism and the rule of law in Nigeria. In particular, the legislature and largely, the judiciary have been tasked with resolving the *executive impasse* that has been the fall-out of the tension in the transition period. Despite the growing importance of the judicial function in transitioning polities,³ scant attention has been paid to judicial activity in contemporary African democratisation processes.⁴ There is thus reason to critically evaluate the nature of judicial government in Nigeria in view of recent socio-political developments in the period of transition to civil rule in the country.

The discussion in this chapter is set against the backdrop of several complexities. These include unresolved issues of transitional justice and reparations for victims of gross abuses of human rights from decades of military authoritarian rule discussed in Chapter One,⁵ and concerns regarding the alarming levels of insecurity in the Niger Delta (source of oil, the main-stay of the country’s economy). Other prevailing concerns are the control of the political and economic sectors of the country by erstwhile military rulers (or their acolytes). Many political office holders in the political transition have strong links to, are sponsored by or are actually former military officers who held political power during the authoritarian period. Many erstwhile ex-military rulers have accumulated immense wealth and either directly or through fronts, acquired substantial control of the national economy partly through the acquisition of former state-controlled enterprises through privatisation and trade-liberalisation programmes. There is also the issue of continued violations of human rights in the post-authoritarian period by a *democratic* government; growing poverty

Quarterly 117 and A Jackson “Nigeria: A Security Overview” (2007) 96 (392) *The Round Table* 587, 590-591.

² F Ni Aolain and C Campbell “The Paradox of Transition in Conflicted Democracies” (2005) 27 *Human Rights Quarterly* 172, 182.

³ T Ginsburg “Constitutional Courts in New Democracies: Understanding Variations in East Asia” (2002) 2 (1) *Global Jurist* 1.

⁴ H K Premeh “African Judges in their Own Cause: Reconstituting Independent Courts in Contemporary Africa” (2006) 4 (3) *International Journal of Constitutional Law* 592, 592-593.

⁵ See also H O Yusuf “Travails of Truth: Achieving Justice for Victims of Impunity in Nigeria” (2007)1(2) *International Journal of Transitional Justice* 268.

(associated with IMF/ World Bank economic structural adjustment programmes);⁶ electoral manipulation and political violence, etc.

Framing issues around constitutionalism, human rights and the critical nature of the role of the judiciary in contemporary Nigerian society indicates there is indeed an onerous responsibility on the judicial function. How the judiciary has played its role in the post-authoritarian period, particularly in the exercise of its constitutional powers of judiciary review can be gleaned from the jurisprudence emanating from decisions relating to these and sundry issues.

The analysis will be conducted within two politically significant period-frames; the transition to civil from authoritarian rule (1999-2003) and the post 2003 period leading to the 'civil-civil' transition achieved in 2007 as well as the immediate period after. This periodisation is adopted with the aim of presenting a constructive template for critical evaluation of the consequences of the judicial accountability gap discussed in Chapters One and Three⁷ on judicial governance in the country. The focus in this chapter is on the first period. However, as is the wont of on-going activities, it may sometimes inevitably overlap with the second period just as the evaluation of that period in Chapter Six also sometimes looks backwards.

The adopted framework is consistent with transitional justice theory. Transitional justice theory recognises that while a single 'transitional moment'⁸ can be identified in 'paradigmatic transitions,'⁹ a number of transitions (or transition milestones) may in fact be discernible within the process of political change.¹⁰ In the context of the Nigerian transition, I argue in what follows that there are discernibly distinct strands in judicial governance that can be evaluated through the prisms of the 'transitions-within-a transition' experience of the country.

The Nigerian judiciary has recently been the focus of both national and international attention as a forum that offers hope for the resolution of ongoing disputes and contestations in the country's troubled political transition. Has the

⁶ O C Okafor "The Precarious Place of Labour Rights and Movements in Nigeria's Dual Transition, 1999-2005" (2007) 51 *Journal of African Law* 68.

⁷ See also Yusuf Hakeem O "Calling the Judiciary to Account for the Past: Transitional Justice and Judicial Accountability in Nigeria" *Law and Policy* 30 (2) (2008) 194-226.

⁸ Ni Aolain and Campbell note 2 *supra* at 181.

⁹ *Ibid.*

¹⁰ *Ibid.* at 183 ('...we argue for the need to conceive of transitional situations not as involving one single transition, but in terms of at least two primary sets...This is not to suggest that there may not be other co-terminus primary transitions occurring').

judiciary been instrumental to furthering or impeding the transition to democratic rule, and the respect for human rights and upholding the rule of law? What has been the nature of judicial intervention in ongoing tensions that emerge from the interplay of a centrifugal federalism¹¹ and dynamics of political transition in a heterogeneous, resource-rich but impoverished polity? These questions constitute the foci of this chapter. We return to some detailed consideration of these issues after a brief consideration of the nature of judicial review in Nigeria's legal system.

2. JUDICIAL REVIEW IN THE NIGERIAN COURTS SYSTEM

On a prefatory note, it is relevant to identify the nature of judicial review in the Nigerian court system. The significance of such identification derives from the realisation that the concept lies at the heart of evaluations of constitutionalisation discussed here and the judicialisation of politics later in this research. Adopting Epstein et al's characterisation of constitutional courts, judicial review in the country's court system, though very close to the American system, is best described as a hybrid.¹²

Like the American system, the Nigerian court system features a diffusion of the power of judicial review. It is marked by the absence of a constitutional court and a general power of judicial review vested on all courts of *superior record*. These are the high courts (usually, but not always), the court of first instance, the Court of Appeal and the Supreme Court. The courts possess only concrete, as against abstract judicial review powers and the locus required to initiate the process are basically closeted, vested in individuals or groups that can establish a real stake in the outcome of the process. However, from judicial practice and a close reading of the provisions of Sections 6 and 46 of the Constitution of Nigeria, 1999, it is apparent that the Nigerian system of judicial review accommodates both *ex ante* and *ex post facto* judicial review. This is a feature it shares with some European constitutional courts.¹³ In addition, Section 315 (3) of the Constitution provides for extensive judicial powers for review of legislation. It states that nothing in the Constitution shall be construed as affecting the power of a court of law or any tribunal established by law to declare invalid any existing law in the country, and

¹¹ Nigeria is the fifth largest federation after India, United States, Brazil and Russia.

¹² L Epstein *et al* "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government" (2001) 35 (1) Law & Society Review 117, 121.

¹³ Ibid.

perhaps more importantly, any provisions of the Constitution. It is now apt to direct attention to the issues of constitutionalism and Nigeria's transition.

3. BACKWARDS WITH PLAIN-FACT JURISPRUDENCE: THE OPUTA PANEL CASE

Barak contends that the primary role of the Supreme Court in democratic governance is 'corrective' in nature. In the discharge of this corrective function, the judge is expected to bridge 'the gap between law and society as well protect democracy in cooperation with the other branches of government.'¹⁴ If we agree with Barak on the primary duty of a supreme court, it can be argued that the Supreme Court of Nigeria fell short of this role in its decision in *Justice Chukwudifu Oputa (Rtd.) and Human Rights Violations Investigation Commission and Gani Fawehinmi v General Ibrahim Babangida, Brigadier Halilu Akilu and Brigadier Kunle Togun* (the *Oputa Panel Case*).¹⁵ In view of the resounding impact of the case on Nigeria's choice of transitional justice mechanism and the evaluation proposed on the judicial role in transitional contexts below, it is germane to set out the facts of the case in some detail.

3.1 The Facts, the Decision

As stated in Chapter One, the desire of former military heads of state and their security functionaries to resist the summons of the Oputa Panel on the Dele Giwa murder led to their institution of the case at the Federal High Court. The case of the generals is that the Tribunal of Inquiries Act (TIA) under which the Oputa Panel was established was not an existing law within the meaning of section 315 of the 1999 Constitution of the Federal Republic of Nigeria. Section 315 makes provisions for savings and modification provisions for existing laws in the country.

They further sought a declaration that the compulsive powers granted the Oputa Panel under the TIA are in breach of fundamental rights guaranteed by sections 35 and 36 of the 1999 Constitution. Section 35 of the Constitution provides for the right to liberty while section 36 concerns the right to fair hearing. With the concurrence of the parties, the Federal High Court, a superior court of record of

¹⁴ A Barak "The Supreme Court, 2001 Term –Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" (2003) 116 (1) Harvard Law Review 19. 28.

¹⁵ [2003] M.J.S.C 63. This is the report of the defendants' appeal to the Supreme Court following the victory of 'the Generals' at the Court of Appeal. Reference will however be made in a composite manner to the matter through the court of first instance (Federal High Court) through to the Supreme Court. Reference to 'Courts' in the following context will cover all three courts except as specifically stated.

first instance, referred constitutional issues arising from the case for determination by the Court of Appeal.

On 31st October 2001, precisely ten days before the close of public hearings by the Oputa Panel, the Court of Appeal ruled on the issues. The Court of Appeal declared the ‘compulsive’ powers of the 2nd Appellant unconstitutional and in violation of the Respondents’ fundamental rights contained in sections 35 and 36 of the constitution. Dissatisfied, the Appellants appealed to the Supreme Court and this enabled the Panel to proceed with the public hearings. The Respondents, also dissatisfied with the decision, cross-appealed.

The Supreme Court held that the Tribunal of Inquiry Act was existing law under section 315 of the 1999 Constitution. It also however held that the Constitution does not confer powers on the National Assembly to enact a general law on tribunals of inquiry for the whole country. The Court also held that tribunals of inquiry fall within the residual powers of both the National Assembly (for the Federal Capital Territory) and State Houses of Assembly for the respective States. The Tribunal of Inquiry Act of 1966 under which the Oputa Panel was established therefore took effect under the 1999 Constitution as an Act of the National Assembly for the Federal Capital Territory, Abuja, only. In essence, the president had exceeded his jurisdiction in establishing the Oputa Panel with a remit to carry out a national inquiry into the violations of human rights in all parts of the country.

3.2 Between Executive Failure and Judicial Complacency

The *Oputa Panel Case* eloquently presents two of a number of unsettling features in the legal and statutory framework of governance in Nigeria’s political transition. First, is the extensive reliance by all branches of government on autocratic legislation deriving from the colonial past and authoritarian military regimes. Second, is a customary, uncritical judicial adherence to precedent based on principles of the common law. Deriving from the first feature, an elected democratic transition government placed reliance on the TIA, a pre-republican legislation, to set up a truth commission by executive fiat at a time when it had become standard practice to do so elsewhere under purpose-specific legislation.¹⁶

¹⁶ Thus, the South-Africa and Ghana truth commissions which in temporality closely preceded and succeeded the Nigerian truth process respectively were set up pursuant to tailor-made legislation. For a fairly comprehensive and representative discussion of the establishment and conduct of truth-seeking processes in different parts of the world, see P B Hayner *Unspeakable Truths: Facing the Challenge of Truth Commissions* (Routledge New York 2002) 94.

Proceeding on the second feature, the judiciary relied extensively on the case of *Sir Abubakar Tafawa Balewa & Others v Doherty & Others*¹⁷ in the *Oputa Panel Case*. In the former case, the then Federal Supreme Court and the Privy Council both upheld objections to the compulsive powers and the jurisdictional reach of the Commissions of Enquiry Act, 1961, which had similar provisions to the TIA. Without delving into the contentious value of judicial precedent, particularly in the common law legal tradition, it is important to make the point that the post-republican Nigerian Supreme Court is bound neither in fact, nor law, by the decisions of both authorities. This is because the Federal Supreme Court was not the highest court for Nigeria at the time since, (as in this case) final appeals still lay to the Privy Council in London. The subsequent republican status of the country saw to the end of precisely that. Thus there was no compelling legal basis to rely on the case in the circumstances of political change and especially in light of the imperatives of transitional justice.

The Obasanjo administration relied on shaky legal foundations for addressing crucial transitional justice issues. Such reliance in the aftermath of three decades of authoritarian rule that earned the country international censure¹⁸ clearly places a question mark over the administration's sincerity and the degree of its commitment to justice, human rights and the rule of law in the country. In this regard, the action of the elected executive seriously impaired the fulcrum and *raison d'être* of the transition. However, the faltering premises of executive initiative notwithstanding, the transition judiciary can not be excused for its fixation on a rational legal formalism that is impoverished by its lack of engagement with the socio-political circumstances of the country and the developments in the international arena.

In coming to a decision that struck at the root of the truth-seeking process epitomised by the *Oputa Panel*, the Nigerian judiciary in the *Oputa Panel Case* arguably undermined the rule of law (even if not deliberately), in the course of the country's transition from authoritarian rule. The attitude of the Court derives from an entrenched judicial tradition of plain-fact jurisprudence. The Court obviously accorded primacy to protecting the *federal character* of the Nigerian polity over the rights of victims of gross violations of human rights.

¹⁷(1963) 1 WLR 949.

¹⁸ S Mole "The 2003 Nigerian Elections: A Democratic Settlement?" (2003) 370 *The Round Table* 423,424.

It is noteworthy that the violations in issue were largely committed by military regimes that paid no more than rhetorical heed to the country's federal character (like most other established aspects of the country's law and politics) and (mis) ruled it in a virtually unitary fashion. In deference to the *supremacy* of military laws (decrees), the judiciary hardly intervened to check the various violations of the constitution in this regard. It is thus ironic that the transitional judiciary at the highest levels will advert to the territoriality argument as justification to shield alleged perpetrators from accountability and transitional justice claims.

Further, the Supreme Court upheld the Court of Appeal's position that Sections 5(d), 11(1) (b), 11 (4) and 12(2) of the Tribunals of Inquiry Act were unconstitutional and invalid because they empower a tribunal of inquiry to compel attendance or impose a sentence of fine or imprisonment for non-attendance to its summons. According to the Court, the sections contravene sections 35 and 36 of the Constitution of Nigeria 1999 that provide for the right to liberty and fair hearing respectively. It viewed mandatory attendance at a truth commission as contrary to the right to personal liberty. The Court insisted that under the Constitution, only a court of law can make an order to deprive a citizen of his fundamental right to personal liberty. While this position of the Court is attractive, it is arguably not sustainable considering the provisions of section 35 (1) (b) that

Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law... by reason of his failure to comply with the order of court *or in order to secure the fulfilment of any obligation imposed upon him by law*¹⁹

The Court placed reliance on section 35 (1) that provides for deprivation of liberty in execution of the judgement of a court, as if it were the only derogative clause to individual liberty in the constitution. Such an interpretive approach is, it is humbly submitted, in view of section 35 (1) (b), erroneous.

Surely, the Court could have upheld, on the basis of the proviso in section 35 (1) (b), the 'coercive' powers of the Oputa Panel under the 1999 Constitution. The Court is well situated to do so from its vantage position as the judicial forum of last resort even without recourse to comparative legislation and jurisprudence in South Africa, another common law jurisdiction with relevant (and at least

¹⁹ Emphasis mine.

persuasive) precedent on the issue. After all, the Oputa Panel was constituted under a law and the duty to attend the summons of the Oputa Panel challenged by the Plaintiffs was imposed by the TIA.

Curious and more objectionable still, is the finding that the powers of the Oputa Panel contravened fair-hearing provisions of section 36 of the Nigerian constitution. It is a basic procedural practice that has been upheld by the courts (in Nigeria and elsewhere) that evidentiary rules weigh against a party who fails to utilise reasonable opportunity provided to air the party's side of a case, as a result of which such party can not be heard to complain about lack of fair hearing. In vindication of this position, the Court was to hold in a later case that

...the duty of the court, trial and appellate, is to create the atmosphere or environment for a fair hearing of a case but it is not the duty of the court to make sure that a party takes advantage of the atmosphere or environment by involving himself in the fair hearing of the case. *A party who refuses or fails to take advantage of the fair hearing process created by the court can not turn around to accuse the court of denying him fair hearing.*²⁰

On the facts in the *Oputa Panel* case, the provisions of section 36, it is respectfully submitted should not have inured to the benefit of the generals. They were summoned as witnesses before the Oputa Panel and the case was initiated by them to obtain judicial sanction for depriving the petitioners and the Nigerian society the benefit of the facts peculiarly within their knowledge relating to serious allegations of wrong doing.

Contestations around the legality of the Oputa Panel in various suits and appeals on them instigated by the generals in an attempt at self preservation brought to the fore the tension that may arise between the truth-seeking process and the judiciary in transition. More importantly, the *Oputa Panel* case in the context of a transitioning polity arguably demonstrates the dangers inherent in the existence of an accountability gap with respect to the judiciary which has been earlier identified in Chapters One, Two and Three. Such an accountability gap bequeaths a polity with a judiciary that may be immune to the changes taking place in the transition environment all around it.²¹

3.3 Again, the Rule of Law Dilemma

²⁰ See in this regard, the position of the Court in *Hon. Muyiwa Inakoju & 17 Ors v Hon. Abraham Adeolu Adeleke & 3 Ors* [2007] 4 NWLR pt. 1025 p.423 and (2007) 7 NILR 136. Available at: <http://www.nigeria-http://www.nigeria-law.org/LawReporting.htm> (25 December 2007) per Niki Tobi JSC at 35. Emphasis mine.

²¹ See generally, Chapter Three and Yusuf note 7 supra.

Former authoritarian military rulers are reputedly difficult to bring to accounts. Roehrig has noted that any attempt to ensure accountability for violations of human rights by past military regimes in post-authoritarian societies is fraught with complexities.²² There is some convergence of opinion on this view. This does not, however, provide justification for avoiding the challenge of re-establishing the supremacy of law over the authoritarian exercise of power that had deprived individuals, groups and society in general, of their rights. Supreme Courts in particular have a unique role in a constitutional democracy²³ in the pursuit of this objective.

The decision of the Court in the *Oputa Panel Case* calls into question its commitment to the duty to bring alive the law as an agent of positive transformation (largely viewed as essentially revolving around the executive and the legislature). The phenomenon at play in cases like the *Oputa Panel* in the context of Nigeria's transition has been aptly described by Teitel as 'the rule of law dilemma.'²⁴ Teitel has criticised accounts of the role of law and legal institutions in transitional contexts that do not take cognisance of the circumstances of political change. Adopting existing conceptions of the role of law, she argues, restricts the potential transformative capacity of law in hitherto conflicted societies.²⁵ In assessments of what now constitutes pioneering experiences in the 'contemporary wave of political change' in diverse regions of the world (Eastern Europe through Latin America to Africa), she identifies the judiciary as a powerful institutional agent for transformation. But as she further notes, the judiciary is itself faced with enormous challenges in the mediation of ensuing transitional tensions. Teitel locates the major reason for this in the distinctive nature of law and justice in transitional contexts. Law and justice as *handmaidens* of change make a paradigm shift in transitions. Law is moulded by and also remoulds the society in the flux of transition. The exigencies of the transition context demand new conceptions of law and justice that are at once 'transformative...extraordinary and constructivist.'²⁶

²² T Roehrig *The Prosecution of Military Leaders in Newly Democratic Nations: The Cases of Argentina, Greece and South Korea* (McFarland & Company Inc. Publishers North Carolina 2002).

²³ See generally Barak note 14 supra.

²⁴ R G Teitel "Transitional Jurisprudence: The Role of Law in Political Transformation" (1996-7) 106 (7) Yale L.J 2009, at 2018-2022.

²⁵ Ibid.

²⁶ Ibid. at 2014

The foregoing formulation constitutes what can be considered a historication of law and justice within the context of transitions. Adjudication by a ‘transitional judiciary’²⁷ in neglect of the *sui generis* role of law and thus, the adjudicatory function, positively threatens the aspirations for change constitutive of the whole process of political transition. Further, it raises the question of the continued relevance of that arm of government in the post-conflict era and its ability to foster the rule of law.

3.4 The Judiciary, Transition and the Transformative Agenda

The gap in governance created by a transition’s peculiar political power-dynamics accentuates the need for a judiciary committed to constructively ‘engage with the transformative agenda,’²⁸ ideally the hallmark of and legitimising justification for the transition in the first place. This is particularly relevant in the context of a transition that has resulted not in a real (as is the aspiration of the people and mantra of the elites now in power) but a virtual democracy: in other words, a situational dynamic in which the ruling elite have perfected the art of manipulating the transition process in a way that does not dislocate their hold on power and yet creates the impression that *liberal* democracy has been instituted.²⁹ The transition to democratic rule in Nigeria presents a good example of this socio-political dynamic.

The elections in the political transition from over three decades of authoritarian rule were strongly contested or influenced by civilians who had held offices under the past military governments or were actually retired military officers in past military regimes.³⁰ Ex-President Olusegun Obasanjo epitomised this dynamic. The former army general and military head of state is generally believed to have been tipped and largely sponsored for president in 1999 by the country’s former self-styled ‘military president’, General Ibrahim Babangida. General Muhammadu Buhari, himself a former military head of state remains one of the frontline contenders to the presidency while General Babangida only dropped his

²⁷ Ibid. at 2030.

²⁸ H Corder “Judicial Policy in a Transforming Constitution” in J Morison, K McEvoy and G Anthony (eds.) *Judges, Transition and Human Rights* (Oxford University Press Oxford 2007) 91, 93.

²⁹ R Joseph “Democratization in Africa after 1989: Comparative and Theoretical Perspectives” in L Anderson (ed.) *Transitions to Democracy* (Columbia University Press 1999) 237, 242-3. See also H K Premph “Africa’s ‘Constitutional Revival’: False Start or New Dawn” (2007) 5 (3) *International Journal of Constitutional Law* 469, 505: ‘Indeed, Africa’s recent democratic transitions have become an occasion for recycling old elites, not for the emergence of a new generation of leadership.’

³⁰ T Oyekola “Ex-Military Officers are Doing Well in Politics- Gowon” *Nigerian Tribune* Online Edition (Lagos Tuesday 4 September 2007)

presidential ambitions shortly before the April 2007 elections. During the 2003 elections, three generals had been front runners.³¹ They had all ruled the country as military heads of state at one time or the other. It remains an irony of the democratic transition in Nigeria that military officers who ran the country aground still occupy the most prominent positions in elite power contestations.

The current president of the Nigerian Senate (the upper house in the two-tier legislature, the National Assembly), is also a retired general and ex-military governor of a state, just as the longest-serving chairman of the ruling People's Democratic Party (PDP), Ahmadu Ali, is a retired army general and one time Minister for Education.³² A number of state governors, law makers in the federal and state legislatures, ministers and other key public office holders are ex-military men, who held strategic public positions under various military regimes in the country.³³ The phenomenon aptly referred to as 'feigned' ruler conversion³⁴ situates the judiciary as the unlikely institution of state for holding out the prospect of a genuine realisation of democracy and rule of law commitment as underpinning the political transition.

The situation in Nigeria is not unique as the experience in Ghana (embodied in what has been referred to as the 'Rawlings factor') has shown. Jerry Rawlings' hold on power in Ghana in the post-authoritarian transition period was so potent that it staved off accountability for human rights violations for eight years after the transition to democracy. This was no surprise considering he got elected as civilian president under the transition programme he instituted and supervised. Beyond that, the 'Rawlings factor' also reputedly conditioned largely, the choice of transitional justice mechanism eventually adopted by the successor administration to achieve accountability for human rights violations.³⁵ The politics of transitions in post-communist Eastern Europe and Latin America have often followed a similar course.³⁶ The reason for this may not be far-fetched; democratic politics, for all of its merits, is after all a game played with resources

³¹ Mole note 18 supra at 424.

³² J Abayomi "Ali, PDP Chairman Resigns" *Vanguard Online* (Lagos Monday 8 October 2007)

³³ See R Joseph "Africa: States in Crisis" (2003) 14 (3) *Journal of Democracy* 159, 163 and N van de Wall "Multi-Party Politics in Sub-Saharan Africa" (2001) 1 *Forum for Development Studies* 11.

³⁴ Joseph note 29 supra at 250-251.

³⁵ F Oduro "Reconciling a Divided Nation through a Non-Retributive Justice Approach: Ghana's National Reconciliation Initiative" (2005) 9 (3) *The International Journal of Human Rights* 327, 340-342. See also K A Attafua "An Overview of Ghana's National Reconciliation Commission and Its Relationship with the Courts" (2004) 15 (1-2) *Criminal Law Forum* 125

³⁶ Teitel note 24 supra at 2022-2024 and 2061

(financial and material) often in abundance in the arsenals of erstwhile authoritarian rulers, often privileged by plundered state resources amassed during their tenures. Against this backdrop, it is little wonder that the political dividend the transition process has delivered is a quasi-democracy.³⁷

Again, the formidable challenges posed by powerful ex-military rulers against efforts to obtain justice in the transition period are largely consistent with the mixed results and varied experience of attempts elsewhere. While in some Latin American countries like Argentina, prosecutions were later ‘rolled back’ in deference to military take-over threats,³⁸ the judiciary in Greece contributed positively and directly to the restoration of the rule of law by way of fearless adjudication in prosecutions involving erstwhile military rulers in the country.

According to Teitel, twice over confronted with the dilemma of the rule of law, the courts in Unified Germany adopted a jurisprudence in which ‘moral right’ trumped a formalist (plain-fact) approach to law, lending credence to the view that transitional justice necessitates a *sui generis* conception of law. In the context of post-communist Eastern Europe’s experience in transition to liberal democracy, the Hungarian judiciary similarly opted for a transition-sensitive response to the rule of law dilemma by protecting the individual’s right to security. Teitel posits that conditioned by different ‘historical and political legacies’, both judiciaries arrived at similar results of ‘transformative understandings’ of the rule of law despite charting different courses.³⁹

The judiciary at all times, but especially in the flux of the transition context, must be wary of the designs of any individual or group to have recourse to judicial process as a shield against justice. This is particularly important for the restoration and fortification of the rule of law in a transitional setting. Such awareness appears to have been lost on the Nigerian Courts in the Oputa Panel Case. It is a paradox that the military would have recourse to the rights-regime and the courts to stave off accountability. While in power, when it was not busy corrupting or trying to subvert the judiciary through bribery and exclusion clauses, it treated its efforts at independence with contempt at best. Military governance is unarguably a violation of the rule of law. It violates the constitution of virtually every modern state.

³⁷ Okafor note 6 supra at 86.

³⁸ For an elucidatory account of the challenges in Argentina’s transition from military authoritarian rule in the early ‘80s, see C S Nino *Radical Evil on Trial* (New Haven: Yale University Press, 1996).

³⁹ Teitel note 24 supra at 2019-2027.

The judiciary had become largely impotent in upholding the rights of individuals in the era of military rule in the country. In the appeal case of *Nwosu v Environmental Sanitation Authority*,⁴⁰ to take but one example, a Justice of the Supreme Court boldly advised victims of rights violations to seek redress elsewhere. He concluded that the Military left no one in doubt as to the inviolability of their decrees. This *apologia* was borne as much out of a sense of frustration of the courts with the importunate and contemptuous treatment of judicial decisions (and the institution as a whole) by successive military administrations as from an attempt at self-preservation. In a way though, it reinforces the need for accountability for the nature of judicial governance during the years of authoritarian rule. How or why was this situation possible? Clearly, considered against the background of the intransigence of the Nigerian military class towards the judicial institution and rule of law while in power, it is paradoxical that the military would turn to the courts ostensibly to protect their rights.

However, the recourse of the Nigerian generals to the courts reinforces the proposition that a virile, dynamic, independent judiciary is central to the nurture of democracy and human rights. If the courts maintain their independence, ultimately, both the rulers and the ruled are always protected. The virility of the judiciary goes a long way to ensure good governance at all times. The guarantee of judicial independence and justice through due process of the law constitutes a check on the inordinate exercise of political power.

The decisions of the Nigerian courts in the legal challenges to the Oputa Panel, the key mechanism in the process of restoring human rights and achieving justice for victims of impunity in the transition to democratic rule, raises concerns regarding how the courts intend to respond to the demands for justice and acknowledge violations of human rights. This also extends to what the role of the courts will be in mediating critical conflicts in the transition era and beyond. One of the concerns is that it appears the courts are pliant to the wishes of the ex-military rulers (who appointed most of them) and who continue to participate directly, by proxies or hover visibly in the background of socio-political life in the country. This leaves a question mark over their required decisional independence.

Another is the fact that despite the recourse of the plaintiffs to human rights provisions as one of the twin bases of their case, none of the Courts, not even the

⁴⁰ [1990] 2 NWLR pt.135, 688

Supreme Court, seized on the opportunity to invoke the obligations of the country under international human rights law. Significantly, counsel to one of the Appellants/Defendants had canvassed that ‘...the Tribunal of Inquiry (the HRVIC) was set up in connection with violation of human rights... for the purpose of implementing a treaty.’⁴¹This provided the Court with the opportunity for advertence to the treaty obligations of the country under the Universal Declaration of Human Rights (UDHR),⁴² International Covenant on Civil and Political Rights (ICCPR) and customary international law.

But while the Court conceded that the Oputa Panel was set up in connection with human rights violations, it rejected out of hand any link with the country’s treaty obligations. In the view of the Court, there was nothing in the enabling law (the TIA) to validate that proposition. It thus rejected one of the mediating forces in transition as theorised by Teitel. That line of reasoning also deprived the Court of a core value of international law in providing stable understandings of the rule of law in transitional contexts.⁴³

Taken together, the two issues raise a third and one perhaps more profound: judges continue to apply and interpret the unreformed set of laws inherited from the authoritarian period with ‘uncritical vigour’⁴⁴ that was the hallmark of their decisions at the time the laws were handed down by dictatorial regimes. While it is not argued that all the laws passed during the authoritarian period are bad with reference to their content, as discussed earlier, there are substantive and procedural reasons for viewing a good deal of military made legislation in the country with suspicion. Further, it is interesting to note that it was not an issue of debate nor was it suggested as to whether judges invariably appointed by the authoritarian military regimes⁴⁵ should resign given the questionable role the judiciary played in the pre-transition period. None did. Again, this followed the pattern elsewhere.⁴⁶ The oversight that has left the judiciary intact, no doubt strengthened in the Nigerian experience by a tradition of military-imposed

⁴¹*Brigadier-General Togun (Rtd.) V Hon. Justice Chukwudifu Oputa (Rtd.) & 2 others and General Ibrahim Babangida & 1 other* [2001] 16 NWLR pt. 740, 597 at 662 (cases consolidated on the orders of the court). Hereafter, *Togun v Oputa* (No.2).

⁴² 10 December 1948 UN GA Res.217 A (III).

⁴³ Teitel note 24 supra at 2028.

⁴⁴ Corder note 28 supra.

⁴⁵ This must be qualified by appointments made in the intervening years of civil democratic governance; 1 October 1960- 15 January 1965 and 1 October 1979- 31 December 1983.

⁴⁶ South Africa is a good example. See for instance Corder note 28 supra at 93.

constitutionalism, may be partly responsible for judicial apathy to the policy issues surrounding the *Oputa Panel Case*.

It is arguable that the judiciary is obliged to resolve the issues at stake in the *Oputa Panel Case* from the perspective of its national as well as international significance. From the national perspective, the country is in search of a lasting transition to a democratic society where the rule of law will substitute whimsical, authoritarian and usually brutish deprivation of political, economic, social and cultural rights. Not a few Nigerians had been denied their rights in the period of military rule aptly described in the words of Justice Oputa in (biblical allusion, no doubt) as ‘the years of the locust’. An overly narrow interpretation of precedent by an unreformed, unaccounted for judicial body would put rectification of this in jeopardy.

On the international level, the country was in dire need of assuming its pride of place in the comity of nations as the foremost black nation in the world considering its enormous potential in light of its human and material resources.⁴⁷ More importantly, the country’s legal obligations under international human rights covenants required the deployment of an effective mechanism to secure reparations for victims of gross violations of human rights that ought to be promoted by a robust engagement of the judiciary with transitional justice process.

3.5. Safety in a Cocoon: Ignoring International Human Rights Law

The Court ought to have taken cognisance of the transitional status of the country, seized the opportunity to enunciate and identify with the developing jurisprudence of the imperative for accountability and justice for victims of gross human rights violations through an affirmation of the *right to truth*.⁴⁸ Some scholars⁴⁹ are of the view that this right is guaranteed by Article 19 of the UDHR and Article 9(1) the African Charter on Human and Peoples’ Rights (Afrocan Charter). While the former has come to assume the status of customary international law, Nigeria is party to the latter.

The Inter-American Court of Human Rights (Inter-American Court) has been the most progressive of existing human rights mechanisms in its explication and

⁴⁷ Jackson note 1 supra at 600.

⁴⁸ P B Hayner “Fifteen Truth Commissions-1974 to 1994: A Comparative Study” (1994) 16 Human Rights Quarterly 597 at 607 and 611 (Emphasis mine).

⁴⁹ J Quinn “Dealing with a Legacy of Mass Atrocity: Truth Commissions in Uganda and Chile” (2001) 19/4 Netherlands Quarterly of Human Rights 383 at 388.

development of a jurisprudence affirming a right to truth for victims of human rights violations. The Inter-American Court, along with its sister mechanism, the Inter-American Commission on Human Rights, faced with a large number of ‘enforced disappearance cases’⁵⁰ has stated in a number of its decisions that there is a right to truth for relations of victims of such disappearances.⁵¹ The *locus classicus* on the matter is the case of *Velasquez Rodriguez v Honduras*⁵² where the Inter-American Court held that relations of an individual, who was arrested, reportedly tortured and then ‘disappeared,’ were entitled to have the report of an independent and transparent investigation carried out by the State into the disappearance.

Counsel to the Oputa Panel advanced the argument (without success) that it was properly set up under the African Charter. The Court held that for this to prevail there was the need for specific legislation setting up the Oputa Panel and investing it with powers to carry out an inquiry of the nature the Oputa Panel was meant to accomplish.⁵³ The constitutional panel⁵⁴ of the Supreme Court of Nigeria made only a dismal reference to international human rights law despite the country’s obligation in respect of the African Charter.

The socio-political circumstances of the country at the time required the courts to adopt a reflexive jurisprudence in the determination of the *Oputa Panel Case*. The Supreme Court of Nigeria in particular, ought to have proceeded on the premise that the issues arising from the case transcended the question of the personal rights of the plaintiffs. Regrettably, like the Court of Appeal, the Supreme Court preferred placing premium on how the ‘coercive’ powers of the Oputa Panel interfered with individual rights. A broader perspective commends the view that the issues involved may no doubt ‘offend’⁵⁵ individual rights. Yet, they also border, even if implicitly, on the obligation of the country to ensure that

⁵⁰ S Davidson *The Inter-American Human Rights System* (Ashgate Publishing Company Aldershot Dartmouth 1997).

⁵¹ See for instance *Neira Alegria v Peru* Inter American Court H.R series No.20 (1995), 16 HRLJ 403.

⁵² Inter-American Court H.R. Series C No.4 (1988), 9 HRLJ 212.

⁵³ *Oputa Panel Case* note 15 supra at 85-86.

⁵⁴ The full complement of 17 Supreme Court Justices does not sit *en banc* on cases together as a panel unlike the US Supreme Court. The Court in its ordinary appellate and original jurisdiction is constituted by 5 Justices. A panel of 7 Justices sit over ‘constitutional’ matters. This ‘Constitutional Panel’ is conventionally presumed to be the highest adjudicative forum in the country.

⁵⁵ *Togun v Oputa* (No.2) note 41 supra at 645.

victims of human rights violations are provided with an opportunity to be heard and provided an effective remedy.

The decisions of the Nigerian Courts on the Oputa Panel arguably demonstrate a glaring disconnection of the judiciary with the transitional realities of the society. As mentioned earlier, Nigeria ratified the African Charter in 1982. The country had gone further to incorporate it into domestic legislation as far back as August 1983. The Supreme Court of Nigeria is bound to respect international customary law as embodied by the UDHR. It also has a 'double' obligation in respect of the African Charter that is at once an international treaty and a municipal legislation. The latter reinforces and expands the limited bills of rights encompassed in successive Nigerian constitutions including the current one of 1999.

The decisions of the Nigerian courts in the *Oputa Panel* Case reflect an impervious disposition against the current position of international human rights law regarding state obligations on victims' *right to truth* and accountability in transitional societies. The attempt by counsel for the Oputa Panel to open the window was resisted by the only justice who did not go beyond a cursory reference to it. The significance and historic nature of the case does appear to have been lost on the courts.

Ratification of international covenants by a state constitutes an undertaking to fulfil the commitments stated in them. A state voluntarily surrenders part of its sovereignty in ratifying international covenants. On questions of international law, treaty obligations and human rights, the decisions of the United Nations specialised committees and regional human rights institutions deserve more than a 'persuasive' status. This is in line with state-party obligations under international law. The obligations include according recognition to decisions made by mechanisms established for ensuring compliance with the instruments. It can be argued that decisions on covenants' provisions by appropriate bodies ought to be regarded as canons to be observed by contracting parties. Otherwise, the whole field of international law will be rendered irrelevant.

3.6 Privileging Domestic Law over International Law

The foregoing further raise the propriety of the precedence sometimes accorded to domestic law (ordinary or constitutional) over international covenants. The issue is particularly topical in jurisdictions like Nigeria and South Africa where the constitution requires that a treaty must be enacted by the national legislature in

order for it to take effect as binding law in the country.⁵⁶ Nigerian courts have developed an ambivalent jurisprudence on the issue. In *Gani Fawehinmi v General Sanni Abacha*,⁵⁷ the Supreme Court of Nigeria held that the provisions of the African Charter can not prevail over the Nigerian constitution. In the lead judgment, Ogundare JSC conceded that the Charter as enacted under Nigerian Law (Cap. No.10, Laws of the Federation of Nigeria, 1990) possessed an ‘international flavour’ and ‘a greater vigour and strength than any other domestic statute’. However he proceeded to hold that

But that is not to say that the Charter is superior to the constitution...Nor can its international flavour prevent the National Assembly...removing it from our body of municipal laws by simply repealing Cap No.10.⁵⁸

With that, the constitutional (and highest) panel of the Supreme Court overruled the decision of the Court of Appeal. The latter had accorded special and decidedly higher status to the African Charter.⁵⁹ The Court of Appeal had decided the international statute had superior status to other municipal laws. It is submitted that the position of the Court of Appeal which accords special recognition to the statute as an international covenant ought to be the correct statement of the law. The judicial position that state constitutions are superior to international law the same state contracted to adhere to, can not be valid. Such jurisprudence hits at the roots of international law. It is standard to find that treaties provide for the binding nature of their provisions on state parties and require that they take adequate measures for the implementation of their provisions. A good example is Article 2 of the ICCPR

Where not already provided for by existing legislative or other measures, *each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*⁶⁰

In view of Article 2 of the ICCPR, it should not be open to municipal courts to override treaty provisions by domestic law. Cases of apparent or implicit conflict between the two ought to be resolved in favour of international law. This is

⁵⁶ See s.12 of the Constitution of the Federal Republic of Nigeria 1999.

⁵⁷ (2001) CHR 20.

⁵⁸ Ibid. at 42.

⁵⁹ It is enacted as Cap.10, Laws of the Federation of Nigeria 1990.

⁶⁰ Emphasis added.

consistent with Articles 26 and 27 of the Vienna Convention.⁶¹ Article 26 affirms the binding obligation created by treaties on contracting states. Article 27 provides that provisions of domestic law may not be invoked to justify failure to perform treaty obligations.

The Nigerian courts ignored the obligation of the country under the ICCPR. Article 2(3) provides that individuals whose rights or freedoms recognized by the covenant are violated are entitled to an effective remedy. The ICCPR similarly guarantees to an individual claiming such a remedy a right to have his claim determined ‘...by competent judicial, administrative or legislative authorities or by *any other competent authority provided by the legal system of the State*’. The latter clause *any other competent authority* covers a Truth Commission established by law (like the Oputa Panel) with a mandate inter alia, to ‘investigate’ cases of rights violations and ‘make recommendations’ for ‘appropriate compensation.’

The Oputa Panel clearly constituted the strongest if not the only mechanism chosen by the government to comply with its obligations in this context as discussed earlier. The mandate of the Oputa Panel addressed virtually all foregoing obligations. Only a handful of individuals (less than ten) were facing criminal charges at the time for some of the atrocities committed during the Abacha regime. To date, none of the trials has been concluded. Over 8 years of protracted trial of the former Chief of Army Staff, General Ishaiya Bamaïyi and four other minions of the late dictator, General Sanni Abacha, in *The State v General Isahiya Bamaïyi & 4Ors*⁶² typifies how the current state of Nigeria’s criminal law and procedure can be exploited by powerful individuals to frustrate the administration of criminal justice in the country.

It is pertinent that in the context of the transition in Nigeria, the rights of victims to obtain a remedy thereby relied to a great extent on the truth-seeking process. It was quite open to the Supreme Court in particular, as the court of last resort, to have taken the expansive view of the facts and law and come to a radically different decision. Disappointingly, it took a rather restricted view of the issues in the case. The decision did not take cognisance of the fact that the nation was at the

⁶¹ Vienna Convention on the Law of Treaties concluded at Vienna 23 May 1969. Entered into force 27 January 1980; U.K.T.S (1980), Cmnd 7964; UNTS 331.

⁶² LD/7C/99. See for instance *V Efeizomor ‘Lagos to Review Bamaïyi, Al-Mustapha’s Case’ Daily Independent Online Edition (Lagos Nigeria Monday 23 July 2007)*.

threshold of history, in transition and desirous of making a decisive break with a past of human rights violations.

Truth Commissions have now acquired the status of a recognised mechanism for addressing past human rights abuses in transitional societies.⁶³ They have taken a position of increasing significance alongside other transitional justice mechanisms. They play an important role in efforts to restore the rule of law in post-authoritarian and post-conflict societies. The Supreme Court ought to have seized upon the reliance of the applicants on the fundamental rights provisions guaranteed by the constitution to consider the right of victims to a remedy as provided by the foregoing provisions. This would have provided it with a balanced progressive jurisprudence on the matter.

3.7 Policy Considerations and Transitional Justice Claims

Apart from normative imperatives of international law, policy considerations should have been positively taken into account by the Court to the benefit of the defendants in the *Oputa Panel* Case. Nwabueze has made the important point that consideration of public policy may contribute positively to judicial determinations. The guiding principle, he advocates, is that public policy considerations, particularly of the subjective type, be subordinated to legal principles and ‘objective standards.’ He further suggests that ‘considerations of expediency’ in deserving instances ‘may justifiably inform the application of law by the courts in the solution to problems.’⁶⁴ Nwabueze’s postulation on the value of public policy in judicial decision-making, it can be argued, supports the position that the Nigerian courts should have had advertence to the principle to decide the *Oputa Panel* Case in a manner cognisant of the societal expectations at the time in Nigeria’s socio-political history.

A crucial issue on which the Nigerian courts found for the applicants was the unconstitutionality of the so called ‘coercive’ or ‘compulsive’ powers of the Oputa Panel. These were the powers of the Oputa Panel to *subpoena* witnesses⁶⁵ and punish for contempt.⁶⁶ The courts held that those powers impugned the

⁶³ UN Security Council Document No.S/2004/616 *Report of the Secretary-General ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’* 1 at17 available at: <http://www.daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement> (10th October 2005).

⁶⁴ B O Nwabueze *Judicialism in Commonwealth Africa - Role of Courts in Government* (C Hurst & Company London 1977) 7-9

⁶⁵ See Section 6 of the Tribunals of Inquiry Act.

⁶⁶ *Ibid.* Section 11.

fundamental right to liberty guaranteed by section 36 of the 1979 constitution of Nigeria (now section 46 of the 1999 constitution). This aspect of the decision in the *Oputa Panel* case, even from the purely formal legal point of view, is curious. The right to liberty under the Nigerian constitution of 1999 as well as earlier constitutions, and indeed in line with international human rights law and practice, can be and is in practice derogated from in defined circumstances. One context in which such derogation might take place concerns reasonable suspicion of the commission of an offence, which was precisely in issue before the Oputa Panel.

A Truth Commission has an extended form of inquiry as its core function. This core function can be easily frustrated or defeated if the truth-seeking body lacks the power to summon witnesses and issue *subpoena* for the production of evidence. Such power is in state practice not at all novel for quasi-judicial bodies in the country in question. Similar powers are statutorily conferred and exercised with judicial sanction by professional disciplinary bodies in Nigeria.⁶⁷

By way of comparison, the South African TRC had very wide powers to summon witnesses, subpoena evidence, and order the search of premises and seizure of materials⁶⁸ as part of its notably ‘significant procedural powers.’⁶⁹ Powers of similar purport were contained in the Ghana National Reconciliation Commission Act that established a subsequent truth commission.⁷⁰ It is doubtful that a truth commission without such powers can effectively carry out its functions.⁷¹ At the very least, the relevance of such a truth-seeking process will be diminished. In all events, the Court ought to have positively construed the provisions of section 8 of the TIA that emphasised the *fact-finding* remit of the Oputa Panel. It provided that evidence taken under the Act shall be inadmissible against any person in any civil or criminal proceedings except in the case of a person charged with giving false evidence before the members. Section 10 further reinforced the protection granted to witnesses testifying before the Oputa Panel by

⁶⁷ See for instance, the Medical and Dental Practitioners Act Cap 221 (now Cap M8, 2004) Laws of the Federation of Nigeria 1990 which establishes the Medical and Dental Council of Nigeria (MDCN). The Act empowers the MDCN to enact rules of professional conduct for medical practitioners as well as establish the Medical and Dental Practitioners Disciplinary Tribunal (MDPDT). The MDPDT is established to handle cases of professional misconduct against medical personnel.

⁶⁸ Promotion of National Unity and Reconciliation Act (PNURA) No.34 of 1995. See Sections 30, 31, 32 and 33.

⁶⁹ E A Christodoulidis “‘Truth and Reconciliation’ As Risks’ (2000) 9 (2) Social and Legal Studies, 179,186.

⁷⁰ See s.15 and 16 of the National Reconciliation Commission Act 2002 (Ghana).

⁷¹ R Wilson “Violent Truths: The Politics of Memory in Guatemala,” *Accord: An International Review of Peace Initiatives* (1997), <http://www.c-r.org/accord/guat/accord2/wilson.shtml>.

restating the rule against self-incrimination as the standard set for witnessing before a court of law.

In contrast, a reflexive jurisprudence suggesting a constructive engagement with the process of transition was enunciated by the Constitutional Court of South Africa in litigation challenging the truth-seeking process in the country's transition to popular democracy. The decision of the Constitutional Court of South Africa (the Constitutional Court) in *Azanian Peoples' Organisation (AZAPO) & 3 Ors v President of the Republic of South Africa 4 Ors* (the AZAPO Case)⁷² stands out in this regard. The applicants sought an order declaring the amnesty provisions in section 20 of the TRC Act void. They were particularly aggrieved that section 20(7) of the TRC Act extinguished criminal or civil liability of the perpetrator for the amnestied criminal act. The absolution from liability also extended to the state as well as any other body, individual or corporate, that would have been vicariously liable for the violation in question.

In approaching the issue, the Constitutional Court conceded that the provisions could be considered a limitation of the constitutional provisions on the right to seek settlement of disputes in a court of law guaranteed by section 22 of the Constitution of the Republic of South Africa. In resolving the issue, the Court resorted to the constitution to determine whether there was any other provision that permitted a limitation to the right in section 22. In the event there was none, it sought to determine whether the limitation could be justified in terms of section 33(1) of that constitution which allowed for some limitations by 'law of general application' to rights provided in the constitution. However, the Court placed premium on the fact that the society was in transition.

Thus, while the Constitutional Court recognised that

every human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack

it preferred to be guided by the dynamics of the transitional context when it stated that *'the circumstances in support of this course require carefully to be*

⁷² (1996) 4 South Africa Reports 671.

*appreciated.*⁷³ In recognition of the social context, the Constitutional Court emphasised the need to provide an environment conducive to the emergence of *the truth*. The Constitutional Court held that surfacing *the truth* could only be achieved where perpetrators were assured that they would not be liable to trials, criminal or civil for coming forward to give their testimonies. The question of amnesty as a part of the truth-seeking process, the Constitutional Court noted, was part of a ‘historical situation’ the country was confronted with in the process of transition to a democratic order.⁷⁴

Arguably, the Constitutional Court was aided in its decision by the fact that the operative constitution was negotiated for a society in transition. Thus it held that

The real answer ...seems to lie in the more fundamental objectives of the transition sought to be attained by the constitution and articulated in the epilogue itself. What the constitution seeks to do is to facilitate the transition to a new democratic order, committed to ‘reconciliation between the people of South Africa and the reconstruction of society.’⁷⁵

But the purposive interpretation placed on the constitutional provisions by the unanimous decision of the Constitutional Court was central to achieving the historic purpose.⁷⁶ This is particularly so when it is considered that Mahomed DP, delivering the lead judgement, concluded inter alia that his decision to uphold the amnesty provisions of the TRC Act was based on the ‘most comprehensive and generous’ view of the relevant constitutional provisions.⁷⁷

In this way the decision in the *AZAPO* Case upholding the constitutionality of the amnesty procedure served to progress the truth-seeking process in South Africa and this stands it in contrast with the *Oputa Panel* Case. However, it is noteworthy that though the *Oputa Panel* Case constitutes an example of negative interaction between the transitional judiciary and transitional justice mechanisms, it is by no means unique. The ensuing tension is similarly reflected in a few other legal challenges to the TRC. A notable reference is the decision of the Appellate Division of the Supreme Court of South Africa (now the Supreme Court of Appeal) in *Brigadier Jan du Preez and Major Gen. Nick van Rensburg v Truth*

⁷³ *AZAPO* Case note 72 supra at 17.

⁷⁴ *Ibid.* at 22.

⁷⁵ *Ibid.* at 38 per Mahomed DP.

⁷⁶ It is apt to note, that the decision in the *Oputa Panel* Case was heard not only by the constitutional panel of the Supreme Court of Nigeria; the highest in the country, but the decision was also a unanimous one.

⁷⁷ *AZAPO* Case note 72 supra at 44.

and Reconciliation Commission.⁷⁸ The TRC, pursuant to its powers to determine its rules of procedure under section 30 of the TRC Act, sought to create an informal and culturally-sensitive atmosphere for victims to narrate their experiences before the Human Rights Violations Committee (HRVC). One of the ways it hoped to achieve this was by excluding cross-examination.

Brigadier Jan du Preez and Major Gen. Nick van Rensburg challenged the validity of section 30 of the TRC Act. They claimed it was in violation of section 24 of the 1993 of the Interim Constitution of the Republic of South Africa. The TRC had caused to be served on them notices to the effect that ‘an unnamed witness would testify that they were involved in, or had knowledge about, the poisoning and disappearance of a person, also unnamed’ at stated location and date. They demanded prior service of the statements of the witnesses before the scheduled hearings, a request the TRC turned down. The case for the TRC was that the remit of the Committee was investigatory and not judicial and thus it ought not to be bound by the legal formalism of courts.

The Supreme Court upheld the objection of the Applicants on the premise that the TRC was obliged to observe the principles of natural justice notwithstanding the nature of the proceedings. Once the TRC received information that may be prejudicial to a person, it was under obligation to furnish the concerned individual with such information prior to its been heard publicly as information of that nature could lead to criminal proceedings. The decision significantly hampered the work of the TRC. It led not only to logistics problems but also the rather awkward circumstance of prior exposure of the Commission’s report to alleged perpetrators.⁷⁹

Unlike the constitutional situation in South Africa, the 1999 constitution of the Federal Republic of Nigeria under which the truth-seeking process in Nigeria, reflected in the *Oputa Panel Case* was challenged by the generals, remains much contested. Initiated and imposed by the military as part of a transition to civil rule programme, it lacked public ownership.⁸⁰ Again, as earlier noted, the truth-seeking process was initiated by executive action under an existing legislation as

⁷⁸ (1996) 3 SALR 997 at 233C-E

⁷⁹ TRC Report Volume 1 Chapter 7 page 174-186 available at: <http://www.info.gov.za/otherdocs/2003/trc/> (12 September 2007).

⁸⁰ See for instance T I Ogowewo “Why the Judicial Annulment of the Constitution of 1999 is Imperative to the Survival of Nigeria’s Democracy” (2000) 44 *Journal of African Law* 135 arguing that the constitution is not only illegal and lacks moral authority but constitutes a deceit and is thus void.

against the purpose-designed legislation of the TRC. This may have piled the stakes somewhat against the Oputa Panel.

The needs of the times, restoration of the rule of law, reparations for victims of gross human rights violations and transformation of societal institutions, required an activist consideration of the issues arising from the truth-seeking process. The Nigerian courts ought to have broken away from the conservative stance characteristic of traditional commonwealth judiciaries and opted for a jurisprudence reflecting not a 'legalistic' consideration of the issues in contention but an activist posture that is sensitive to the 'ideals of the nation'.⁸¹

The decision of the Supreme Court could have been different if it took a purposive approach to the legislation in question. Such an approach would have allowed it to uphold the establishment of the Oputa Panel for investigating past human rights violations as a measure for ensuring 'order and good government of the Federation or any part thereof'. Section 4 (1) of the Constitution of 1999 confers this power on the Federal Government of Nigeria.

4. TWO DECISIONS AND THE PURPOSIVE APPROACH: HOPES FOR TRANSFORMATION?

4.1. The *PDP* Case: When Death is not to Die

Achieving institutional transformation presents 'profound challenges' to states in transition. How to deal with existing state institutions with a record of inadequacies in governance or even outright complicity for human rights violations have also tasked transitional justice analysts.⁸² The engagement of state institutions with the context of transition in their work would be required for desired transformation. Such a commendable recognition of and engagement with the transitional context of the country was displayed by the majority decision of the Supreme Court (constitutional panel) in the earlier case of *Peoples Democratic Party & 1Or. v. Independent National Electoral and 4Ors (PDP Case)*.⁸³

4.1.1 *A Lacuna, a Formidable Minority and a Slim Majority*

The case emanated from the transition to civil rule elections which foreshadowed the current democratic dispensation in the country. The crux of the matter was that following his victory in the gubernatorial elections Adamawa

⁸¹Nwabueze note 64 supra at 75.

⁸²Ni Aolain and Campbell note 2 supra at 200.

⁸³(1999) 7 S.C Part II 35.

State,⁸⁴ Atiku Abubakar (and before he was to take the oath of office), was subsequently nominated by Chief Olusegun Obasanjo to run as his vice-presidential candidate on the platform of the same party, the PDP. They won the presidential election on that joint ticket.

The situation was thus that Atiku was no longer available to be sworn in as Governor of Adamawa State. The electoral body, the Independent National Electoral Commission (INEC), indicated its intention to conduct a by-election for the office of Governor and Deputy Governor in the State on the premise that Abubakar's acceptance to run as vice-presidential candidate rendered the position of Governor-elect vacant. In a letter sent to him by INEC, the electoral body averred that since he had not been sworn-in, his deputy could not 'automatically take over the position.' Bonnie Haruna, Atiku's running-mate, challenged that move in court, contending that he ought to be sworn in as governor in the circumstances.

Faced with the situation where there was an obvious lacuna in respect of a key issue in electoral legislation in an all important transitional process, the learned justices reasoned that for the court to perform its constitutional functions

*effectively and satisfactorily, it must be purposive in its construction of the provisions of the constitution. Where the constitution bestows a right on the citizen... we have the duty and indeed the obligation to ensure that the inured right is not lost or denied the citizen by construction that is narrow and not purposive.*⁸⁵

The Court held that the intention of the framers of the law was to provide for situations where for one reason or the other (the ultimate being death), the deputy governor should step into the office of the governor where the latter is no longer available to take up his position.⁸⁶ The Court, with a split decision of 4 to 3 (Uwais, Chief Justice of Nigeria with the majority, Justices Ogundare, Mohammed and Uwaifo, strongly dissenting) thus abandoned the unambiguous provisions of the law and sought to discover *legislative intent* in a radical and implicit recognition of the unique situation of transition from decades of military authoritarian rule to civil democratic governance.

⁸⁴ One of Nigeria's thirty six.

⁸⁵ *PDP* Case note 83 supra at 47-48. Emphasis mine.

⁸⁶ *PDP* Case note 83 supra at 71-72.

Specifically, Uwais CJN, in the lead judgement decided that the provisions of section 37(1) of the State Government (Basic Constitutional and Transitional Provisions) Decree 3 of 1998, to the effect that

If a person duly elected as governor dies before taking and subscribing the oath of allegiance and oath of office, the person elected with him as deputy shall be sworn in as governor and he shall nominate a new deputy governor from the same senatorial district as that of the deceased governor who shall, with the approval of the House of Assembly of the state be appointed as deputy governor.

must be liberally construed. Leading the majority, he maintained there was nothing sacrosanct about the word 'die' in the provision, thereby reversing the premise for the decision of the Court of Appeal, which had preferred the formalist (plain fact) approach. Rather, it should be liberally construed to accommodate a case where the elected candidate was 'unavailable' to be sworn in. It dismissed the plain-fact (formalist) interpretation approach adopted by the Court of Appeal as 'narrow and restrictive' and sometimes inappropriate to fulfilling or advancing 'the intention, spirit, objects, and purposes of the Constitution.'⁸⁷

The Supreme Court went on to hold that since in relinquishing his Governor-elect status, Atiku Abubakar was irrevocably barred from reclaiming it, his action could, in the words of the Court, be 'likened to permanent incapacity or even death.' In the circumstances, his action came within the contemplation of the relevant provisions of the law.⁸⁸ For this proposition the Court relied heavily on the provisions of section 45(1) of the same law, which provides for the Deputy Governor to hold the office of Governor where the latter becomes vacant by reason of death, permanent incapacity or removal for any reason.

The majority judgment was strongly⁸⁹ criticised in the dissenting judgements as deliberate usurpation of the legislative function under the guise of interpretation. Ogunbare JSC objected to what he rightly sensed was a 'policy' decision. The duty of the Court, he insisted was not to 'determine what the legislature meant to say but what it actually said.'⁹⁰ The plain - fact interpretation according to the learned justice was the proper approach. It was not within the competence of the

⁸⁷ Ibid. at 71.

⁸⁸ Ibid. at 61.

⁸⁹ The dissent was so extensive it doubled the length of the lead judgement and the concurring decisions of the majority put together. Thus for instance whereas in the *Judgements of the Supreme Court of Nigeria Delivered in July 1999 (part II)* (Law Breed Limited Lagos 1999) the lead judgement and the three concurring judgements are reported on pages 35-72, the dissenting judgements takes up pages 73-149.

⁹⁰ *PDP* Case note 83 supra at 91.

Court to attempt modification of unambiguous provisions to ‘bring it into accordance with its own views as to what is reasonable.’⁹¹ He averred that any gap in legislation must be left to the legislature to fill for the contrary would amount to ‘judicial legislation,’ which was not the function of a court. Note how this approach completely ignores the important issue of the rights of the Deputy Governor-elect. As noted above, this was a decisive point in the majority decision.

In the *lead* dissenting judgement, Ogundare JSC posited that there was in any event, no lacuna in the provisions of section 37(1) of the State Government (Basic Constitutional and Transitional Provisions) Decree 3 of 1998, which was in contention.⁹² Subscribing to these views, Mohammed JSC similarly contended that ‘policy, expediency, political exigency and convenience’ ought to be excluded from constitutional interpretation,⁹³ thus implicitly (at the least) rejecting a reflexive jurisprudential approach to the transitional processes ongoing in the country at the time. In towing the line of dissent, Uwaifo JSC, expressly dismissed the majority’s preference for a ‘purposive approach.’ His position was based on what he (rightly) surmised was a radical change in the traditional jurisprudence of the Court

...the line of decisions of this court on the *preference* for the *literal interpretation of statutes* whose words are clear, precise and unambiguous is *intimidating* and can not be ignored by sheer resort to another principle of interpretation which may in a sense tend to overrule or undermine those other decisions indirectly and without justification.⁹⁴

This was despite his concession that the liberal or broad interpretational approach was suited among others to ‘circumstances to cover such eventualities due to changing times, different social environments...not fully contemplated or overlooked at the time the constitution was drawn up.’⁹⁵ He thus discounted the circumstances of political transition (arguably an inextricable part of the case), as not momentous (enough) to warrant a departure from the *plain fact* jurisprudential tradition of the Nigerian Supreme Court.

⁹¹ Ibid. at 93.

⁹² PDP Case note 83 supra at 85 to 99. Uwaifo JSC expressed similar sentiments. See page 126-28.

⁹³ Ibid. at 111.

⁹⁴ Ibid. at 123. Emphasis mine.

⁹⁵ PDP Case note 83 supra at 123.

In fairness to the dissenting judgement, it is noteworthy that the provisions of section 45 unlike section 37(1) in fact and by the concession of the Court applies after the Governor and the Deputy Governor had been sworn in. Thus on the specific facts of the case, section 45 would be inapplicable. Yet, the Court in its majority decision took the view that since the legislation in issue was of a constitutional nature, the document must be ‘read together as a whole.’ It thus had no problem in arriving at the decision that the rationale of the provisions taken together was to avoid a vacuum in the important office of Governor and ensure a ‘smooth’ succession.’⁹⁶ To hold otherwise in the context of a fragile transition with a highly sceptical public,⁹⁷ wary of ‘transitions without end’⁹⁸ and dashed hopes on an end to authoritarian rule, would have constituted a disservice to the role of law and the transition judiciary in a post-authoritarian dynamic.

4.1.2 Breaking Away from Tradition

A fundamental issue in the *PDP Case* is the nature of the rights of the 2nd plaintiff, Bonnie Haruna; Atiku’s elected running-mate for deputy governor. The law in question, the State Government (Basic Constitutional and Transitional Provisions) Decree, even as the title suggests, was constitutive of the transitional arrangements going on in the country at the time, particularly with respect to elections. While conceding the constitutional nature of the legislation, the Respondents argued that the law was intended to provide a framework for governance of the country in the transition period and not to create individual rights.

In rejecting the contention, the Court held that constitutional legislation establishes rights that the courts must be ‘creative’ to protect and uphold. This approach led the majority to hold that where the Governor-elect abdicates, abandons or relinquishes his mandate, the Deputy Governor-elect (though elected on a joint ticket) does not thereby forfeit his right to the latter position. This was so because they had each acquired individualised rights by their election, the one to be governor and the other, deputy governor.⁹⁹ The right so conferred was of a

⁹⁶ Ibid. at 72-73

⁹⁷ P Lewis *Performance and Legitimacy in Nigeria’s Democracy- Afrobarometer Briefing Paper No.46* (July 2006) available at: <http://www.afrobarometer.org/Papers/AfrobriefNo46.pdf>. (25 September 2007). The survey concludes that ‘popular attitudes suggest that Nigeria’s new democracy remains fragile, and suffers a growing deficit of popular confidence.’ (at p.2)

⁹⁸ L Diamond, A Kirk-Greene and O Oyediran (eds.) *Transition without End: Nigerian Politics and Civil Society under Babangida* (Lynne Rienner London 1997).

⁹⁹ *PDP Case* note 83 supra at 50

public nature and did not inure to the benefit of an individual who was not elected. Quite importantly, the Court noted that to hold to the contrary was not only ‘fallacious but *dangerous* to the democratic process.’¹⁰⁰ I share this concern.

Regrettably, as earlier noted, the court failed to carry forward such a *purposive* approach in the subsequent *Oputa Panel* Case particularly with regard to the rights of the victims of authoritarian rule. The judicial misdirection set the stage for non-implementation of the Panel’s recommendations. As noted earlier, the government insisted that the outcome of the *Oputa Panel* Case incapacitated it from taking the submitted report forward. But it did not state the specific aspects of the decision that supported or mandated this position. In turn, the fact of non-implementation of the Oputa Panel’s recommendations has been attended by dire consequences for transitional justice, social stability and economic development in Nigeria. The current bedlam in the Niger Delta, where whole communities had come forward with serious allegations of violations of human rights by the state and multinational corporations at the Oputa Panel but failed to obtain redress, is but one cardinal indicator of this.

4.2. The ICPC Case: Federalism v Commonweal

The foregoing purposive approach to judicial interpretation was also adopted by the Supreme Court in another epoch-making case in the transition period. This was in *Attorney General of Ondo State v Attorney General of the Federation & 35 Ors* (the *ICPC* Case).¹⁰¹

4.2.1 From the Doldrums of Infamy

At the dawn of the transition to civil rule, Nigeria had become a notoriously corrupt country occupying the non-enviable position of second most corrupt nation in the world, according to Transparency International’s corruption index.¹⁰² The country has been cited as ‘the crowning example of governmental corruption and betrayal of the hopes of the citizenry in Africa.’¹⁰³ Combating corruption in the polity was clearly a policy imperative for an incoming administration intent on halting the downward spiral in the nation’s economic and social development, or

¹⁰⁰ Ibid. per Ayoola JSC at 148. Emphasis mine.

¹⁰¹ (2002) 6 S.C. Pt I, 1.

¹⁰² Independent Corrupt Practices and Other Related Offences Commission *Progress Report September 2000- July 2005* (ICPC Abuja 2005) 2 available at: <http://www.icpc.gov.ng/history.php> (1 September 2007).

¹⁰³ E O Iheukwumere and C A Iheukwumere “Colonial Rapacity and Political Corruption: Roots of African Corruption and Misery” (2003) 3 *Chicago-Kent Journal of International and Comparative Law* 1, 46-60.

even one determined to move the society towards the realisation of its full potential. Then incoming-President, Olusegun Obasanjo recognised the enormity of the problem of corruption in the country. In his inaugural address to the nation at his swearing-in, he expressed the determination of his administration to tackle corruption which he described as ‘a full-blown cancer’ and ‘the greatest single bane of our society.’¹⁰⁴

To underscore the administration’s commitment to combating the scourge of corruption as a major policy initiative, the anti-corruption law was the first executive bill submitted by it to the National Assembly (the federal legislature) for enactment. After stiff opposition from a considerable number of legislators, excision or tempering of some perceived ‘draconian’ provisions and public outrage at the obvious reluctance of the legislature to pass the bill into law, the National Assembly enacted the Corrupt and Other Related Offences Act No.5 of 2000 several months later.¹⁰⁵

The explanatory memorandum at the end of the law states its purpose as the prohibition and prescription of punishment for corrupt practices and other related offences. In addition, it established the Independent Corrupt Practices Commission (ICPC, the Commission) to investigate and prosecute offenders. The powers of the ICPC extended to all individuals; public and private, including corporate bodies in the country. The all-encompassing reach of the ICPC Act was bound to attract jurisdictional challenge given the federal character of the Nigerian polity and the general discontent with previous practice of military regimes to disregard the dynamics of federalism in governance and law-making.

The attempt by the Commission to prosecute an official of the Ondo State government set the stage for the inevitable challenge of the jurisdictional powers of the ICPC.¹⁰⁶ By virtue of section 232 of the 1999 constitution and in line with Nigerian constitutional practice, the Attorney-General of Ondo State on behalf of

¹⁰⁴ Nigeria World “Inaugural Speech by His Excellency, President Olusegun Obasanjo following his Swearing-

In as President of the Federal Republic of Nigeria on May 29, 1999” available at:

<http://nigeriaworld.com/feature/speech/inaugural.htm>

¹⁰⁵ In Nigeria’s federal legislative tradition, federal and state statutes are referred to as Acts and laws respectively. However, I use the term ‘law’ generically in this study to refer to both forms of legislation except where clarity demands specificity.

¹⁰⁶ In Nigeria, like other federal systems, there are federal (central), states and local authorities’ officials. ‘State official’ here refers to the narrower context of an official of a state government (constituent part), as against a ‘federal’ or ‘local authority’ in Nigeria’s thirty six-state federation.

the state government headed for the Supreme Court. The section confers on the Supreme Court, original jurisdiction, to the exclusion of any other court, on any dispute between the federation and a state or between states *inter se* once the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends. This was one such case.

He challenged the constitutionality of the ICPC Act by taking not just the Federal Government (protagonist of the legislation) to Court but also all the other 35 states in the country for the obvious reason that the decision in the case would automatically affect their interests. The relief sought by the Plaintiff was double-pronged. First, the Plaintiff sought an injunction of the Court to declare the law invalid on the ground that the law lacked jurisdictional validity for purporting to create a commission with powers to prosecute public and private individuals for offences within the states and in state high courts.¹⁰⁷ Secondly, and of even more significance, it sought a perpetual injunction to restrain the ICPC and the Federal Attorney-General from exercising or applying any of the provisions of the law in Ondo State. In effect, the law would thereby be invalidated as a whole. Counsel to the Plaintiff canvassed precisely that in concluding his address to the Court.¹⁰⁸

The case for the Plaintiff (and some of the Defendants other than the 1st Defendant) was basically that no express or even implied provisions in the Constitution confer powers on the National Assembly to create a monolithic body with such an all-encompassing reach as the ICPC or the offences (of corruption) for which it was empowered to prosecute for the whole country. It was urged on the Court that the omission of a ‘general power to create and punish offences’ in the ‘scheme of enumeration’ (Legislative Lists) in the Constitution precluded the National Assembly from enacting the ICPC Act.¹⁰⁹ Thus the anti-corruption law and *a fortiori* the ICPC were *ultra vires* the National Assembly as ‘corruption’ is a residual matter within the exclusive legislative competence of the state governments. It is pertinent to note the similarity of this argument with that proffered by the Plaintiffs in the (earlier) *Oputa Panel* case on the powers of the president to establish a truth commission for the whole country.¹¹⁰ I will return to a juxtaposition of the two cases later.

¹⁰⁷ In line with common practice in federal political systems, state and federal offences are prosecuted in the state and federal courts respectively.

¹⁰⁸ *ICPC* Case note 101supra at 10-13.

¹⁰⁹ *Ibid.* at 44.

¹¹⁰ Incidentally, the same counsel for the Plaintiffs (Generals) in the *Oputa Panel* Case note 5 supra proffered it.

Less than half of the states, sixteen, filed briefs of argument in the matter. Not surprisingly, they were evenly split (8 each) in their support for or opposition to the case for the Plaintiff. While thirteen completely abstained, 6 were represented at the hearing but were precluded from arguing a position due to procedural requirements that only parties who had filed a brief could canvass oral arguments before the Court.

At the core of the case for the 1st Defendant (the Federal Government) was the argument that the National Assembly was vested with the power to enact the ICPC Act pursuant to its constitutional powers to make laws for the ‘peace, order and good government of the Federation.’ The 1st Defendant conceded that the Exclusive Legislative List does not refer expressly to ‘corruption.’ It however argued that the National Assembly is conferred with the power to legislate as it did on corruption by a joint reading of several provisions of the Constitution. These include in particular the provisions of item 68 of the Exclusive List which provides that the National Assembly is empowered to legislate on ‘Any matter incidental or supplementary to any matter mentioned elsewhere in this list.’

The 1st Defendant further anchored its argument on a joint construction of sections 15 (5), 88 (2) (a) and (b) as well as paragraph 2 of Part III and item 60 (a) of the Constitution. Item 60 (a), relied upon by the Federal Government provides that the National Assembly has the power to establish and regulate authorities ‘for the Federation or any part thereof’ in order ‘To promote and enforce the observance of the Fundamental Objectives and Directive Principles’ contained in the Constitution. Section 15 (5) of the constitution tersely provides that ‘The State shall abolish all corrupt practices and abuse of power.’ Finally, section 88 (2) (a) (b) of the constitution provides that the National Assembly shall have the power to ‘expose corruption, inefficiency or waste in the administration of laws within its legislative competence.’

The Court sanctioned the legality of the ICPC Act. It noted that in view of section 4 (2) of the Constitution which provides that the National Assembly has the power to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List, it was *intra vires* the National Assembly to enact the ICPC Act under Item 60 (a) of the Constitution as canvassed by the 1st Defendant. Uwais C.J.N stated that the

“Fundamental Objectives and Directives of State Policy” can only be enforced by legislation. He dismissed the argument that the anti-corruption law ought to be limited to public officers and the three arms of government alone since it forms part of the Fundamental Objectives and Directive Principles of State Policy. In identifying with the social realities of the country in relation to the challenge posed by corrupt and related practices, he declared that since

Corruption is not a disease which afflicts public officers alone...If it is to be eradicated effectively, the solution to it must be pervasive to cover every segment of the society...¹¹¹

4.2.2 ‘Policy United’ All the Way

Clearly, as noted by Professor Ben Nwabueze, one of the *amici curiae*, the task of the Court in the case was ‘challenging because the issue impinges on the cardinal principles of Nigeria’s federal system.’¹¹² The ICPC Act in the view of the respected jurist was ‘subversive’ of the principles of federalism as enshrined in the Nigerian constitution and in violation of its constitutive doctrines of autonomy and non-interference.¹¹³ The confluence of constitutionalism and a key-policy issue in a transitional context was bound to test the jurisprudence of the Court with resonance for the polity.

The special significance of the case and its policy implications were not lost on the Court. In a clearly uncharacteristic move (at least in recent memory), it invited three distinguished legal practitioners as *amici curiae* to address the Court on the case. All three filed separate (advisory) briefs of argument with two arguing against the legality and the third in support of the ICPC Act.¹¹⁴ In an unbridled positivistic approach to the role of law in society, a highly regarded constitutional law jurist and retired Professor of Law, Benjamin Nwabueze, argued that the country could ‘cope better’ with corruption which had a long history in the polity, than for the Court to uphold a legislation that tampers with the federal structure of the country and could lead to ‘grave political danger.’¹¹⁵ The Court tilted the balance in favour of actively working against corruption, viewing it as a more dangerous phenomenon in the polity.

¹¹¹ ICPC Case note 101supra at 28.

¹¹² Ibid. at 17.

¹¹³ Ibid. at 18-19.

¹¹⁴ Ibid. at 91.

¹¹⁵ Ibid. at 94.

It is germane to an understanding of the case to note that there is an allocation of legislative powers between the two tiers of government in the second schedule to the Constitution. The 'Exclusive Legislative List' itemises the exclusive jurisdiction of the federal (central) government while the 'Concurrent Legislative List' specifies the shared sphere of legislative powers between the two tiers. There is an unwritten *Residual Legislative List* that is constitutionally deemed the exclusive province of respective state governments on unlisted matters.

The learned Chief Justice displayed a utilitarian conception of the function of law to buttress his jurisprudential preference to sacrifice formalism (that could have accorded better recognition to the federal status of the country) at the altar of the (transitional) exigencies of the times when he further observed that 'the aim of making law is to achieve the common good.'¹¹⁶ He took the view that 'state' in section 15 (5) applied to both the Federal and State levels of government in the country and thus the power to legislate on corruption could be regarded as concurrent.

The point ought to be made however, that on a formalist construction of the foregoing provisions and others in the Nigerian constitution, it may well be argued that the Plaintiff and most of the Defendants who adopted the position, brief and argument of the former, were on quite firm grounds. To buttress this position, the Court did find some merit in the case for the Plaintiff and the case for the latter succeeded in part even if minimally, in respect of certain provisions that it sought to be declared *ultra vires* the ICPC. Incidentally, these were only aspects of the law the Court adjudged impugned on the judicial powers and independence of the courts. The Court applied the *blue pencil rule* to strike down those sections.¹¹⁷

For good measure, it is noteworthy there are no specific provisions in the itemised list of legislative competencies in the Nigerian constitution conferring power on the National Assembly to enact law and establish a monolith anti-corruption agency for the whole country, desirable as this may be. The Court only came to such a decision by applying a *liberal* interpretation and imputing an implied existence of such powers

Reading these provisions of the 1999 constitution together and construed liberally and broadly, it can be easily seen that the National Assembly

¹¹⁶ ICPC Case note 101supra at 29.

¹¹⁷ Ibid. at 32-33. Sections 26(5) and 35 are implicated in this.

possesses the power both “incidental” and “implied” to promulgate the Corrupt and Other Related Offences Act, 2000 to enable the State which for this purpose means the Federal Republic of Nigeria, to implement the provision of Section 15(5) of the Constitution.¹¹⁸

It is important to note here that the Court addressed the tension between the policy choice to combat corruption through a monolith institution like the ICPC and the fundamental principle of federalism clearly enshrined in the Constitution. Uwais C.J.N conceded the possible infringement of the ‘requirement of autonomy of the State government and non-interference with the functions of State government (sic).’ But he was quick to observe that such interference has constitutional support.

The learned Chief Justice waived ‘cardinal principles’ aside as ‘best ideals to follow or guidance for *an ideal situation*,’¹¹⁹ again demonstrating the recognition of the transitional circumstances of the country and the policy considerations involved in the Court’s position on the matter. Ogwuegbu JSC was even more candid in his admission of the possibility of interference and a compromise concerning the doctrine of autonomy at the core of federalism as the unanimous decision constituted. He readily sacrificed the latter for what he and other members of the Constitutional Panel of the Court considered to be the overriding priority to ‘make laws for the peace, order and good government of the Federation.’ He was of the view that corruption constituted a threat to all of these and the ICPC Act was designed to combat the threat. In what can be regarded as poignant reflection of the letter and spirit of the judgement, he affirmed that

The Court is conscious of the history of corruption in Nigeria and should not be at liberty to construe the ICPC Act or any Act ...by the motives which influenced the Legislature, *yet when the history of the law and legislation tells the court what the policy and object of the Legislature were, the court is to see whether the terms of the Act are such as fairly carry out the policy and objective...Any legislation on corruption must be of concern to every Nigerian.*¹²⁰

The Court was thus acutely aware of the *political nature* of its decision. The remarkable identification of the Court with the aspirations of the society and its preference for a purposive jurisprudential approach constituted unparalleled exceptionalism in the history of judicial constitutionalism in Nigeria.

¹¹⁸ Ibid. at 35 per Wali JSC.

¹¹⁹ ICPC Case note 101supra at 30. Emphasis mine.

¹²⁰ Ibid. at 59 to 61. Emphasis mine.

5. VALIDITY OF PURPOSIVE JURISPRUDENCE IN NIGERIA'S TRANSITION

Barak posits that the purposive judicial interpretational approach is the 'proper system of interpretation' of the constitution and statutes alike in democratic societies.¹²¹ If we agree with this postulation, then the purposive interpretive approach is even more apposite for adjudication in transitional contexts where immense national and international resources, are usually deployed to effect institutional transformation and restoration of the rule of law.

5.1 Displacing Formalism in Transitional Contexts

A comprehensive reading of the judgements delivered by each of the six justices in their concurrence with the lead judgement in the *ICPC* Case reveals a purposive jurisprudence that identified with the peculiar historicity of corruption in the country. Thus, the Court waxed strong on casting its lot with policy measures regarding one of the salient programmes stated in the inaugural address of (then incoming) President Olusegun Obasanjo. In this regard, Uwaifo JSC declared in his judgement

The issue of corruption and abuse of power has become international. It is a declared state policy in Nigeria to combat it and so it has assumed a national issue of high priority which is considered best suited for the National Assembly to be addressed through a federal agency like the ICPC.¹²²

Similar advertence to the foregoing principles and the 'peace, order and good government' provisions adopted by the Court in the *ICPC* Case would have served equally well to save the *Oputa Panel* Case from been determined along so narrow lines as did the Court on that occasion. The Court in coming to the decision to uphold the ICPC Act clearly made a policy decision to reject the black letter of the law. Formalists (especially) may strongly deprecate such an approach in normal situations as fostering uncertainty in the law. But that is precisely the point that the Court missed in the *Oputa Panel* Case. Transition contexts are not normal contexts. While certainty in the law requires the judiciary to be consistent, consistency in transitional societies ought to be in full awareness of, and attuned to, the social context.

Teitel's contention that in transitional contexts, what makes law 'positive' is the 'popular perception in the public sphere'¹²³ is apt to the Nigerian situation. Thus

¹²¹ Barak note 14 supra at 26. 66-82.

¹²² Barak note 14 supra at 116.

¹²³ Teitel note 24 supra at 2027.

the adoption of a liberal purposive approach as demonstrated by the Supreme Court to the social realities of the country in its attempt to *break with the past* it is argued, is to be preferred to the plain-fact or formalist approach that may be the appropriate course in the absence of social contingencies challenging the very foundations of societies in political transition. This is what Teitel considers as the ‘social construction of the law’; one of the paradigmatic shifts from conventional understandings of the rule of law relevant to conceptions of law in transitions.¹²⁴

In the pre-transition period, Nigerian society had been victim of economic and financial rape leading to monumental social deprivations perpetrated by the largely predatory ruling elite.¹²⁵ This deplorable situation was occasioned partly by weak legislation and law enforcement arrangements as well as a corrupt and compromised judiciary. Bell, Campbell and Ni Aolain, much like Teitel, have noted that the law as well as legal institutions suffer degradation in conflict (and repressive) situations that impair their legitimacy. Thus, both law and legal institutions must facilitate change as well as be changed themselves.¹²⁶ Perhaps in realisation of this, the Court opted here for a ‘constructivist’¹²⁷ transformative model of adjudication, and actively led the way in support of the expressed popular desire for checkmating past injustices and continuing similar tendencies.¹²⁸ The attitude of the Court is well captured in the concluding remarks of Ogwuegbu JSC in the case. At the risk of descending into the adversarial arena, he candidly voiced what is no doubt popular opinion on the matter in the Nigerian society

I must also point out that all Nigerians except perhaps those who benefit from it are unhappy with the level of corruption in the country. The main opposition to the ICPC Act is I believe, borne out of fear and suspicion.¹²⁹

5.2 Deepening the Rule of Law in Transitional Contexts

There is also the sense in which the decision in the *ICPC* Case significantly deepens the rule of law in the country. This is in the way it has strengthened the hands of prosecutors who are reassured that no one will be above the law in the fight against corruption. The decision signals clearly that it would not be ‘business

¹²⁴ Teitel note 24 supra.

¹²⁵ Lewis note 97 supra.

¹²⁶ C Bell, C Campbell and F Ni Aolain “Justice Discourses in Transition” (2004) 13 (3) *Social & Legal Studies* 305, 309.

¹²⁷ Teitel note 24 supra at 2014

¹²⁸ Joseph note 33 supra at 167.

¹²⁹ *ICPC* Case note 101 supra at 67.

as usual' for corrupt public and private actors who had held the country hostage and taken it to 'the nadir of the miasma of corrupt practices.'¹³⁰ Recently, the chief prosecutor and highest ranking law officer in the country, the Attorney-General of the Federation, after coming under strident public criticism for his perceived toleration of corruption by public officers, declared an all out war on corruption. He vowed to ensure the prosecution of all established cases of corruption by public officers in the post-transition period till date. Prosecutors, he assured, would leave no sacred cows as 'governors, ministers and any other government official mentioned in those reports would be prosecuted.'¹³¹ In this regard it is noteworthy that recent research on public perceptions of institutional performance and legitimacy in the democratic transition in Nigeria indicates a 'growing approval for anti-corruption efforts.'¹³²

The role of the judiciary in adopting a purposive approach to salient foundational issues in the anti-corruption project, with its notable impact on the rule of law, can not be divorced from such perceptions. This is particularly so granted that clamours for transparency in the management of public funds, on the one hand, and prosecution of erring corrupt public office-holders on the other, have assumed centre-stage in the criminal justice administration system in the country in recent times than ever before.¹³³ A clear manifestation of the situation is the tremendous support (including again, judicial) for the establishment and activities of the Economic and Financial Crimes Commission (EFCC), despite the clear overlap in the functions and powers of the two and the elaborate structural arrangements that have been made for their effective operations.

Teitel has stated that the judiciary, more than any other arm of government, is better positioned to facilitate change in transitional societies.¹³⁴ In the event there appears to be substantial political will in the other arms of government to design a policy to effect radical change, it would be counterintuitive for the judiciary to frustrate such policy initiatives.

Mass public support for an anti-corruption policy in the Nigerian context is better appreciated against the background that the statute books have for decades

¹³⁰ Ibid. at 133 per Uwaifo JSC.

¹³¹ F Aboyade "Aondoakaa to Prosecute Persons Indicted by National Assembly" *This Day* Online (Abuja Saturday 20 October 2007).

¹³² Lewis note 97 supra at 8.

¹³³ O Ojo and M Abubakar "CLO, TMG Want EFCC, Conduct Bureau to Try Etteh" *The Guardian* Online Edition (Lagos Saturday 29 September 2007) available <http://www.guardiannewsngr.com/news/article05>

¹³⁴ Teitel note 24 supra at 2033.

provided some of the severest punishments (including death sentence in some cases), for property crimes like robbery, stealing, arson and related offences generally considered crimes within the province of underprivileged felons. The anti-corruption drive with its seeming emphasis on ‘grand’ (as against ‘petty’) corruption¹³⁵ was viewed as more inclusive if not specifically targeted at the criminally-minded members of the upper strata of the society.

The decision of the Court in the *ICPC* Case constitutes a defining moment, a watershed in the country’s nascent anti-corruption policy. The enormity of the corruption scourge in the country is highlighted by the fact that - and again in contrast with the facts of the *Oputa Panel* Case is instructive - the ICPC was finalising prosecutorial arrangements on more than 20 former state governors barely 4 months after they left office and lost executive immunity from prosecution for official corruption and abuse of office.¹³⁶ At least one has been convicted following his impeachment and three others are currently on trial on similar charges.

The Court made a remarkable (*albeit* momentary) break with the past in the *ICPC* Case moving tangentially along some of the very lines it was to later reject in part or whole in the *Oputa Panel* Case. This approach comes through not only in the lead judgement but ran through all the separate concurring decisions in the *ICPC* Case. It is significant that the issue of ‘policy’ consideration was cited in the latter decision with unanimous approbation and expressed in the lead judgement rather than in reprobation and dissent that characterised it in the *PDP* Case. Recall that Ogundare JSC raised this point in condemnation of the majority decision in the *PDP* Case. He had stated that

It is not for the Court to determine what the legislature meant to say but what it actually said. Nor is the court to read something into such provisions on the grounds of policy.¹³⁷

This is no doubt in obvious disregard of the dynamic role of law and the judiciary in transition. In implicit disavowal of its long-standing plain-fact jurisprudential approach, the majority of the Court did not refer to any of its earlier decisions that

¹³⁵ E Uslaner “Corruption and the Inequality Trap in Africa” *Afrobarometer Working Paper No. 69* (April 2007) available at: <http://www.afrobarometer.org/chapters/AfroPaperNo69.pdf> (25 September 2007).

¹³⁶ See F Oretade “ICPC to Speed up Ex-Governors’ Trials” *ICPC News* (Monday 3 September 2007) available at: http://www.icpc.gov.ng/read_news.php?id=61 (3 September 2007) and F Igwuoke “Speakers Back Ex-Govs’ Trials” *This Day* (Abuja Sunday 22 July 2007).

¹³⁷ *PDP* Case note 83 supra at 91.

relied so heavily on ‘policy considerations.’ The Court indeed closed its eyes to formalist adjurations to keep the flow of the waters of law and politics pure and separate.

5.3 Beyond Provincialism

Equally significant was the willingness of the Court to engage in a comparative juridical approach in its judgement in the *ICPC* Case. It analysed with much approval, many foreign cases from other federal jurisdictions bearing on transition, emergency, and more generally, cases with significant implications on national life. It had hitherto demonstrated a judicial proclivity for ignoring even relevant international law obligations of the country in the context of the transition as with the *Oputa Panel* Case.

Thus, a good deal of the *rationes decidendi* in the *ICPC* Case were rooted in foreign precedents specifically from federal jurisdictions like the United States, Canada and Australia. This marked a departure from a fairly established tradition of insularity in which otherwise relevant foreign decisions were considered with suspicion and declared inapplicable in the country. It is significant to the extent that failure to benefit from and accord recognition to such decisions delivered in similar contemporary socio-political contexts (like the South Africa transitional experience), hampered the development of a robust human rights jurisprudence and culture in the country.

Advertence to comparative law constitutes one of the tools to achieve an effective discharge of the duties of judges in a democracy, particularly in the context of an increasingly globalised world.¹³⁸ In the converse then, neglect of comparative perspectives may deny national courts of potentially perspicacious jurisprudential insights.

5.3.4 Peace, Order and Good Governance to the Rescue

Another striking feature of the decision in the *ICPC* Case is the heavy store (rightly) placed by the Supreme Court on the constitutional provision that the National Assembly had the power to legislate for the ‘peace, order and good government’ of every part of the federation. As I argued earlier, rejection of this provision by the Court in the *Oputa Panel* Case constitutes a fundamental misdirection regarding the role of law in the context of transition. There is again

¹³⁸ Barak note 14 supra at 110-114.

in this regard, the circumstance that the series of human rights violations, the investigation of which formed the core of the remit of the Oputa Panel, were committed under various military regimes that ruled in a unitary fashion. Thus, a centralised process of scrutiny and accountability is arguably best suited to addressing transitional justice claims arising from them. No doubt, the shaky legal arrangements of the *Oputa* Panel made the intentions of the executive less credible at best. However it would have better served the purpose of the rule of law and justice to victims of impunity to uphold the process than to chip away the basis of its legal validity through unrepentant and rigid plain-fact jurisprudence.

The foregoing position is reinforced by the fact that the TIA, which was in issue in the *Oputa* Panel case, started its life and was so upheld by the Court, as a valid Act passed by the National Assembly. It thus shared a critical element with the ICPC Act; it is meant to ensure the ‘peace, order and good government’ of every part of the federation without precluding state governments from enacting similar legislation.

In any event, the purpose it was made to serve in the establishment of the Oputa Panel was clearly for that. That the Court ought to have followed this purposive approach is underlined further by the fact that it appeared to have laid fairly firm foundation for transition jurisprudence in the majority decision in the earlier *PDP* Case. This is in spite of the unsuccessful attempt to retain it on the well-worn tracks of plain-fact jurisprudence. But the Supreme Court failed to establish a required and important line of consistency when it upheld the jurisdictional argument against the Oputa Panel.

6. DISCORDANT TUNES

One of the important functions of judges in their interpretive role is the creation and sustenance of ‘normative harmony.’ This ensures individual statutes are creatively interpreted as part of an integrated legal system.¹³⁹ Failure of the judiciary, especially at the highest levels, to foster an integrated and consistent approach to the interpretive role particularly in the context of transition tend to jeopardise the critical role, outlined for the transition judiciary by Teitel. The judiciary would then be failing in its role of ‘bridging the gap... between law and society.’¹⁴⁰

¹³⁹ Barak note 14 supra at 35.

¹⁴⁰ Ibid.

I have contended above that there exists a public accountability gap with respect to the judiciary in the process of Nigeria's political transition. It is pertinent to determine further whether the judiciary, faced with the challenging dynamics of law and justice in the context of transition, has itself become transformed, the accountability gap notwithstanding. It is possible to come to a positive conclusion at first blush. Closer scrutiny however suggests differently. The jurisprudence emanating from the Nigerian judiciary in the post-military authoritarian period appear to be discordant at best.

6.1 Ambivalence or New Directions?

An ambivalent disposition continues to characterise the decisions of the courts. This view of the matter could of course be challenged particularly in view of recent acclaim that has trailed a number of transition-related decisions delivered by the judiciary, the Supreme Court in particular. They centre on constitutional issues generated from a rash of election related cases in the heated political scene in the country. A good number of them have been described as 'landmark' decisions¹⁴¹ for which it has received plaudits even from usually critical quarters.¹⁴²

In particular, public opinion surveys focusing on election petition tribunals which adjudicate the highly controversial 'civilian-civilian' election transition cases in the country, even suggest the judiciary has been the most 'consistent' branch of government in the transition period.¹⁴³ Others have described the judiciary as 'the hero of Nigeria's democracy.'¹⁴⁴ In view of these examples, therefore, ought not the Nigerian transition judiciary to be commended for overcoming its previous questionable record of judicial governance? We will examine further the growing incidence of judicial intervention in mediating the political transition later in this research. Suffice to say at this point that commendable as the above appraisals may be, they constitute no more than flashes in the pan of the situational circumstance of judicial activity in the

¹⁴¹ See for instance C Akiri "Obi: Advantages of the Supreme Court Ruling" *The Guardian* (Lagos Wednesday 27 June 2007), M Brown "Election Petitions and the Judiciary" *The Guardian* Online Edition (Lagos Friday 1 June 2007), L Njoku "Appeal Court Reinstates Obi- Factional Lawmakers File Stay of Execution of Judgment" *The Guardian* Online Edition (Lagos Sunday 11 February 2007).

¹⁴² See for instance D Iriekpen "Agbakoba, Falana Commend S'Court" *This Day* Online Edition (Abuja Friday 15 June 2007).

¹⁴³ H Shobiye "Poll Applauds Kogi Election Tribunal" *Punch On the Web* (Lagos 24 October 2007).

¹⁴⁴ E Mammah, E Aziken and E Ulaye "Kebbi Governor, Yar'Adua's In-Law, Election Voided" *Vanguard* Online (Sunday 21 October 2007).

country. In this regard, it is important to consider the temporality of the foregoing decisions and other contemporary transition cases and the trends they reflect. In other words, what does the analysis of the foregoing cases tell us about the judicial function in Nigeria's political transition?

Consider that the Court in its decision in the *Oputa Panel Case* that was decided more than three years after the *PDP Case*,¹⁴⁵ seemed to have still been caught up in its old plain-fact jurisprudential approach despite the purposive approach signposted by the majority decision in the latter. Further, it bears repetition that a seven-man Constitutional Panel unanimously decided the *Oputa Panel Case* in defiance, I have argued, of international law obligations of the country to victims of gross violations of human rights. The relapse displaced the purposive approach advocated by the constitutional panel of the Court in the *PDP Case*.

Even the commendable purposive approach of the *ICPC Case* decided on 7th June 2002 was clouded by the *Oputa Panel Case* and despite their contemporaneousness there was no reference in one to the other at all levels of the courts involved. The absence of cross-citation reflects a lack of coherence in the jurisprudential outlook of the Supreme Court. In a common law based legal system, where precedent is at the nerve-centre of judicial-decision making, such lack of clear judicial direction necessarily impacts on the lower courts negatively.

Again, it is germane to recall that the purposive decision in the *PDP Case* was itself seriously *threatened* at the time and was only achieved at the closest possible split of 4/3. This was despite the obvious threat to the rule of law a counter decision posed in the prevalent fragile political environment of a non-negotiated transition.¹⁴⁶ It is important to note too that none of the cases made any explicit reference to the transitional status of the Nigerian society, momentous as this was in all three cases in particular, and the socio-political circumstances of the time. All of these suggest the absence of a coherent purposive jurisprudential approach that behoves a transition judiciary.

In summary, the initial post-transition period was characterised largely by jurisprudential ambivalence and lack of engagement with the dynamics of

¹⁴⁵ The Supreme Court decided the *PDP Case* expeditiously on 11th May 1999 on time for the inauguration of the Plaintiff on 29th May 1999 and gave its full reasons on 16th July 1999. The *Oputa Panel Case* was decided on 31st January 2003. The Supreme Court did not at all advert to the purposive approach in the *PDP* and *ICPC* Cases when it decided the *Oputa Panel* case in 2003.

¹⁴⁶ P M Lewis *Growing Apart- Oil, Politics and Economic Change in Indonesia and Nigeria* (University of Michigan Press Ann Arbor-Michigan 2007), 243-245 and S Akinrinade "Constitutionalism and the Resolution of Conflicts" (2003) 368 41, 47-50.

transitional justice. It will be suggested that the courts later adopted a judicial attitude marked by relatively progressive and transition-conscious adjudication.¹⁴⁷ However, some inconsistencies challenge the proposition that there is a clear and coherent direction in terms of the jurisprudential approach of even the Supreme Court. Thus there are cases of both judicial approaches in the two strands. However, there are dominating elements of each approach in the initial and later periods to justify the case for a fairly distinct categorisation as advanced in this chapter. What appears certain though is the fact that the Court has now become more conscious of its powers and the need for an active judicial role in the country's troubled political transition. The transition-conscious adjudication is more closely considered in Chapter Six in the discussion on judicialisation of politics in Nigeria.

CONCLUSION

The need for all institutions of governance to participate in obtaining redress for human rights violations in post conflict societies is underscored by the necessity of a process of accountability to serve as the foundation for establishing the rule of law in such societies.¹⁴⁸ The judiciary, considering its usually privileged stability in the face of political upheaval, must be at the forefront of institutionalising the rule of law particularly in post transitional contexts.

The enunciation of a radical, transformative jurisprudence by the judiciary in a post-authoritarian transition holds considerable promise for the restoration of the rule of law and at the institutional level, signals a definitive break from the past.¹⁴⁹ Such judicial disposition is particularly important in transitional societies where the executive and legislature in the new *democratic* dispensation may owe avowed loyalty to or are actual protégés of the illiberal regime, thus potentially at the risk of derogating from the quantum of real representation of the common interest.

The judiciary in societies in transition can not remain aloof of the realities of the operating environment, even if only for the pragmatic necessity to maintain its relevance in society. It has a critical role to play in mediating conflict and upholding human rights through a robust interpretation of law in transitional

¹⁴⁷ See Chapter Six *infra*.

¹⁴⁸ D Tolbert and A Solomon 'United Nations Reform and Supporting the Rule of Law in Post Conflict Societies' (2006) 19 Harvard Human Rights Journal 29 at 34.

¹⁴⁹ Teitel note 24 *supra* at 2033.

societies moving away from the experience of abuse of power and misuse of state institutions. The need for the mediating role of the judiciary in governance is even more acute in societies, like Nigeria, where the judiciary has been previously implicated in validating authoritarian rule and thus, undermining the rule of law. Proper performance of the role will enable the judiciary to earn credibility, promote justice, foster peace and contribute to societal recovery and development. Such a proactive role is of particular relevance in developing and transitional societies where the judiciary has been noted for enunciating ‘usurper friendly’ jurisprudence.¹⁵⁰

In the performance of its adjudicatory role in the *Oputa Panel Case*, the Nigerian judiciary opted for a conservative approach to the issues at stake in the emergent contestations. In its handling of the challenge to the powers of the Oputa Panel and its work, the Nigerian judiciary not only failed to engage with the established international human rights standards on the right to truth and remedy for victims of gross human rights violations, but also the dynamics of a society in transition. The judiciary may not be faulted for not offering, of its own volition, to *tell its truth* about its role in gross human rights violations and misgovernance. But there are good reasons to expect it would allow the truth-seeking process to be carried out by another agency, in this case, the Oputa Panel, unhindered. Rather, the formalistic judicial approach to the truth-seeking process left *the truth* in jeopardy and victims in despair.

The foregoing judicial attitude would appear due largely to a failure of self-realisation on the part of the judiciary. The attitude has prevailed because of the judicial accountability gap identified in Chapters One, Two and Three above. The seeming *faux pas* of the Oputa Panel to integrate judicial accountability for past governance as part of the truth-seeking process, led to the absence of a conscious and concerted institutional introspection on the part of the judiciary. An accountability mechanism in the nature of the truth-seeking process represented by the Oputa Panel would have engendered institutional soul-searching and facilitate a coordinated and consistent initiative of self-redemption which is still missing in the performance of the judicial role in Nigeria.

¹⁵⁰ T I Ogowewo “Self-Inflicted Constraints on Judicial Government in Nigeria” (2005) 49 (1) *Journal of African Law* 39, 42.

In post-authoritarian societies, the public expect much of the judiciary. As the Nigerian experience demonstrates, in the spirit of newly restored constitutional supremacy, civil liberties, democracy and openness in governance, the judiciary is constantly required to mediate between the rulers and the ruled and hold the exercise of power in check and (more) accountable. Such demanding expectations derive partly from the fact that it has the longest history of functional institutional stability compared to the executive and legislative branches of government, since both are invariably trumped by military political-adventurism and authoritarian rule. Ironically, the judiciary typically steeped in well-worn traditions and customarily exempt from popular public accountability mechanisms deployed in transitional societies may be slow or even unwilling to take on headlong the challenges of social transformation. It may be ill-prepared or even oblivious to these great expectations and its important role in the transitioning polity.

The discussion in this chapter on judicial constitutionalism in Nigeria's political transition suggests a combination of public-driven factors may significantly impact on the state of judicial inertia in transitions. Such factors may reconfigure judicial synergy, redirecting the judiciary to the realisation that it cannot but move with the socio-political realities of the times. It will thus be primed to join the front seat in taking on a proactive role in governance and moving the transitioning state forward as evinced in the *ICPC* and *PDP* decisions. How well it proceeds on the path that takes forward this purposive approach is dependent on its ability to make a distinct break with a past tainted by complicit jurisprudence.

However, the potential of this public-driven initiative for judicial transformation is intrinsically limited and must be regarded with caution. This is because it is largely spontaneous, uncoordinated and not institutionalised as a matter of official policy. It is doubtful, as evidenced by the ambivalence that characterised the jurisprudence of the Supreme Court discussed above (and further examination of the conduct of the judicial function in the post-authoritarian period that will be examined later), that it can evoke a consistent and permanent transformation of the judiciary in the country. This is because the demands of post-authoritarian adjudication can be daunting. The challenges of grappling with mediating disputed institutional and individual claims have in fact become a critical issue in transitioning polities all over the world and its to these that we turn our focus in the remaining part of this research.

THE JUDICIALISATION OF POLITICS: DIALECTICS OF A PHENOMENON

INTRODUCTION

The existence of a gap in accountability of the judiciary for the past in Nigeria's transition to civil democratic rule has been identified and analysed in previous chapters.¹ Thus far, the imperative of accountability of the judiciary in transitional contexts has been advanced on two cardinal premises. The first is distinctly normative in nature. Normatively, there is the imperative of comprehensive accountability as a measure of transitional justice claims. All institutions of state responsible for misgovernance are in the transitional justice paradigm required to account for their conduct. The other reason, of a hybrid character, can be located simultaneously in normative and political considerations. It is the need for transformation of complicit state institutions as a *sine qua non* for the reinstatement of the rule of law and sustenance of the democratic initiative in the transitioning society. A process of reform would require a holistic evaluation of previous performance in order to identify operational strengths and deficiencies to map out action points.

In this chapter, the focus is on the dialectics of the judicialisation of politics with particular reference to transitional contexts. The judicial role in governance has taken centre stage not only in developed democracies,² but also, democratising polities round the world.³ A central feature of judicial powers in contemporary governance is the growing influence of courts on the direction of politics and mechanisms for democratic accountability in the public (government) and private (individual) spheres. This growing incidence of active and (sometimes) direct judicial participation in policy-making in transitioning polities further validates the case for institutional accountability of the judiciary (along with other institutions of the state) for its past role in governance in those societies.

In other words, the increasingly decisive role the exercise of judicial power plays in policy-formulation and decision-making in contemporary governance

¹ Chapters Two, Three and Four supra. See also H O Yusuf "Calling the Judiciary to Account for the Past: Transitional Justice and Judicial Accountability in Nigeria" (2008) 30 (2) Law & Policy 194, 207-219.

² T Ginsburg *Judicial Review in New Democracies* (Cambridge University Press Cambridge 2003) 1, 4 and R Hirschl "Constitutionalism, Judicial Review, and Progressive Change: A Rejoinder to McClain and Fleming" (2005) 84 Texas Law Review 471, 475-477.

³ T Ginsburg "Constitutional Courts in New Democracies: Understanding Variations in East Asia" (2002) 2 (1) Global Jurist (Advances Article 4) 1 available at: <http://www.bepress.com/gj/vol2/iss1/art4>.

reinforces the importance of accountability of the judiciary for the past in societies in transition. The strategic position of the judiciary in governance raises the need for substantial scrutiny and accountability for its role in the authoritarian period of a society's past which may be, as in the context of this study, one of authoritarian rule. This is important to legitimate its authority in the conduct of the moderating role almost invariably thrust on it in post-authoritarian societies. In view of its peculiar institutional design that mostly shields the judiciary from scrutiny, especially of a public (or democratic) nature on a regular basis (in contrast to other public centres of power), society has to be assured that the judiciary is properly constituted to exercise its expanding powers.

In this regard, it has been recognised that motivations other than holding power to account, or concern for the common good, may condition otherwise bold, even confrontational, decisions of the judiciary, trumping actions and policy initiatives of other branches of government. The operation of the judicial function based on such an institutional outlook, jeopardises the symmetry of 'horizontal accountability' which judicial activity ideally represents in such contexts.⁴ Horizontal accountability is a form of accountability where a subordinate reports to, or is held accountable by, an external as against a hierarchical superior. This contrasts with the traditional, vertical form of accountability in which an agency reports 'internally' to a superior. Horizontal accountability is regarded as being more promising for achieving accountability and has now become an increasingly adopted form of accountability.⁵

In our context, horizontal accountability refers to the situation where the judiciary actively participates in activating or monitoring legal mechanisms for the democratic accountability of the political branches. In an ideal setting, the separation of powers anticipates that, democratic accountability mechanisms will operate vertically within the institutional confines of the respective branch of government. In other words, democratic accountability is conducted within an individual branch of government without reference to another.

The judicialisation of politics in transitions to democracy suggests the judiciary increasingly finds itself involved in governance in democratising societies in contexts where its role remains under-defined, and its motivations, opaque.

⁴ P Domingo "Judicialization of Politics: The Changing Political Role of the Judiciary in Mexico" in R Sieder, L Schjolden and A Angell (eds.) *The Judicialisation of Politics in Latin America* (Palgrave Macmillan New-York 2005) 21, 24.

⁵ T Schillemans 'Accountability in the Shadow of Hierarchy: The Horizontal Accountability of Agencies' (2008) 8 *Public Organization Review* 175, 175-176.

Despite this, there is an incremental resort (by the political branches of government as well as individuals), to the judiciary for the resolution of administrative and policy disputes in post-authoritarian societies. Newly established or rehabilitated constitutional courts in East Asia have been actively involved in emerging political controversies. They have played, and continue to play, notable roles in allocation of political offices, election oversight, corruption-monitoring, transitional justice claims, human rights enforcement and legislative compliance with constitutional provisions and standards.⁶

A comparative evaluation of the process and parameters of judicialisation in South East Asia, Central and Eastern Europe, Latin America and Africa (with particular reference to Nigeria), suggests convergence on the centrality of the judicial function in the institutionalisation of human rights and democratic ideals. Thus, judicialisation of politics has come to be recognised as an important, if not indispensable feature of political activity in the modern state.⁷ However, this view of the judicial function in the democratic process appears, at least potentially, antithetical to the substantially well articulated and sustained counter-majoritarian view of the judiciary.

This chapter presents a brief juxtaposition of judicialisation of politics with democracy and the rule of law. It highlights the existential dynamics of the phenomenon in the contemporary society in general and transitioning polities in particular. The chapter then critiques counter-majoritarian objections to the democratic legitimacy of judicial review. There is a challenge of assumed solidity of the representative nature of the political branches around which such objections are typically crafted. The discussion subsequently focuses on an analytic framework for the judicialisation of politics. It further proceeds to an examination of comparative experiences of judicialisation of politics in transitioning polities. This is followed by an outline of the failed attempt at establishing a constitutional court in Nigeria before focusing on the Nigerian experience of court-packing and its impact on judicial independence. It emerges that there is a need for closer and more comprehensive attention the judicial function.

2. JUDICIALISATION OF POLITICS, DEMOCRACY AND THE RULE OF LAW

⁶ T Ginsburg and G Ganzorig “When Courts and Politics Collide: Mongolia’s Constitutional Crisis” (2000-2001) 14 (2) *Columbia Journal of Asian Law* 309 (-326).

⁷ Domingo note 4 supra at 21.

In his pioneering work on judicialisation of politics, Shapiro placed the judiciary at the heart of governance much more than legal purists were ready to concede.⁸ The notable resurgence of the judiciary as a political force in transitioning polities in particular, validates Shapiro's views on the nature of the judicial function in democracies.

Mature democracies have not been immune from the continually extending reach of judicial power and its impact on governance in recent times. However, accounts of the judicial function, especially in transitioning polities disclose that judicial power has challenged and in some cases, strongly eroded parliamentary sovereignty.⁹ From the Americas to Europe, through Africa to Asia, the story is the same; the judiciary is playing a decidedly more prominent role in shaping policy and governance than ever before.¹⁰ For this reason, Hirschl draws attention to a 'rapid transition to "juristocracy"'.¹¹

Pildes¹² and Isaacharoff¹³ both refer to the judicialisation of politics as the 'constitutionalization of democratic politics.' Their terminological preference is easily the norm in scholarly considerations of judicialisation of politics by American legal and political theorists.¹⁴ It appears to be preferred perhaps for its more *orthodox* origin which in-effectively obscures the centrality of judicial governance in contemporary democratic experience. After all, it is practically inconceivable to discuss democratic arrangements without some form of constitution and thus, the incidence of institutional 'constitutionalism' or 'constitutionalisation.'

⁸ M Shapiro "Political Jurisprudence" (1964) 52 Kentucky Law Journal 294.

⁹ Ginsburg note 2 supra at 3-5.

¹⁰ Ginsburg note 2 supra at 6-9. There is a growing body of literature on this theme in recent times. See for instance M Shapiro and A S Sweet, *On Law, Politics, and Judicialisation* (Oxford University Press Oxford 2002), A S Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford Clarendon Oxford 2004), N C Tate and T Vallinder *The Global Expansion of Judicial Power* (New-York University Press New-York 1995), A S Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press Oxford 2000), R Hirschl *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press Cambridge Massachusetts 2004), and Sieder, Schjolden and Angell (eds.) note 4 supra.

¹¹ R Hirschl "Resituating the Judicialisation of Politics: *Bush v Gore* as a Global Trend" (2002) 15 (2) Canadian Journal of Law and Jurisprudence 191 and Hirschl note 10 supra at 13.

¹² R H Pildes "The Supreme Court 2003-Foreword: The Constitutionalization of Democratic Politics" (2004) 118 (1) Harvard Law Review 28.

¹³ S Isaacharoff "Constitutionalizing Democracy in Fractured Societies" (2004) 82 Texas Law Review 1861

¹⁴ This trend is common in American legal scholarship generally. Thus see H K Prempeh "Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa" (2006) *Tulane Law Review* 80: 1239, B Ackerman "The Rise of World Constitutionalism" (1997) 83 Virginia Law Review 771 (-791) dealing with a comparative evaluation of judicial developments in South Africa, Asia and Europe and R G Teitel "Transitional Jurisprudence: The Role of Law in Political Transformation" (1996-7) 106 (7) Yale Law Journal 2009.

Shapiro and Sweet have noted the ironic dialectic of the judicial function in democratic societies. Public office holders in the political branches seek legitimacy by subjecting themselves to elections and control by the people they are to serve. Judges on their part claim to be ‘neutral servants of “the law”.’¹⁵ In other words, unlike other government officials and other institutions of a democratic state, judges achieve legitimacy by claiming neutrality in the exercise of their powers and performance of their duties. Thus, their allegiance is to *law* and not the people *law* serves. But while it is indispensable that the judiciary upholds the law in an independent manner, Shapiro and Sweet make the important point that judges do have a lot to do with politics.

In transitioning societies, particularly authoritarian ones, the judiciary is usually the only one, of the three branches of government that has a record of institutional continuity through out the period of distortion in the exercise of state powers. The political branches suffer either suspension or abrogation at some points and only remerge as democratic institutions in the post-authoritarian period. They are usually, as in the Nigerian experience, fragile partly due to their chequered institutional existence. The judiciary thus emerge as a critical player in governance building on the privilege of institutional continuity and function as a mediator.

The recognition that the judiciary plays an important role in established democracies,¹⁶ usually through horizontal accountability (despite institutional continuity and relatively better developed accountability mechanisms), in a way explains the ascendance of judicial power in polities transitioning to democracy. This is because (as explained above), the displacement experienced by the other branches saddles the transitional society with fragile political institutions that are usually ill-equipped to effectively manage the resolution of inevitable state-society and inter-institutional disputes that arise in the context of transition. The judiciary easily becomes the choice forum for resolution of myriad contestations.

However, the growing incidence of horizontal accountability in established democracies does not fully explain the remarkable growth of judicial power in transitional societies. Some normative questions regarding the validity of the judicial role in policy-making remain unresolved.¹⁷ Specifically, does the

¹⁵ Shapiro note 8 supra at 3-5.

¹⁶ Pildes note 12 supra. See also, R Bork *The Tempting of America: The Political Seduction of the Law* (The Free Press New York 1990) and R Bork *Coercing Virtue: The Worldwide Rule of Judges* (Vintage Canada Toronto 2002).

¹⁷ For a prescient elucidation of the role of the judiciary in transitions see Teitel note 14 supra.

experience of transitioning politics of the judicial function not challenge the rather well established objections to the tangential ascendance of judicial governance at the heart of the counter-majoritarian argument? Is the devolution of more powers to the judiciary not directly antithetical to the very principles of accountability and representation at the heart of the democratic transition project? These are important questions to which the discussion now turns.

3. JUDICIALISATION OF POLITICS AND THE COUNTER-MAJORITARIAN ARGUMENT¹⁸

Contemporary political and legal thought has witnessed a growing opposition to the rise of judicial power. There is the concern that judicial governance in a democratic society is contrary to notions of popular sovereignty.¹⁹ In what is regarded as the classic articulation of the issue, Bickel asserted it was contrary to democratic precepts to allow an unelected, minority branch of government, to overturn the decisions of elected officials.²⁰

On the counter-majoritarian view, through the instrumentality of judicial review, judges effectively impose the views of a faction on society as a whole. This is especially the case in the context of appointive judicial positions where political actors play an important role in their appointments.²¹ For critics of the appointive system, the growing influence of partisan interest groups over the appointment process constitutes a sore point. The growing influence of such lobby groups further strengthens opposition to the considerable powers exercised by the judiciary over policy issues.²² The influence of interest groups in judicial appointments (and implicit influence on the direction of judicial constitutionalism) is acutely felt in American judicial constitutionalism. According to Schor, this has led to the development of the view, in some quarters,

¹⁸ The articulation of the argument is credited to Alexander M Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (The Bobbs-Merill Company Indianapolis New York 1962).

¹⁹ See for instance L D Kramer *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press New York 2004). But See L Alexander and L B Solum "Popular? Constitutionalism?" (2005) 118 (5) *Harvard Law Review* 1594 for a critique of Kramer's notions of popular sovereignty.

²⁰ A M Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (The Bobbs-Merill Company Indianapolis New York 1962) K D Ward and C R Castillo (eds.) *The Judiciary and American Democracy: Alexander Bickel, The Counter-majoritarian Difficulty, and Contemporary Constitutional Democracy* (State University of New-York Press New-York 2005). See also M Schor "Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty" (2007) 16 *Minnesota Journal of International Law* 61.

²¹ Bickel *ibid.* at 108.

²² Schor note 21 *supra* at 108.

that the easiest route to amending the American constitution is not by legislative majority, but getting ‘one’s partisans on the Supreme Court.’²³

The quest to check the growing power of the judiciary, the ‘counter-majoritarian difficulty,’ has reputedly remained at the centre-stage of American constitutional theory for over five decades. To combat the challenge, Schor suggests a ‘democratisation of judicial review’ through the creation of appointive mechanisms that ensure ‘democratic majorities’ have a say in the composition of the courts or over their decisions.²⁴ In effect, such democratisation meets the challenge of the ‘undemocratic’ nature of the power wielded by a few (judges) over representative (executive and legislative) branches of government.

It is arguable that the counter-majoritarian objection can sometimes be overstated. First, judges are themselves not any less representative or democratic in certain jurisdictions, as is the case in some American states where judicial offices are elective. Second, a certain amount of *democratic representation* is at play within appointive jurisdictions where judicial offices are filled through the instrumentality of (independent) committee recommendation, executive nomination and legislative assent as is the case in some national jurisdictions.²⁵ Nigeria is, at least in theory, one such jurisdiction. This is arguably the case, considering that the executive (represented by the president or governor) and the respective branch of the legislature (usually the upper chambers like the Senate in both America and Nigeria), are ordinarily deemed representatives of the people. They thus constitute a form of *Electoral College* for judicial appointment.

The foregoing position is objected to by critics of judicial review on the basis of ‘comparative legitimacy.’²⁶ Waldron argues in this regard that legislatures are much more accountable to their constituents and more democratically elected than judges. The comparative legitimacy argument is not without considerable force. This is the case, especially if it is considered that an electoral college sometimes tends to offer such narrow representation as to be undemocratic, notably in the context of first past the post electoral practices.

²³ Schor note 21 supra at 108.

²⁴ Ibid. at 113.

²⁵ For an account of the sometimes contentious process of confirmation of Supreme Court nominees in the United States see K J McMahon “Presidents, Political regimes and Contentious Supreme Court Nominations: A Historical Model” (2007) 32 (4) Law & Social Inquiry 919(-)(54).

²⁶ J Waldron “The Core of the Case against Judicial Review” (2006) 115 Yale Law Journal 1346, 1392.

However, a significant flaw in the comparative legitimacy argument is the neglect to take in to account the complexities that attend elections to political offices even in advanced democracies. Critical analysis of the electoral systems in a number of liberal democracies may not yield the rather presumed solidity of the counter-majoritarian dismissal of judicial review. It can be reasonably argued that there are differing levels of representation for both majorities and minorities in the various electoral systems ranging from first past the post, preferential voting, electoral colleges, to proportional representation. But the characterisation of the executive and legislative involvement in judicial appointment as an electoral college assumes the political branches of government are themselves elected in free and fair, popular elections. The validity of the characterisation dissolves (or is at the least diluted), where the political branches are not elected through a transparent process. The lack of transparency however impacts on the legitimacy of the democratic credentials of the political branches and their representative claims as a whole.

Conceding the democratic legitimacy of the political branches does not however resolve the representation quagmire ‘haters of judicial review’²⁷ have set up in objection to judicial review. Kyritsis rightly argues that it is essential to identify what is the exact nature of ‘representative democracy’ which critics of judicial review insist it devalues. He argues that the legislature (and presumably by extension, the executive) ‘represent’ the people under a ‘trustee’ as opposed to a ‘proxy’ model of representation. Under the proxy system, a political representative is ‘like a conduit of the convictions of his constituents,’ without recourse to his own notions of the merits of the decision at stake. On the proxy model of representation then, ‘the law of the country’ (and by extension, government policy) is a concrete reflection of the actual will of the people.²⁸

Conceivably, representation under the proxy model justifies democratic objections to the legitimacy of judicial review, in as much as it could be regarded as trumping the decisions of the people *directly* carried out by their representatives in the political branch. But Kyritsis argues that the reality of representation in contemporary democratic practice is of the trustee model. Under the trustee model of representation, representatives take the views of constituents into consideration. However, they still maintain considerable distance from even

²⁷ D Kyritsis “Representation and Waldron’s Objection to Judicial Review” (2006) 26 (4) Oxford Journal of Legal Studies 733, 735.

²⁸ Kyritsis note 28 supra at 742.

an agglomeration of such views in the performance of their representative functions. They exercise a wide berth and independence of thought and action on matters of legislation, policy and governance generally.²⁹ This is the operative conception of representation in democracies today.³⁰ Kyritsis contends that glossing over the elitist nature of representation in democratic practice, even (if not especially) in model democracies, is at the heart of over-emphasises on the undemocratic nature of judicial review.³¹ While this may not directly address the argument against judicial review, it at least substantially weakens the comparative legitimacy argument.

Kyritsis' model of representation and participation in liberal democracies finds support in political philosophy. It broadly fits into Ci's characterisation of 'political agency' in modern democratic practice. Kyritsis' proxy and trustee models of representation substantially aligns with Ci's postulation that participation in liberal democracies is reflected in 'utopian' and 'ideological' discourses respectively. Like Kyritsis, Ci argues that a considerable dose of ideological rhetoric is employed in liberal democratic discourse to conceal the gap between representation and actual participation of constituents.³²

In principle, democracy connotes a system which allows the people to rule themselves. But, as Ci emphasises, 'political agency,' the form representative governance is expressed, may be considered somewhat antithetical to the aspirations of majoritarian participation in governance. This is because in practice, the people get an opportunity to appoint to positions of power, those who will rule them, ostensibly 'in their name.'³³ But for the most part, they are unable to determine how this power is exercised. There thus remains a significant measure of domination, a condition democracy was conceived to obviate. On this view, representation as a salient feature of democracy in liberal democratic societies is a fiction sustained by a series dynamics.³⁴ The distance between the ideal of represented and the representative in democratic practice highlights the debate about the weight of the presence required to determine consent in a liberal

²⁹ Ibid. at 741-749. It is to be noted that the whole context of Kyritsis' discussion was limited to the legislature but I am of the view that it extends with equal force to the executive as well.

³⁰ Ibid. at 743-744.

³¹ Ibid. at 750-751.

³² J Ci "Political Agency in Liberal Democracy" (2006) 14 (2) *The Journal of Political Philosophy* 144, 147, 149.

³³ Ci note 33 supra at 151.

³⁴ Ibid. at 151- 158.

democracy. This is what political theorists refer to as ‘the paradox of political representation.’³⁵

Further, it can be contended that the dialectic of judicial legitimacy, sets the grounds for opposition to the growing powers of the judiciary in determining the course of policy and governance. In matured democracies, the exercise of power is usually available to scrutiny. Governmental power is to a large extent, accounted for in the public domain. However, experiential accounts and empirical evidence in contemporary transitional societies, suggest the need for care in applying such a standard as evaluative mechanism for the judicial function in transitional polities. Deriving from this, the counter-majoritarian view on the rise of judicial power may have an important place in the socio-political scheme of matured and stable democratic polities. It may conduce to the needs of such societies which over time, have developed and institutionalised sophisticated mechanisms, and processes for scrutiny and accountability, regarding the exercise of state power. Substantive accounts of judicial intervention in the governance of transitioning polities through adjudication of emerging disputes point in new directions.

Rather than the rise of judicial power constituting an erosion of the common (democratic) will, normative and context-specific examination of the judicial function, lean towards a positive role for the judiciary in the institutionalisation of democratic values. This is largely the case in the ever-shifting sites of such disputes which range from horizontal and vertical levels of political arrangements, electoral contestations among political actors to individual and group (rights) claims by citizens against the state.

Waldron, notwithstanding his articulate opposition to judicial review generally and the ‘strong’ variant decidedly,³⁶ implicitly endorses the validity of the foregoing position. In a representative restatement of his views on judicial review in a recent article aptly titled ‘The Core of the Case against Judicial Review,’³⁷ he sets out four conditions which must be satisfied before a valid case can be made against judicial review. He stipulates that the society must have functional democratic institutions in ‘good working order,’ with a legislature elected through free and fair elections, conducted on the basis of universal adult suffrage and a

³⁵ D Runciman “The Paradox of Political Representation” (2007) 15(1) *The Journal of Political Philosophy* 93.

³⁶ See for instance J Waldron *Law and Disagreement* (Clarendon Press Oxford 1999) 10-17, 211-312 and J Waldron ‘A Right-Based Critique of Constitutional Rights’ (1993), 13 (1) *Oxford Journal of Legal Studies* 18.

³⁷ Waldron note 27 supra.

non-elected judiciary. The other two conditions are the requirement of societal commitment to individual and minority rights, and ‘persisting, substantial, and good faith disagreement’ within those committed to those rights.³⁸ He argues that objections to judicial review may not hold where any of these conditions is non-existent. Thus, he sets up social prerequisites (‘assumptions’) that must be taken for granted in arguing a case against judicial review. In transitional polities, it is easily the case that one or other of these conditions does not exist. In fact, the absence of some or all of these conditions underwrites the democratic transition process.

For clarity, it serves to relate the foregoing discussion to the African experience of governance in the context of political transition. Governance in many African states has continued to be steeped in corruption and parochial considerations. In many instances, the political elite secure and maintain their hold on power through sham electoral processes in countries that are still recovering from extended periods of social displacement deriving from authoritarian military rule or civil-conflict. In such societies, there is palpable disconnect between political office-holders and the people they purport to serve arising from the legitimacy deficit that underwrites the ascendance and hold on power by many actors on the political scene. The Nigerian socio-political situation is a classic example of this untoward situation. I will return to this later.

The frequent breakdown of elite political consociation arrangements, in many developing countries, is another factor in support of judicialisation of politics as a force for democratisation, and construction of the rule of law. The political struggle for power by the elite in fractious and multi-nation states, commonly the sites of democratisation and transition from conflict in Africa (and elsewhere), usually erodes, if not rolls back, the gains of democratic statehood. The recent experience of political crises in Kenya and lately, the dire situation in Zimbabwe, are sad commentaries on this dynamic. In essence, the fragility of the power-sharing and democratic culture in many transitioning polities, commends resort, as Teitel has pointed out, to an apolitical institution for institutionalising constitutional and democratic behaviour, a culture of rule of law and respect for human rights.³⁹ In other words, the experiences of the exercise of power by the political class and conduct of state institutions in transitioning polities (notably in post-authoritarian contexts), supports the view that the judiciary is well suited to

³⁸ Ibid. at 1359 to 1369.

³⁹ Teitel note 14 supra at 2030-2034.

act as the stabilising agent, if not the direct purveyor, of representative democracy.

In articulating the transformative potentials of law at times of significant social and political change, Teitel⁴⁰ argues that the role of law undergoes ‘normative shifts’ which distinguishes it from the conception and understanding of law in ‘ordinary times.’⁴¹ In other words, there is a paradigm shift in the understanding of the workings of law and its place in a society in transition. This phenomenon is what Teitel called, ‘transitional jurisprudence.’⁴² In the context of political change, the transitional judiciary, due partly to institutional fragility of the political branch, is usually faced with deciding difficult, time-bound important cases. Such cases usually have direct bearing on the process of transition. Thus, the judiciary is faced with what Teitel refers to as the ‘ambivalent directionality of law.’⁴³ Teitel’s analysis of transitional jurisprudence as being a distinctive and legitimate conceptualisation of law in society is relevant to this study of the judiciary, particularly the Supreme Court in the context of the political transition in Nigeria.

Dyzenhaus’ discussion of legality in times of emergency in his book, *The Constitution of Law: Legality in a Time of Emergency* provides further support for this view. He suggests that constituting the rule of law in times of emergency involves a ‘rule of law project’ conducted through institutional dialogue between the executive, legislature and the judiciary. The three branches engage in this dialogue for the realisation of fundamental constitutional values.⁴⁴ This cooperative model accords an important role to the judiciary even as it recognises the important place of the political branches in the institutionalisation or restoration of the rule of law.

In sum, there is much in support of the proposition that there is a need for reassessing objections to the legitimacy of active judicial participation in governance. Despite conventional wisdom in political and constitutional thought, the view that the ability of the judiciary to alter the exercise of political power by elected representatives as being antithetical to ‘democratic values,’⁴⁵ lacks

⁴⁰ Teitel note 14 supra .

⁴¹ Teitel note 5 supra at 2015.

⁴² Teitel note 14 supra at 215-2016.

⁴³ Ibid. at 2033.

⁴⁴ D Dyzenhaus *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press Cambridge 2006) 147.

⁴⁵ Waldron note 27 supra.

universal validity in transitional contexts. The political and constitutional experiences of transitional societies, suggest the need for a reappraisal of the ‘counter-majoritarian’ view of the place of the judiciary in a democratic society. An assessment of the Nigerian experience of the judicialisation of politics, examined in Chapter Six, provides opportunity for further explication of the position. At this point, it serves to set out the broad outlines of the concept itself for clarity of further discussion.

4. JUDICIALISATION OF POLITICS: AN ANALYTICAL FRAMEWORK

The definition of judicialisation of politics proffered by Sweet goes to the heart of the judicial role in transitioning societies. He defines it as the ‘process by which triadic law-making progressively shapes the strategic behaviour of political actors engaged in interactions with one another.’⁴⁶ Hirschl for his part maintains that the phenomenon is ‘multi-faceted.’⁴⁷ He defines it as ‘the ever accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions and political controversies.’⁴⁸

These are no doubt perceptive definitions of the judicialisation of politics. However, definitions can be normatively constrictive. Further, there is the view that judicialisation of politics extends beyond noticeable judicial control of policy, to the internalisation of the formal procedures and language of courts by non-judicial decision-making forums.⁴⁹ Thus, the conceptualisation of the outlines of judicialisation of politics in democratic and democratising polities provides an analytical template on which to conduct an evaluative study of the impact and significance of the phenomenon. This section focuses on that objective.

Perhaps the most discernible feature of judicialisation of politics is the extension of the scope of ‘judge-made’ law. This refers to the situation where judges play an active, if not dominating role in shaping state policy across a range of spheres. Such active role derives from an increasing resort by the other branches (and sometimes levels) of government as well as individuals to judicial resolution of

⁴⁶ A S Sweet “Judicialisation and the Construction of Governance” in Shapiro and Sweet note 10 supra 55 (-89), 71.

⁴⁷ Hirschl note 11 supra at 217.

⁴⁸ R Hirschl “The New Constitutionalism and the Judicialisation of Pure Politics Worldwide” (2006) 75 (2) Fordham Law Review 721, 721.

⁴⁹ J A Cuoso “The Judicialisation of Chilean Politics: The Rights Revolution that Never Was” in Sieder, Schjolden and Angell note 4 supra at 105, 106.

political disputes.⁵⁰ For politics and political players alike, a direct consequence of judicialisation of politics in this way, is an increased awareness of and attention to how the powers of judges impact policy decisions.⁵¹ It is also identifiable in the resolution of tension emerging from deficient institutional arrangements and design (as we shall see later in the case of Nigeria), possible hallmarks sometimes of un-negotiated political transitions.

Between individuals or groups *inter se*, or individuals in claims against the state, judicialisation may be reflected by an exponential increase in the claims for the judicial recognition of sometimes untested, newly legislated, or even otherwise non-justiciable rights contained in some constitutions⁵² like social and economic rights contained in the 1999 Constitution of the Federal Republic of Nigeria. This is easily the case where access to the courts has been liberalised from legal constraints like narrow rules of legal standing to sue, particularly in societies recovering from some form of conflict or the other. Judicialisation of politics in this regard is enhanced by the complicity of state institutions (including the judiciary itself) for deprivation of the rights of a segment of society at some period past which has been disavowed in the democratisation process.

Availability of legal aid alongside social and legal mobilisation in the wake of constitutionalisation of civil liberties and other rights, promotes judicial shaping of policy. Reflections on this aspect of judicialisation of politics have recognised that the judiciary in transitioning polities- usually confronted with fragile or lopsided economic structures- faces the daunting task of balancing centrifugal forces struggling for control of state and society. In that dynamic, the judiciary is called upon to determine the duty of the state to implement competing claims of constitutional rights (often-times of a socio-economic nature), intra-government disputes and claims, state-society obligations and a host of divergent, yet competing claims.

But the task of judges in governance in the present ‘Age of Democracy’⁵³ is decidedly complicated. Normatively, judges are required to uphold the letter and spirit of newly legislated or revived bills of rights and certain understandings of the rule of law, for which they are arguably well-prepared. Yet, they are challenged by formidable arguments of their lack of specialised expertise on the multi-layered, multi-dimensional effects of policy-prioritisation and

⁵⁰ Sieder, Schjolden and Angell note 4 supra at 3

⁵¹ Ibid.

⁵² Ibid. at 3.

⁵³ Pildes note 12 supra at 29.

implementation, a function, purists insist, is exclusive to the executive and legislative branches of government. Against judicial intervention in this situation, it is argued that even if the lack of expertise is not conceded on the part of judges, it is still a strong point that social rights require policy decisions across the board for reasonable balancing of priorities, something the case-by-case judicial approach misses.

Justice Albie Sachs of the South Africa Constitutional Court clearly articulates the judicial dilemma in such societies in his reflections on the *Grootboom Case*.⁵⁴ He noted of the central issue in the case; evaluating the duty of a local authority's legal obligation to house thousands of displaced persons against the background of their trespass on private property⁵⁵

If we insist on money being provided for Mrs Grootboom's community, this requires taking money away from other items in the budget. Is that not what parliament should be doing?... We have millions of homeless people. When do we intervene, if at all, and force what could be massive redirection of funds on the legislature and the executive?⁵⁶

In this regard, Sieder, Schojlden and Angell have made the important point that judicialisation of politics extends beyond constitutional powers of judicial review. Rather, the increased visibility of the judiciary is noticeable in the 'resolution of political, social or state-society conflicts.'⁵⁷

There is something of a paradox in the increased visibility of judicial power in governance, considering the concept of separation of powers, and the inclination of political players to jealously guide their spheres of influence. Certainly, many of the political questions that have been judicialised had the tacit, if not express, support of the political class for that course of action.⁵⁸ If it is true that 'the first instinct of power is the retention of power,'⁵⁹ what then drives the ceding of the power-space by the political branches of government to the *apolitical* judicial branch? In this regard Tushnet, in evaluating the relational dynamics of political and judicial power around the world has noted that the ceding of powers by the

⁵⁴ *Government of the Republic of South Africa & Others v Grootboom & Others* (2000) SACLR LEXIS 126.

⁵⁵ This was within the context of a constitutional Bill of Rights that recognised the right to housing and property as justiciable rights. See sections 26 and 25 of the Constitution of the Republic of South Africa 1996.

⁵⁶ A Sachs "Social and Economic Rights: Can they be made Justiciable?" (2000) 53 Southern Methodist University Law Review 1388, 1389. His comments were made in a speech as guest speaker at a public forum before the case, then pending before the Constitutional Court, was heard.

⁵⁷ Sieder, Schjolden and Angell note 4 supra at 3.

⁵⁸ Hirschl note 2 supra at 477.

⁵⁹ Justice Scalia in *Mc Connell v FEC*, 124 S. Ct. 619, 729 (2003) quoted in Pildes note 12 supra at 44.

political to the judicial branch has not always proceeded as a matter of deliberate choice on the part of the respective institutions.⁶⁰ This observation applies to the Nigerian experience too. As mentioned above, it has been deliberate in certain instances. At other times, it has been decidedly outwith the control of either party.

It has been argued that quiescence, if not outright deference of the executive and legislature to judicialisation of politics may have its roots in a desire to secure 'regime legitimization.'⁶¹ This is especially the case in the context of democratising polities where reinstatement of the rule of law is a key issue in the transition. Equally so is the desire to obtain legitimacy in times of crisis where there is a legitimacy deficit, deriving from any of a number of dynamics (not least sham elections), of the political branches of government. I will argue later that legitimacy-deficit, as a propelling factor for judicialisation of politics, is germane to the Nigerian transition experience.

Related to the foregoing is the vacillation of the political branches to take decisive action on topical and sensitive issues in both matured and transitioning democracies. Pildes cites as an instance, the need for a legal framework to deal with terrorism in the United States and the attitude of the Bush administration to it. Despite its relational significance to 'security, liberty and international relations,' Pildes notes of the attitude of the Bush administration on the issue that

...the executive branch did not seek to force Congress to share responsibility for these difficult judgments, nor did Congress show any interest in asserting such responsibility itself.⁶²

Gaps in crucial decision-making of this nature may derive primarily from attempts to avoid responsibility for decisions that may influence voters in an election year for instance. Despite the obvious institutional distortions in governance that results, the political branches may be content to cede decision-making power and shift responsibility for potentially unpopular decisions away from themselves. Through such subterfuge, they turn away public displeasure towards the judiciary, making the courts a 'convenient scapegoat'⁶³ for policy misadventures, while at the same time abdicating the very responsibility for which they are elected.

However, it is also the case that concessions of power to the judicial branch may be involuntary. It may result from the inability of elites to resolve contestations,

⁶⁰ M Tushnet "Political Power and Judicial Power: Some Observations on their Relations" (2006) 75 (2) Fordham Law Journal 755, 755.

⁶¹ Domingo note 4 supra at 22 and Isaacharoff note 13 supra.

⁶² Pildes note 12 supra at 36-37.

⁶³ W Sadurski *Rights Before Courts: A Study of Constitutional Courts in Post Communist States of Central and Eastern Europe* (Springer Dordrecht 2005) 291.

usually of a political nature amongst themselves. As the account of the Nigerian experience shows, this latter dimension may be quite significant in shaping the incidence of judicialisation of politics in democratising polities.

Moreover, in the nature of transitional experiences, gaps in political decision-making may follow on obvious or perceived fragility of a polity yet recovering from a fractured existence arising from severe forms of authoritarianism or war. This dynamic as a propelling force for judicialisation of politics characterised the approach of the Obasanjo administration's initial preference for referring claims for wider control of the country's oil resources by the oil-producing areas of the country to the judiciary for resolution. It is instructive that the decision of the Supreme Court in the case in point, *Attorney General of the Federation v Attorney General of Abia State and 35 Others*⁶⁴ came to be viewed as having created more problems than it solved. It generated social tensions and a political stalemate in the country that provoked calls for a political approach to the contestations in the case.⁶⁵ The crucial point remains that in the thick of the agitation for increased control of territorial resources between the federal and (littoral) state governments, the former, wary of the groundswell of opinion towards greater devolution of its control of such resources, consciously deflected an issue essentially for political resolution towards the judiciary. It thus *played safe* while simultaneously advancing an image of a democratic, rule-of-law-abiding government.

In sum, judicialisation of politics essentially presupposes a more visible presence of the judiciary in political and social life. The incidence of judicialisation of politics results in the transformation of the legal and political culture in a polity. The courts emerge in the social milieu as the forum of choice for 'social redress and rights claims.'⁶⁶ This has been singularly noticeable phenomenon in transitions to democracy in post authoritarian societies of South-East Asia, Central and Eastern Europe and Africa.

5. COMPARATIVE PERSPECTIVES

In a study of the establishment and working of constitutional courts in political transitions from authoritarian (one-party), communist or military rule in four

⁶⁴ The *Resource Control Case* [2002] 6 NWLR pt.764, 542.

⁶⁵ For an overview of the decision see K S A Ebeku 'Nigerian Supreme Court and Ownership of Offshore Oil' (2003) 27 (4) *Natural Resources Forum* 291 (-299).

⁶⁶ Domingo note 4 *supra* at 22-23.

countries in South-East Asia, Ginsburg observed the dramatic rise of judicial review of legislative and executive action.⁶⁷ There is increasing judicial restraint on the exercise of political power in Taiwan, Korea, Mongolia and Thailand. All of these in a region reputed for the near-total absence of effective judicial review on the actions of powerful executives.⁶⁸ In the aftermath of transition to democratic rule in these countries, the (constitutional) courts have become ‘important sites of political contestation...to achieve social change.’⁶⁹

Judicial intervention and activity on various fronts have had deep resonance for governance in the region. The courts have struck at ‘elements of the old system,’ including corruption, while providing a platform for the resolution of conflict among political players. In the political transition of these countries, courts and judges have played a significant role ‘underpinning and facilitating democratisation.’⁷⁰ They have thus become active participants in the democratisation project.⁷¹

In Central and Eastern Europe, constitutional courts have taken on head long, some of the most vexed social and political challenges confronting the liberal democratisation process in those countries. They have intervened in and moderated the course of post-totalitarian transitional justice measures like prosecution of alleged violators of human rights and lustrations,⁷² all with considerable resonance for politics and governance in the so-called ‘velvet revolutions’ of Central and Eastern Europe.⁷³ Thus, the Constitutional Court of Hungary ruled in the *Zetenyi Law Case*,⁷⁴ that the law passed by parliament for the prosecution of communist political crimes was unconstitutional. It held that the *Zetenyi Law* was retrospective and in violation of the principle of legal security, one of the cornerstones of the rule of law.⁷⁵ The decision effectively

⁶⁷ Ginsburg note 3 supra at 3.

⁶⁸ Ibid.

⁶⁹ Ibid. at 9.

⁷⁰ Ginsburg note 2 supra at 15.

⁷¹ Ibid. note 2 at 24.

⁷² See Sadurski note 65 supra at 221-262 for detailed consideration of judicial review of lustration legislation and measures in Central and Eastern Europe.

⁷³ Sadurski note 65 supra.

⁷⁴ Judgment of March 5, 1992, 1992/11 ABH. 77 pt V(5) (Hung.) dealing with the “Law on the Right to Prosecute Serious Criminal Offences Committed Between December 21, 1944 and May 2, 1990, That had Not been Prosecuted for Political Reasons” November 4, 1991. Quoted in R Teitel “Paradoxes in the Revolution of the Rule of Law” (1994) 19 Yale Journal of International Law. 239.

⁷⁵ J Priban *Dissidents of Law* (Ashgate Dartmouth Hampshire 2002) 89.

blocked the prosecution of serious crimes committed during the communist era for been inconsistent with the newly amended Hungarian Constitution.⁷⁶

As Priban further notes, the Constitutional Court of the Czech Republic in contrast, upheld the legitimacy of similar legislation in its review of the “Act on Lawlessness of the Communist Regime and the Resistance Against It,” presumably in a manner that sought to balance the tension between impunity and retrospectivity.⁷⁷ More than that, the Czech Constitutional Court has played ‘an enormous role’ in the ‘re-modernisation’ of Czech society.⁷⁸ According to him ‘The moralist and political vocabulary of the Court’s judgment’ has gone ‘beyond the usual limits’ employed by similar courts in liberal, well established democracies.⁷⁹ The Court extended its purview beyond strictly legal contexts to explication of moral and political requisites for a society based on law and democracy.⁸⁰ The trend has been replicated in Poland and Unified Germany.⁸¹

Teitel agrees with Priban that the jurisprudence of the constitutional courts in Central Eastern Europe have extended the traditional realms of judicial review.⁸² She states that in the process, the courts have gone on to establish a ‘newfound source of political legitimacy.’⁸³ The legitimating function derives from the liberal locus afforded to individuals (and presumably groups) to actively challenge political action, signalling a ‘new governmental openness.’⁸⁴ The constitutional courts have changed the ‘constitutional culture’⁸⁵ by limiting hitherto unbridled state power. I will argue in Chapter 6 that despite scholarly scepticism on the democratic credentials of the activist judicial approach (based partly on its perceived potential of fostering legislative irresponsibility),⁸⁶ the judiciary in Nigeria’s fragile transition is recognised to have taken on this role ascribed by Teitel to the constitutional courts in Central and Eastern Europe with significant impact on democratisation and governance in the country.

⁷⁶ Teitel note 76 supra at 240-241.

⁷⁷ Priban note 77 supra at 100-109.

⁷⁸ Ibid. at 96.

⁷⁹ Ibid. at 96.

⁸⁰ Priban note 77 supra 114-155.

⁸¹ Ibid. at 97-99.

⁸² R Teitel “Post-Communist Constitutionalism: A Transitional Perspective” (1994-5) 26 (1) Columbia Human Rights Law Review 167, 182-187.

⁸³ Ibid. at 186.

⁸⁴ Ibid. 186.

⁸⁵ Teitel note 84 supra at 169.

⁸⁶ Sadurski note 65 supra at 289-299.

The propriety of judicial review of rights and policy issues or in the language of this discourse, the judicialisation of politics, has been viewed with much scepticism by scholars like Sadurski.⁸⁷ But there is hardly any contention that constitutional courts in Central and Eastern Europe have generally given force to some rights provisions which for decades had not been worth the paper they were written on.⁸⁸ They have also limited parliamentary action, striking down legislation and policies they deemed out of tune with constitutional provisions.⁸⁹ The courts have actively participated or sometimes taken the lead in setting an agenda of liberalism for the new government.⁹⁰

Not surprisingly, varying responses from the political branches of government and the public, have trailed the exercise of wide ranging powers of constitutional judicial review. The responses have ranged from grudging compliance, to considerable resistance and emergence of serious tensions between the judiciary and the political branches. The Mongolian experience demonstrates this reasonably well.⁹¹

In Latin America, judicialisation of politics in the region's democratic transitions (from authoritarianism) has become one of the most important features of politics in the region.⁹² From the 1980s onwards, the judiciaries of Latin America have become more visible and relevant participants in the determination of policy issues of a political, economic and social nature. Courts have increasingly been called upon to decide matters that were previously reserved for the political domain.⁹³ In Mexico for instance, the Supreme Court has been drawn into adjudication of political and economic policy cases.

Increased judicial participation in determination of policy has tracked (even if initially at a slow pace) the 1994 constitutional reforms which granted the Mexican Supreme Court more independence and expanded powers of judicial review. It has since boldly taken on a more public role.⁹⁴ In the process, the Supreme Court has made a noticeable shift away from over seven decades of reticence in governance in which it had more or less functioned as an extension of

⁸⁷ *ibid.*

⁸⁸ But Sadurski cautions however that 'more nuanced' evaluation of the records disclose a less rosy picture. Sadurski note 65 *supra* at 289-290.

⁸⁹ Teitel note 84 *supra* at 176-182.

⁹⁰ Teitel note 14 *supra* at 2009, 2023.

⁹¹ Ginsburg and Gombosuren note 5 *supra*

⁹² R Rios-Figueroa and M M Taylor (2006) 38 (4) *Journal of Latin American Studies* 739.

⁹³ R Sieder, L Schjolden and A Angell "Introduction" in R Sieder, L Schjolden and A Angell (eds.) *The Judicialisation of Politics in Latin America* (Palgrave Macmillan New-York 2005) 1-17.

⁹⁴ Domingo note 4 *supra* at 28-40.

the ruling party.⁹⁵ The judiciary in Brazil has similarly stamped its imprint on decisions on matters of policy in the country's democratisation process. In view of the prominent position of the two countries as the largest in Latin America, analysts have expressed the view that it is necessary to take cognisance of judicial activities in accounts of 'politics and policy reform' in the region.⁹⁶

On the comparative front, the Constitutional Court of South Africa is unique. While similar courts elsewhere have been actively involved in shaping policy and governance in transitioning polities, it played a cardinal role in the constitutive process of transition from apartheid to popular democracy in the *rainbow* nation.⁹⁷ With a view to address the inverse concerns of the parties that negotiated the South Africa transition through an institutionalised and independent forum, the Constitutional Court was vested powers that 'had never before been imparted on any court.'⁹⁸ The Constitutional Court played an important role in the institutional design of a new nation by its thorough scrutiny and initial rejection of the proposed provisions of the permanent constitution for South Africa.⁹⁹ It rejected attempts at limiting judicial review while it insisted on adequate safeguards for separation of powers as well as structural and fiscal federalism.¹⁰⁰

The Constitutional Court further required the incorporation of international human rights standards in the new constitution and sought to maintain critical balance between majoritarian control and minority rights. It thus acted on the powers conferred on it by the Interim Constitution of South Africa, to ensure strict adherence to the principles agreed by the negotiating parties.¹⁰¹ Further, the decisions of the Constitutional Court on the Bill of Rights in the South-African constitution including those on economic and social rights as in *Grootboom*,¹⁰² have had significant impact on policy and governance in a country struggling to come to terms with a harrowing past for the majority and forge an inclusive, egalitarian future for all. The South Africa Constitutional Court has been noted for

⁹⁵ J Rios-Figueroa "Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994-2002 (2007) 49 (1) Latin American Politics and Society 31, 35-38.

⁹⁶ Rios-Figueroa and Taylor note 94 supra at 765.

⁹⁷ H Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge University Press Cambridge 2000).

⁹⁸ Isaacharoff note 13 supra at 1874.

⁹⁹ *In re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26; *Certification of the Amended Text of the Constitution of the Republic of South Africa* (1996) ZACC 24.

¹⁰⁰ Isaacharoff note 13 at 1878-1879.

¹⁰¹ *Ibid* at. 1879.

¹⁰² *Grootboom* note 56 supra.

holding a delicate balance between competing interests that could threaten the body politic.¹⁰³

If the Constitutional Court of South Africa has been unique in its functioning, the impact of the Supreme Constitutional Court of Egypt, on socio-economic and political issues in the country, broke away from the received wisdom on a central feature of judicialisation of politics. Established by an authoritarian regime, it challenged the theoretical position that a democratic dispensation is *sine qua non* for judicialisation of politics.¹⁰⁴ The authoritarian regime in Egypt established the constitutional court essentially with an economic, rather than a socio-political agenda. Confronted with economic depression at home, and international pressure from abroad, the government established the court to assure foreign investors of its commitment to economic liberalism and preservation of private property rights away from its historical record of nationalisation of private corporations and investments in the country. It hoped to achieve this through what would be regarded as an independent judicial review mechanism.¹⁰⁵

According to Moustafa, the Supreme Constitutional Court not only effectively assisted the government to push through its new liberalised economic vision through striking down socialist oriented legislations, it also provided an acceptable forum for the ventilation of hitherto repressed political opposition views. It has also played a key role in securing property and advancing political rights of individuals and groups,¹⁰⁶ with the latter especially, to the discomfiture (sometimes outright consternation) of its authoritarian creators. Despite its rather moderate activism,¹⁰⁷ its decisions opened up the space for the ventilation of opposition views on an institutional platform, with the court acting as an interface between state and society.¹⁰⁸ Its decisions on private property rights constituted a veritable outlet for policies desired by the government but from which it exercised considerable reticence in the apprehension of public outrage.¹⁰⁹

¹⁰³ Isaacharoff note 13 supra at 1893.

¹⁰⁴ T C Neal "Why the Expansion of Judicial Power" in N C Tate and Torbjorn Vallinder *The Global Expansion of Judicial Power* (New-York University Press New-York 1995) 28

¹⁰⁵ T Moustafa "Law versus the State: The Judicialisation of Politics in Egypt" (2003) 28 (4) *Law and Social Inquiry* 883, 895-896.

¹⁰⁶ Moustafa note 107 supra at 914-921.

¹⁰⁷ *Ibid.* at 903-907.

¹⁰⁸ *Ibid.* at 894-903.

¹⁰⁹ *Ibid.* at 908-913.

In testimony to the visible power of the Court over policy, the government later adopted various extra-legal measures to curb its progressive jurisprudence.¹¹⁰ Notwithstanding these measures, the Court impacted significantly on the course of governance in the country. It substantially established its position as an institution not only for economic liberalisation as conceived by its creators, but the choice institution of resort for political emancipation.¹¹¹

In summary, it can be fairly asserted that distrust for inherited, complicit, state institutions in transitioning polities, has played a significant role in the sometimes uncritical social approval of newly created ones. Constitutional courts, new institutions that they are, have arguably benefited immensely from what Teitel refers to as the ‘legitimacy of hope’ that surrounds institutions that offer fresh beginnings.¹¹² An important point offered by a nuanced approach to this comparative analysis is the connection between the establishment of new courts and institutional accountability for the exercise of power in the pre-transition period. Although the various societies examined above did not directly engage with accountability of the judiciary for past governance as advanced in this thesis, the creation of powerful new judicial bodies signifies, at the least, considerable dissatisfaction with the existing judicial bodies.

Thus, behind the creation of these new courts is the desire to break away from the perceived or actual complicit judiciaries and the need for securing the legitimacy of an important institution to participate in rebuilding the various societies. Nothing furnishes support for this view more than the commonly reported cold relationship between the old and the new courts and the public interest and (usually) acclaim the work of the latter have generated within a relatively short time. However, it is pertinent to reflect further on the assumption that a new judicial institution is the only viable approach to ensuring judicial promotion and protection of democratic tenets and the rule of law in transitioning polities. The absence of such courts in Nigeria’s transition offers an opportunity for such reflection.

6. A STILL-BORN CONSTITUTIONAL COURT: LEGACY OF A FAILED TRANSITION AND JUDICIARY

¹¹⁰ Ibid. at 914-926

¹¹¹ Ibid. at 926-927.

¹¹² Teitel note 76 supra at 246.

Unlike most of the democratic transitions in Latin America, South East Asia, Central and Eastern Europe, and elsewhere in Africa, the Nigerian transition to democracy did not lead to the establishment of a constitutional court. It is significant however that this was not due to the fact that the idea was never considered. It is remarkable that in 1995, General Sanni Abacha (the country's military ruler at the time), as part of his suspect transition to civil democratic rule programme, toyed with the idea of establishing a Constitutional Court in the country. He was perhaps learning from Egypt, particularly since Nigeria was then in a similar socio-political and economic situation both at the national and international levels that surrounded the establishment of the Supreme Constitutional Court of Egypt over a decade earlier.¹¹³

The dictator was conscious of public disenchantment with the discharge of the judicial function, especially with regard to important human rights and constitutional issues. Apart from the perceived failure of the judiciary, there was also the pariah status military authoritarianism finally earned the country under his jackboot-rule. He thus proposed the establishment of a constitutional court along the lines of the South African Constitutional Court. He went as far as presenting the country with draft legislation for the creation of the proposed court.

The Abacha regime's plan for a constitutional court in the country however drew considerable opposition from the judiciary and some respected legal practitioners who felt it was at best, a subterfuge to deflect growing discontent with its ultra-authoritarian bent. The preference in those quarters was for restoration of independence to the institution as then constituted and return to democratic governance. It was felt that these were the essential elements for the restitution of the rule of law and constitutionalism in the country. Protagonists of the position argued that, the failings of the judiciary derived basically from military authoritarianism. Only the exit of the military from governance would ensure judicial transformation. Or so went the argument.

There is some merit in the opposition to the idea of a constitutional court in Nigeria. Considering the uninspiring record of purported military transition initiatives in the country, the proposal may have been a ploy to foster support for Abacha's dubious political transition programme. But it is equally true that the idea of a constitutional court did attract considerable support from a spectrum of

¹¹³ T Moustafa *The Struggle for Constitutional Power: Law, Politics and Economic Development in Egypt* (Cambridge University Press Cambridge MA 2007).

the society. It was felt in some circles that such a court could provide a strong and legitimate forum for advancing human rights and moderating the political institutions in the exercise of their wide powers. The interest and support garnered by the proposal reinforces the growing recognition of the crucial role of courts in transitioning polities.

Whatever the merit of the opposing positions, the non-creation of a constitutional court is not sufficient to excuse judicial acquiescence to authoritarian rule and wide spread violations of human rights that took place during the period of authoritarian rule in the country. Rather, it can be argued that the non-establishment of a constitutional court to take on the important role of advancing human rights and transitional jurisprudence in the Nigerian context is particularly significant. It reinforces the normative argument for the imperative of accountability for the judiciary role in governance during the authoritarian period in the country as a requisite for future legitimacy of the judicial function in the polity.

If the dictator's plans to establish a constitutional court had succeeded, it would have significantly altered the non-centralised system of constitutional judicial review in Nigeria. Post-independence, all courts of superior records in theory, maintained a constitutional power of judicial review which is general in its application. 'In theory,' for it is a matter of historical interest that successive military regimes variously resisted judicial review of their *laws* and executive actions. In the post-authoritarian period in Nigeria, the exercise of the power of judicial review has taken centre-stage within the polity even in the absence of new courts. Whether there are new constitutional courts with wide powers or rehabilitated ones with rejuvenated powers of judicial review, the incidence of court packing constitutes a source of concern on the exercise of judicial power and its role in governance in the modern state.

7. COURT PACKING VERSUS JUDICIAL INDEPENDENCE

Constitutional law scholars have expressed concern about the implications of the power to appoint judges (usually) exercised by the executive. Apprehensions surrounding abuse of this power is captured in the constant refrain of 'court-packing,' in scholarly evaluations of the doctrine of judicial independence. Plainly stated, the oft-repeated concern is that a political authority, usually, a president or a governor, may utilise the opportunity of constitutionally vested powers to appoint cronies, or at least, sympathetic individuals, into judicial office,

principally the highest hierarchically. The aim is to secure predictable judicial outcomes in the event of constitutional challenge of their policies.

According to Hirschl, hegemonic political elites, seeking to obtain advantage or security in new democratic settings through the judicialisation of politics, contend with the dilemma of judicial empowerment.¹¹⁴ He similarly identifies the opportunity to exercise ‘general control’ over the processes of legal education and appointment of judicial officers as key predisposing factors to judicialisation of politics.¹¹⁵ These are serious concerns.

No doubt, fears regarding abuse of appointive powers of the executive have in some cases been borne out by the experience in liberal and illiberal democracies, and more so in authoritarian societies at one time or the other. But, while ‘court-packing’ remains a threat to the decisional independence of judges, empirical evidence of its impact on conduct of the judicial function remains inconclusive and mixed at best. The Nigerian experience furnishes a remarkable example. Court-packing as a measure of executive interference with the judicial function, features in a rather subtle, albeit potent, manner in the Nigerian judicial system. This was peculiarly true of the appointment of judges during the decades of authoritarian military rule.

The manifestation of executive interference with judicial independence at the time can be traced to the peculiar workings of military rule. The (theoretically) federal polity was mostly administered in a unitary fashion, a phenomenon that has generated inter-governmental tension in the post-authoritarian period. Notwithstanding the operation of a dual federal and state court system, the court system remains devoid of the structural parallelism characteristic of judiciaries in some other federal jurisdictions like the United States. The appellate jurisdiction is a purely federal affair. Appeals from both the federal high and state high courts proceed to the (federal) Court of Appeal and onwards to the (federal) Supreme Court. In terms of composition of the courts, judges were (and are still) usually appointed (promoted) from the federal and state high courts to the appellate courts by the Head of State (or president). This practice has assumed conventional status without constitutional or statutory moorings.

During the period of authoritarian military rule, appointments to the state judiciaries were made by state military administrators and at the federal level, by

¹¹⁴ Hirschl note 2 supra at 480-481.

¹¹⁵ Ibid. at 478.

the Head of State notionally on the recommendation (sometimes advice) of the appropriate judicial commission. The nomenclature of the commissions was typically, 'Judicial Service Commissions' with the implicit assertion of their independence and power in the judicial appointment process. Depending on the respective regime however, they were also more candidly styled 'Advisory Judicial Committee,' making clear just how much respect the military had for any indication of judicial independence or liberalism in the important task of constituting a prospective contender for power in the polity. The latter creation was specific to the federal judiciary under the regime of General Sanni Abacha.

Beyond nomenclature, judicial appointments were, in practice, at the discretion and control of the respective military ruler. Predictably, it was abused. At the 'entry' point into the superior courts system, the high courts, judges were appointed largely from the office of the respective Attorneys General, federal or state. Civil servants-turned-judges, trained in the bureaucratic tradition of deference to superiors, constituted the face of 'court-packing' in the appointment of judges in Nigeria. Court of Appeal justices are then appointed from the ranks of High Court judges. In turn, the Supreme Court justices are appointed from the Court of Appeal.

The tradition of appointing mainly civil servants from the executive branch of government (state law offices), attuned to an instrumentalist view of the rule of law, substantially influenced the dispensation of justice by the courts in the period of authoritarian rule.¹¹⁶ A 2006 study commissioned by the United States Agency for International Development (USAID) indicates that this attitude has persisted in the post-authoritarian period.¹¹⁷

It is reasonable to infer that the appointive tradition in the context of military regimes, arguably a subtle and incipient mode of court-packing, was a key factor in the judicial legitimisation of authoritarian rule in the country discussed earlier.¹¹⁸ The ambivalence that characterised judicial output, in the immediate years of the post-authoritarian transition in the country, as discussed in Chapter Four,¹¹⁹ can also be partly attributed to this style of court-packing. It is reminiscent of the instance in the hey-day of military rule, where a Chief Judge of

¹¹⁶ A caveat is in order here namely that some of the finest judicial officers in the country have been appointed from the ranks of law-officers.

¹¹⁷ ARD Inc. *Democracy and Governance Assessment of Nigeria* (USAID) 12 and 28 available at http://pdf.usaid.gov/pdf_docs/PNADI079.pdf

¹¹⁸ On this aspect of judicialism in Nigeria, see Yusuf note 1 supra.

¹¹⁹ See also H O Yusuf "The Judiciary and Constitutionalism in Transitions: A Critique" (2007) (1) *Global Jurist* (Advances Article) 1.

a state in open court, declared that the state military administrator, who was the defendant (in his official capacity) in a case before him was akin to a *Kabiyesi*.¹²⁰

The marked turnaround and institutional independence lately discernible in the jurisprudence of the Nigerian Supreme Court (discussed in Chapter Six) presents a remarkable instance of the sometimes unpredictable results that may attend court-packing, notably in a transitional context. One of the least mentioned aspects of the Obasanjo administration in Nigeria¹²¹ in relation to the judiciary is that it has an unprecedented record of appointments to the Supreme Court. Of the 16 justices now on the bench of the court, President Olusegun Obasanjo, through the incidence of expired judicial terms,¹²² appointed 12 to succeed retired justices. The country's first (and yet only) female Supreme Court justice, is included in that number.

Ultimately, as the various legal battles involving the federal government in the Obasanjo era demonstrated, the Supreme Court was highly involved in very political cases concerning the federal executive, headed by President Obasanjo. Cases went before the Supreme Court either as a court of original jurisdiction in disputes between the federation and the states, or as a court of last resort in final appeals. In view of the varying complexities involved in individual cases, it may be rather simplistic to assert that the composition of the Court in this way substantially influenced its decisions one way or the other. The sheer number of the cases involved would require rather extensive empirical case-by case analysis, outside the purview of this study to make precise and definitive claims on this aspect of the matter.

What is certain is the fact that on the whole, the federal government lost more cases than it won in that dispensation, usually with serious implications for the political and policy decisions of the federal executive under the leadership of the president. It is thus fairly safe to say that the impact of the opportunity for the administration to appoint a large number of justices in Nigeria's post-authoritarian transition has not been a decisive factor on the adjudicatory preferences of the

¹²⁰ King in Yoruba language, a major ethnic identity in Nigeria. Literally, it means 'a person of unquestionable authority.' The implication of the allusion is clear; the governor, like a regal monarch, can do no wrong.

¹²¹ May 29 1999 to May 29 2007. This was the first civil administration in the country that governed through the eight-year constitutional limit in the country.

¹²² Justices of the Court of Appeal and Supreme Court can optionally retire at 65 but must do so on their 70th birthday.

Supreme Court. This is then an instance that hardly bears out the trepidation on the power of the political branch to appoint judges.

Indeed, a regrettable result of the judicialisation of inter-governmental disputes was the resistance of President Obasanjo to implement a good number of the judgements of the Supreme Court against the federal government. Consequently, his administration came to gain notoriety for its intransigence to implementing judicial decisions not in tandem with his wishes and this disregard for the rule of law led to substantial loss of valuable political capital by the federal government. Obasanjo's successor, President Umar Musa Yar'Adua, acutely aware of the prevailing discontent with the brazen disregard of the Obasanjo administration for enforcing unpalatable judgements, has not spared any effort to adumbrate his respect for the rule of law, especially with regard to complying with judicial decisions.¹²³

Whether the new President's proclaimed and (and so far relatively) demonstrated respect for the rule of law in this way is genuine, or a subterfuge to obtain legitimacy for his government in the light of the seriously flawed electoral process that brought him to power, is not clear. What is certain is that his position on prompt compliance with judicial decisions has reflected quite positively on his administration. This development reinforces the position that judicialisation of politics, notably in the 'new constitutionalism',¹²⁴ is driven and maintained by a matrix that includes (but by no means limited to) a political setting that is conducive.¹²⁵ By new constitutionalism is meant the increased incidence of constitutionalisation of human rights and governance issues particularly in transitional contexts leading to the emergence of more powerful judiciaries. This is partly due to the adoption of new constitutions or constitutional reforms which provide for a range of rights and extensive powers of judiciary review.¹²⁶

¹²³ L Akande "Yar'Adua Canvasses Rule of Law on Etteh, Others- Raises Hope on Niger Delta" *The Guardian* Online Edition (Lagos Saturday 29 September 2007); M Onuorah and L Ughebe "Sweet Victory for Governor Peter Obi- To Remain in Office till 2010, Supreme Court Sacks Uba, Yar'Adua Pledges to Obey Verdict" *The Guardian* Online Edition (Lagos Friday June 15 2007).

¹²⁴ S Roesler "Permutations of Judicial Power: The New Constitutionalism and the Expansion of Judicial Authority" (2007) 32 (2) *Law & Social Inquiry* 545, 553, 560 and Hirschl note 2 supra.

¹²⁵ Hirschl note 2 supra at 482.

¹²⁶ Hirschl uses this term often but like most others, he does not clearly define its meaning. See for example Hirschl note 2 supra, R Hirschl "Resituating the Judicialisation of Politics: *Bush v Gore* as a Global Trend" (2002) 15 (2) *Canadian Journal of Law and Jurisprudence* 191, R Hirschl *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press Cambridge Massachusetts 2004), R Hirschl "The New Constitutionalism and the Judicialisation of Pure Politics Worldwide" (2006) 75 (2) *Fordham Law Review* 721 and R Hirschl "The Judicialization of Politics and the Rise of Political Courts" (2008) 11 *Annual Review of Political Science* 93.

According to Hirschl, ‘judicial empowerment’ presents a ‘dilemma’ to political elites.¹²⁷ They desire to deflect criticism from themselves and probably secure or strengthen their legitimacy through the process of judicialisation of political issues. But importantly too, they harbour the hope that courts will reflect or promote their ideological preferences in the process. The judiciary, he asserts, does not disappoint the political class in this regard. In deliberations on overly political issues, judges, he claims, tend to subscribe to ‘prevalent worldviews, national meta-narratives, and the interests of influential elites.’¹²⁸

Hirschl’s analysis draws on the readiness of courts to utilise judicial review for upholding political and civil rights, while maintaining a lukewarm (and sometimes even regressive) jurisprudence towards rights claims in the nature of social and economic rights and empowerment of the underprivileged in society, despite the constitutionalisation of those rights. While Hirschl’s views appear to be attractive propositions, it is useful to unpack them a bit in the light of the Nigerian transition experience of judicial activism in transition to assess their persuasiveness in this context.

First, the propositions are rather too sweeping in their reach. That courts may be influenced by the social realities of their environment may not necessarily be objectionable. It does not have to be regarded as pandering to the political elite, unless of course judicial decisions or even a particular decision is clearly perverse. A contrary approach can only imperil the relevance of judicial power as a whole and judicial review of political action especially.

Second, one can take issue with the assumption of determinability and commonality of elitist interests implicit in Hirschl’s position. It is difficult, if not impossible, to conceive the convergence of elitist interests in a fragmented society like Nigeria, where the elite thrive on divisiveness and habitual resort to primordial sentiments to secure and preserve their hold on power.¹²⁹ The political elite commonly appeal to ethnic, religious and other sectional allegiances to secure and maintain their hold on power as well as shield themselves from public accountability in governance. Thus, it is perhaps more accurate to assert the non-existence of any previous shared narratives in the country’s experience of

¹²⁷ Hirschl note 2 supra at 480.

¹²⁸ Hirschl note 2 supra at 481.

¹²⁹ P M Lewis *Growing Apart - Oil, Politics and Economic Change in Indonesia and Nigeria* (University of Michigan Press Ann Arbor 2007) 245-255.

statehood. It will be recalled that in Chapter Three, this latter point was earlier discussed in relation to identifying a basis for accountability of the judiciary.

Consequently, it is not easy to articulate to any reasonable degree of precision, what is to be regarded as 'interests of influential elites' as the different groups and even individual members of the ruling elite, economic or political (or even both) are constantly involved in contests for socio-economic and political control. Though driven by a common motivation of securing a hold on power, the means required to achieve their objectives are hardly shared. Similarly the nature of the (usually parochial) interests at stake is predictably divergent. In view of the complexity of the political contestations among the elite in Nigeria, the proposition that judicial decisions can satisfy or accord with divergent and sometimes, unwieldy interests of a class whose members are in constant struggles for ascendance and advantage over one another is, to say the least, problematic.

CONCLUSION

All around the world, and especially in transitional societies, the judiciary is on the march of power. Judicialisation of hitherto conventional and sometimes, constitutionally entrenched exclusive zones of the political branches have witnessed decisive incursions from the judicial branch. The judicial force has shown no visible signals of dissipation, much less abatement. A gentle breeze, in all probability, is all that is required to blow into oblivion, the famous 'weakest branch' sticker, legal and political theorists have, for so long, hung on the walls of the judiciary.

The immense powers wielded by the judiciary over key policy aspects of governance, especially in the contemporary new constitutionalism, strongly advises closer and more systematised scrutiny of the judicial function. This is even more pertinent in transitioning polities contending with what can be regarded as reinvented centres of power, while simultaneously responding to the establishment of new judicial institutions which predictably attract considerable support from various publics.

In democratising and established liberal democratic societies alike, protestations of deficient democratic credentials have surprisingly been ineffectual in curbing the geometric increase in, and sometimes preference for, judicial determination and control of public policy as well as highly political and moral questions. If anything, it seems to fuel it.

The impact of the judicial role in transitioning polities, from Central and Eastern Europe through to South East Asia, Latin America and Africa, briefly outlined above, commends the view that it is critical to the democratisation process that the judiciary be adequately positioned for the transition from an authoritarian past. It is only then that it can be expected to take on the serious challenges of definitive, purposeful judicial governance required for strengthening the democratising or transitional polity.

In the diverse regional experiences evaluated in this chapter, newly established constitutional courts have played (and mostly continue to play) the role of the *guardian angel of democracy*. In other words, the courts, through judicial activism, are securing the core values of the constitution, promoting democratic aspirations of the people and securing human rights. While the exception in Egypt supports the need for rethinking assumptions on the right political circumstance for viability of judicial activism in governance, it nonetheless reinforces the undeniably growing powers of judiciaries all around the world. The framework outlined in this chapter provides a template on which to conduct an evaluation of the judicialisation of politics in the context of the Nigerian transition to civil and democratic rule.

Chapter Six
COURTS TO THE RESCUE? THE JUDICIALISATION OF POLITICS IN
NIGERIA

INTRODUCTION

Nigeria's political transition from three decades of authoritarian military rule to democracy constitutes a momentous aspect of the country's political history. It is of moment for instance, that the country has witnessed its longest experience of civil 'democratic' rule in its post-colonial history from the culmination of the handover of power by the military on 29 May 1999 till date, after a series of aborted political transition programmes launched by successive military regimes at various times during the period of authoritarian rule.

Equally epochal is the 2007 general elections in the country. It marked the first successful 'civil-civil' political transition. By the civil-civil transition is meant the transfer of power from one elected government to another devoid of military intervention in governance. Recognition of the salience of the elections is of course without prejudice to the fact that they have turned out to be the most contested in the country's chequered electoral history. The widespread contestations are no doubt a fall-out of the very suspect democratic credentials of the elections. The level of concomitant judicialisation of politics electoral contestations have engendered, has contributed in no small measure to the exceptional expansion of judicial power and its impact on governance in Nigeria, examined in this chapter.

However, by far the most remarkable feature of the transition from military authoritarianism is the judicialisation of 'pure politics,'¹ leading to the phenomenal rise of judicial power in the country's transition experience in the post 2003 period. In this regard, one of Hirschl's classifications of the multi-dimensional facets of judicialisation of politics is relevant. He observes that the judicialisation of 'mega-politics' (or pure politics), as a type of judicialised politics, manifests in various forms. The manifestation of judicialisation of pure politics includes judicial monitoring of policies in economic planning, national security and other prerogatives of executive power under the rubric of the 'political question.' Others relate to restorative justice measures, regime transformation and legitimation, as well as collective, fundamental existential and

¹ R Hirschl "The New Constitutionalism and the Judicialisation of Pure Politics Worldwide" (2006) 75 (2) Fordham Law Review 721.

identity questions of statehood. He further identifies in this category, the judicialisation of democratic electoral processes.²

In the Nigerian experience, judicialised politics³ has involved virtually every aspect of governance described above by Hirschl. The judicialisation of the process of democratisation, power contestation among the political elite, inter-governmental policy and legislation issues, have all had profound impact on politics and governance. ‘Judicialisation of this type,’ Hirschl further observes, has resulted in the judiciary adjudicating and deciding ‘watershed political questions’ not expressly provided for in the constitutions of the respective countries.⁴ Our earlier discussion in Chapter Five has shown there is ample evidence in the literature that the phenomenon has become widespread across the spectrum of advanced, liberal, young and aspiring democratic polities alike.⁵ We also recall that even authoritarian societies are no longer completely left out from the incidence of the phenomenon.⁶

Critical evaluation of the phenomenon in Nigeria highlights public as well as institutional responses to the judicialisation of politics as it takes centre-stage in the country’s transition to democratic rule, after decades of authoritarian rule. The Nigerian experience, it is argued, provides contextual foundation for suggesting the need for more attention by legal theorists to the relevance of public opinion in theoretical analyses of the judicial function. Such closer attention, it is contended, can only enrich the legal academy.

Significantly, there is a shift in the judicial approach at the apex of the system (considered here) to the resolution of disputes, particularly political ones, in the period under examination. This represents a relatively marked departure from the initial reticent and ambivalent judicial attitude to the political transition in the

² Ibid. at 727.

³ In this chapter, I use the terms ‘judicialisation of politics’ and ‘judicialised politics’ interchangeably.

⁴ Hirschl note 1 supra at 728.

⁵ See for example J Ferejohn “Judicializing Politics, Politicizing Law” (2002) 65 *Law and Contemporary Problems* 41, 43-44, T Ginsburg *Judicial Review in New Democracies* (Cambridge University Press Cambridge 2003), C N Tate “Why the Expansion of Judicial Power” in C N Tate and T Vallinder *The Global Expansion of Judicial Power* (New-York University Press New-York 1995) 28; R G Teitel “Post-Communist Constitutionalism: A Transitional Perspective” (1995) 26 (1) *Columbia Human Rights Law Review* 167; J Priban *Dissidents of Law* (Ashgate Dartmouth Hampshire 2002); W Sadurski *Rights Before Courts: A Study of Constitutional Courts in Post Communist States of Central and Eastern Europe* (Springer Dordrecht 2005); T Ginsburg and G Ganzorig “When Courts and Politics Collide: Mongolia’s Constitutional Crisis” (2000-2001) 14 (2) *Columbia Journal of Asian Law* 309; H Klug *Constituting Democracy: Law, Globalism and South Africa’s Political Reconstruction* (Cambridge University Press Cambridge 2000).

⁶ T Moustafa *The Struggle for Constitutional Power: Law, Politics and Economic Development in Egypt* (Cambridge University Press Cambridge MA 2007).

country discussed in Chapter Four. The chapter concludes that the attempt to rescue a troubled transition can be a very challenging and potentially integrity-eroding task for an untransformed judiciary with an unaccounted past.

2. DEMOCRATIC TRANSITION AND JUDICIALISATION OF POLITICS IN NIGERIA

It is significant that in a recent restatement of his objections to ‘strong’ forms of judicial review (discursively the precursor of judicialisation of politics) Waldron concludes on contingent and exceptionalist premises. He recognised that certain ‘pathologies’ which include ‘dysfunctional legislative institutions’ and ‘corrupt political culture’ could constitute attenuating justifications for judicial review.⁷ One can go on to extend this situational exceptionalism as valid, if not inevitable, justification for judicialisation of politics in transitioning societies.

Purist protestations notwithstanding, Waldron’s position here aligns with Teitel’s proposition that the extra-ordinary circumstances that usually characterise transitions conduce to ‘hyperpoliticized adjudication.’⁸ A substantive premise for this is that in such societies the institutional memory of the political branches has been weak largely as a result of the lack of opportunity to evolve into maturity or at least develop steadily due to intervention of the military or other forms of imposition of authoritarian rule. This is the experience in Nigeria where the military intervened barely five and a half years after independence. In other cases it may have been virtually obliterated as a result of high level conflict.

Hirschl has identified four key dimensions of judicial intervention in contemporary constitutionalism that delineates the course of judicialisation of politics around the world. These are namely in the area of ‘core executive prerogatives;’ ‘foundational “nation-building” processes;’ ‘fundamental restorative justice dilemmas;’ and ‘political transformation, regime change, and electoral disputes.’⁹ I argue in this section that critical evaluation of the democratic transition in Nigeria strongly suggests close affinity with Hirschl’s foregoing articulation of the directionality of judicial intervention in politics.

2.1 The Judiciary in Institutional Reconstruction

⁷ J Waldron “The Core of the Case against Judicial Review” (2006) 115 *Yale Law Journal* 1346, 1406.

⁸ Ruti G Teitel, “Transitional Jurisprudence: The Role of Law in Political Transformation” *Yale Law Journal* 106 (7) (1996-7): 2035.

⁹ R Hirschl “Resituating the Judicialisation of Politics: *Bush v Gore* as a Global Trend” (2002) 15 (2) *Canadian Journal of Law and Jurisprudence* 191, 192.

After more than four and half decades of its post-colonial existence, Nigeria remains one of a number of ‘divided societies.’¹⁰ In such societies, ‘constitutional design’ plays an important role in forging a ‘common political identity.’¹¹ The reality of the fractious nature of the Nigerian state commends the need for institutional redesign that would facilitate the establishment of a cohesive society, utilising the much elusive *transition moment*. Thus, the judiciary, especially in the exercise of its powers of judicial review, has a pivotal role in the task of nation-building in societies recovering from the vagaries of violent conflict or military authoritarian rule.

Hirschl has argued that most instances of judicialisation of politics in new constitutionalism countries (transitioning polities) are propelled by the actions of ‘hegemonic’ groups apprehensive of losing out in the power game. His argument appeals to the idea that while a number of variables foster judicial activism and thus, judicialisation of politics, a political setting that is conducive to it is the decisive factor. In Chapter Five, I have tried to show how several other factors and forces are involved that suggest a complexity that this description does not capture. However, one feature worth pursuing at this point is that of a predisposing political environment.

The predisposing and conducive political environment for judicialised politics in Nigeria was provided in part by the enigmatic prevalence of democratically elected but authoritarian executive presidency. The phenomenon, referred to by Premeh as the ‘imperial presidency,’¹² which has continued to plague African countries, despite the ‘new wave’ democratic transition, found extensive expression in Nigeria between 1999 and 2007. It has led to an unprecedented incidence of judicialisation of politics in the country. It is significant to note that the trend towards judicialisation of politics has yet to abate. Additional fodder for the phenomenon has been provided by the seriously flawed electoral process that hallmarked the country’s epoch-making ‘civil-civil’ transition.

In this regard, the 2007 elections in Nigeria brought out in sharp relief, just how critical the role of the judiciary could be in transitioning societies. The controversial electoral process has led to numerous litigations on the part of those

¹⁰ S Choudry “Editor’s Note ‘Constitutionalism in Divided Societies’” (2007) 5 (4) *International Journal of Constitutional Law* 573.

¹¹ *Ibid.* at 574.

¹² H K Premeh “Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa” (2007) SSRN Working Papers Series available at: <http://ssrn.com/abstract=1015369> (last accessed 11 February 2008).

who felt handed the short end of the stick. Many observers, local and international called for wholesale cancellation of the elections. Others urged recourse to the judiciary for the resolution of the disputations arising from it. The option of recourse to the judicial process, as would be extensively discussed later in this chapter, was largely preferred by political players in the country. The International Crisis Group brought the relevance of the expected judicial role in to focus when it noted that

Nigeria's democracy has derailed. The April 2007 general elections were supposed to consolidate the country's evolution as a democracy, facilitate the peaceful resolution of its many internal conflicts and bolster its stature as a leading peacemaker and peacekeeper in Africa. Instead, the conduct and outcome deepened long-running political crises, pushed the country further down the road to failure as a democratic state...*The first step to defuse the tensions stirred by the elections is to pursue electoral justice through the judicial tribunals provided for in the Electoral Act. This will not be sufficient to restore government credibility but is essential to give a clear sign of willingness to redress the irregularities of the process.*¹³

An untransformed judiciary will most likely fall short of the crucial mediating role expected of it in a democratic crisis of the nature that confronted Nigeria at the end of the April 2007 elections in the country (or any other) in a period of transition.

The Nigerian situation is further compounded by the view held by some respected individuals and groups (including the most renowned constitutional lawyer as well the country's only Nobel Laureate) that the only viable solution to the flawed process is a complete nullification of the elections. Proponents of this position advocate a political rather than legal resolution of the debacle. They argue that a number of factors would incapacitate the courts from dispensing justice on the electoral petitions.¹⁴

The judiciary is no doubt acutely aware of the demanding situation. Perhaps nothing better reflects the awareness than the public statement of Justice James Ogebe, (then) Justice of Appeal, and Chairman of the Presidential Elections Tribunal sitting over several petitions for the annulment of the President Yar'Adua's election at the 2007 general elections. While appealing to judicial

¹³ International Crisis Group *Nigeria: Failed Elections; Failed State?* Africa Report No. 126- 30th May 2007 (Emphasis mine).

¹⁴ C Ndujihe "The Patriots Opposes May 29 Hand-Over" *The Guardian* Online Edition (Lagos Saturday 26 May 2007). The position is not without some international support. See for instance "EU Parliament Wants Aid to Nigeria Stopped until Fresh Polls" *The Guardian* Online Edition (Lagos Saturday 26 May 2007).

support staff on strike for better pay and conditions of service to call off the strike to enable the tribunal to conclude its work expeditiously, he said

The government is unstable now. You know that they have not been able to do many things because of this case, and they will not be able until they know their fate, so the longer it takes, the longer your matter will linger. So, if we finish the case, they will know where they stand, and will then be able to tackle many of the issues.¹⁵

One can conveniently cite over a dozen remarkable cases of judicialisation of politics in the country in the context of the democratic transition at the inter-governmental level.¹⁶ A fairly topical representative survey would include *Attorney General of the Federation v Attorney General of Abia and 35 Ors*¹⁷ dealing with disputed claims between the federal and littoral States for oil resources derivable from the continental shelf of the country. *Attorney General of Ondo State v Attorney General of the Federation & 35 Ors* (the ICPC Case)¹⁸ dealing with the establishment of a monolith anti-corruption agency in the federation; *Attorney General of the Federation v Attorney General of Abia and 35 Ors* (No.2)¹⁹ and *Attorney General of Ogun State v Attorney General of the Federation*²⁰ both dealing (again) with fiscal federalism and allegations of illegal withholding of funds by the Federal government.

*Attorney General of Lagos State v Attorney General of the Federation*²¹ centred on disputations over the propriety of inherited military legislation that confers ultimate planning powers on the federal government, possessed only of complete geo-political control over the federal capital territory. All the states of the federation challenged the constitutionality of certain sections of the Electoral Act (promulgated by the National Assembly), in as much as it sought to make provisions for elections into local (government) authorities in *Attorney General of Abia and 35 Ors v Attorney General of the Federation*.²²

The disputations on the appropriate spheres of power and control in the country between the federal government on one hand, and the states on the other, were frequent. In the result, there was a seeming endless recourse to the judiciary for resolution. Customisation of this approach to governance and the extensive

¹⁵ I Amaechi "Cost of Obasanjo's Betrayal" *Daily Independent Online Edition* (Lagos Tuesday 12 February 2008)

¹⁶ And that number is by no means exhaustive of this line of cases.

¹⁷ (2002) 4 SC Pt I, 1.

¹⁸ (2002) 6 S.C. Pt I, 1.

¹⁹ (2002) NWLR 542 S.C.

²⁰ (2002) 12 SC Pt II, 1.

²¹ (2003) 6 SC Pt I, 24.

²² (2003) 3 SC 106.

judicialisation of politics it generated attracted judicial notice and obiter dicta of the Supreme Court, the judicial venue for their resolution.

In one of the later cases, *Attorney General of Abia & 2 Ors v Attorney General of the Federation & 33 Ors*²³ the Supreme Court observed that it was ‘yet another open quarrel between the State and Federal Government’ with which the Court had become ‘thoroughly familiar.’²⁴ The Court noted that the cases revolved around federalism and unitarism from the constitutional and political stand-point. This is not surprising given the context of the country’s un-negotiated transition. The transition away from military authoritarianism has forced to the centre stage of governance, tensions arising from the country’s *de jure* federal status that has witnessed a transformation to a *de facto* unitary state. Inherent tensions between the two leanings were accentuated by a government at the centre, headed by a former military ruler who, despite his internationally recognised status as a dictator-turned-democrat, ‘defender of democracy,’²⁵ and African statesman, relapsed into entrenched authoritarian understandings of the rule of law and governance in the country.²⁶

The conduct of governance at the centre in its interactions with the states and the tension it has generated is a stark reminder of the rather problematic operation of federalism in Nigeria in particular and Africa in general.²⁷ As Adamolekun and Kincaid have noted, this derives not so much from the inadequacies of federalism, as from the botched attempts at democratic governance that has plagued post-colonial Africa.²⁸

The legal contestations which have arisen from the foregoing state of affairs reflect the judicialisation of politics through the mechanism of ‘structural judicial review.’ It is defined by Stone as the process, in federal polities with written constitutions, whereby judges interpret and enforce constitutional provisions that relate to the basic structure of government.²⁹ They can be considered as arising

²³ (2006) 7 NILR 71, 1

²⁴ *Ibid.* at 2.

²⁵ N Onishi “Man in the News; Nigerian Question: Olusegun Obasanjo” *The New York Times* Online Edition (New York 22 March 1999).

²⁶ On this see generally, P C Aka “Nigeria since May 1999: Understanding the Paradox of Civil Rule and Human Rights Violations under President Obasanjo” (2003) 4 *San Diego International Journal of Law* 209 and P M Lewis *Growing Apart- Oil, Politics and Economic Change in Indonesia and Nigeria* (University of Michigan Press Ann Arbor 2007) 247.

²⁷ L Adamolekun and J Kincaid “The Federal Solution: Assessment and Prognosis for Nigeria and Africa” (1991) 21 (4) *Publius: The Journal of Federalism* 173

²⁸ *Ibid.* at 174.

²⁹ A Stone “Judicial Review without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review” (2008) 28 (1) *Oxford Journal of Legal Studies* 1, 2.

from the intersection of Stone's structural and rights provisions³⁰ in the Nigerian Constitution. This aspect of judicialisation of politics is no doubt very important in the Nigerian experience of the phenomenon.

However, our analytical focus here will be directed at another line of cases. They share the critical element of judicialisation of highly political issues with the foregoing, but with the crucial addition of their engagement with the rights of individuals in the democratisation process as they intersect with wider issues of socio-political rights and governance in the polity. This analytical preference provides opportunity for a more robust engagement with and reflection on the dimensions and nature of judicialisation of politics in the Nigerian transition.

2.2 The *Ladoja* Case: The Godfather versus the People

2.2.1 *The Socio-Political Background*

The incidence of 'Godfatherism,' and here, I borrow a term that has become commonplace in political parlance in Nigeria, has been a major source of corruption with grave consequences for the delivery of basic infrastructure, social and economic facilities and services in the country.³¹ The trend is traceable to a culture of predation in governance instituted by successive military administrations and taken to new heights by the Babangida and Abacha regimes in the middle 80's to the later part of the 90's.³²

The concept of the 'Godfather' in Nigerian politics, refers to the situation where an individual, usually deriving from his privileged financial position, initiates and or 'bankrolls' the candidature of another for elective office. In *quid pro quo*, the latter, when he gets into office is beholden to the godfather, who naturally claims a stake in the appointments and dispensation of patronages of the public officer. Public resentment of the phenomenon is high and the general opinion in the country is decidedly in favour of ridding the political system of it. For instance, a recent survey on what the demise of a number of prominent 'Godfathers' in a section of the country portended for democracy found that it would enhance democratic consolidation in the polity.³³

³⁰ Ibid. at 3-5.

³¹ Human Rights Watch *Criminal Politics: Violence, "Godfathers" and Corruption in Nigeria* (2007) Volume 19 No 16 available at: <http://hrw.org/reports/2007/nigeria1007/nigeria1007web.pdf> (2nd January 2008).

³² Lewis note 26 supra at 238-245.

³³ Independent Opinion Poll "The Demise of Some Top Yoruba's Political 'Godfathers' in Recent Time, Do You Consider this an Enhancement or a Hindrance to Democratic Consolidation in Western Nigeria?" *Daily Independent* (Lagos Tuesday 17 June 2008).

Godfatherism thrived in many parts of the country during the initial civil governance period that ran from 1999 to 2003. Despite public condemnation, it has abided in various degrees.³⁴ However, the public outcry against it has, even if to a limited extent, emboldened some elected officers to throw off the yoke of their godfathers presumably to deliver on their mandates to the public.

2.2.2. *Neither Impeachment nor Removal*

In 2005, the malaise of Godfatherism in national life and governance came to the fore in Oyo State.³⁵ The course of events that followed resulted in *Hon. Muyiwa Inakoju & 17 Ors v Hon. Abraham Adeolu Adeleke & 3Ors* (the *Ladoja Case*).³⁶ The Executive Governor, Senator Rasheed Ladoja, fell out of favour with his self-acclaimed godfather, Chief Lamidi Adedibu.³⁷ The grouse of the godfather, who had barely rested his famed military apologist stance during decades of military authoritarianism in the country,³⁸ was typical. Following his election in 2003, Governor Ladoja had failed to allow him dictate appointments of key officials of his cabinet. Two years on, and midway into the four-year tenure, Adedibu was not enjoying the measure of patronage he reckoned his position as political godfather of the governor entitled him. He publicly declared he would make the state ungovernable for his (now estranged) protégé.

He made good his threat and the perceived loyalists of the Governor, including the Speaker of the House of Assembly, the Deputy Speaker, 1st and 2nd Plaintiffs/Respondents (Respondents) and their families suffered physical attacks linked to the hatchet-men of Adedibu.³⁹ Not satisfied with the unyielding stance of Governor Ladoja, Adedibu instigated the Defendants/Appellants (Appellants), 18 of the 32 state legislators, to *impeach*⁴⁰ the Governor.⁴¹ In a purported parliamentary session held by the Appellants on 13 December 2005 at a hotel in

³⁴ Human Rights Watch note 31 supra at 5, 33-35.

³⁵ In the South West of Nigeria and one of the country's 36.

³⁶ [2007] 4 NWLR pt. 1025, 423 and (2007) 1 NILR 121 available at:

<http://www.nigeria-law.org/LawReporting2007.htm> (25 December 2007). References are to the latter report based on accessibility considerations.

³⁷ He died on 11 June 2008. He was reputed to have converted the state in to his 'personal republic,' having personally handpicked all the current elected officials from his party in the state. See for instance O Nnana "Adedibu's Own Empire?" *Vanguard Online* (Lagos Thursday 18 October 2007). This may sound farfetched but is quite realistic in the chequered democratic experience in Nigeria.

³⁸ M John "On Adedibu and His Boy, Dimeji Bankole" *Daily Independent Online Edition* (Lagos Tuesday 18 February 2008).

³⁹ See for instance "Shoot-out in Oyo Assembly, Lawmaker Stabbed" *Daily Independent* (14 December 2005).

⁴⁰ This term was extensively employed by the parties as well as the courts of first instance and appeal but as will be made clear below in the lead judgement of the Supreme Court, the constitution provides for removal. A clear case of inappropriate adoption of American constitutionalism no doubt.

⁴¹ Human Rights Watch note 31 supra 54-62.

the state capital, they suspended the procedural Rules of the House of Assembly. They subsequently passed a motion on 22nd December 2005 for the investigation of allegations against Governor Ladoja. These actions were taken without following the procedure stipulated by the Constitution. The Appellants subsequently swore in the Deputy Governor having purported to remove Governor Ladoja, 4th Defendant/Respondent.

2.2.3. Courts and the Political Question

The trial high court rejected the complaint of the 1st- 3rd Respondents that Governor Ladoja (who at that point was not party to the suit) be reinstated. It held that impeachment was ‘a purely political matter’ over which the constitution granted exclusive powers to the legislature as part of its internal affairs. Impeachment proceedings were not justiciable. According to the court, the jurisdiction of the judiciary over such proceedings was ousted by section 188 of the Nigerian Constitution of 1999. The Respondent appealed.⁴²

The Court of Appeal overturned the decision and its judgement was affirmed by the Supreme Court on a further appeal by the Appellants. The Supreme Court was provided with the first opportunity to pronounce on the ‘troublesome area of law’⁴³ on the removal of governors in Nigeria’s jurisprudence. Like the Court of Appeal, the Supreme Court faulted the action of the ‘Group of 18 legislators’ (Appellants) for non-compliance with the laid down procedures for instituting proceedings to remove Governor Ladoja, who had by then joined the suit as an interested party. It declared his purported removal referred to as ‘impeachment’ by the parties and lower courts, a nullity. It clarified that the former rather than the latter term was the language of the constitutional provisions on the matter.

The Supreme Court affirmed that the power of judicial review vested in the courts by section 6 (6) (b) of the Constitution (contrary to the holding of the trial court), extended to determining whether a body vested with the exercise of an exclusive power acted in accordance with the law conferring such power. The Court was definitive that the legislature (in this case, the Oyo State legislators), as custodian of the Constitution, abused its powers by engaging in ‘patent violation and breach’ of its provisions. The judiciary as the ‘custodian of the construction or interpretation’ of the Constitution should be alive to check all acts of violations and ‘indiscretions’ of the legislature. The Court stated further that society and the

⁴² *Ladoja* Case note 36 supra at 2-3.

⁴³ *Ibid.* at 44.

people ought not to be left helpless in the face of such breach, but should be aided by the judiciary.⁴⁴

The controversy in the *Ladoja* Case emanates from a pervasive but abnormal situation in an aspiring democracy. Critical to the evaluation here, it provided the judiciary with what can be regarded as the pace-setting case of judicialisation of politics in the country's transition from decades of military authoritarian rule. The constitutional panel of the Supreme Court aptly seized the golden opportunity to intervene on the side of the rule of law and democracy in Nigeria's political and constitutional history.

The Court's approach in the *Ladoja* Case signals a movement away from a 'coordinating style of adjudication' to a 'redemptive' one.⁴⁵ It benchmarks judicial activism in the transitioning polity. In the nature of Ackerman's analysis of redemptive adjudication, the decisions of the appellate courts explicitly converged with the expressed will of the people over that of narrow and parochial interests in the country.

Crucial for Nigerian jurisprudence as a whole and transition jurisprudence in particular, the Court did not shy away from the 'political question.' The Court acknowledged the political character of the matter. Thus, it asserted that

...American jurisprudence has so much developed the political question doctrine in their case law, so much so that it has taken a very firm root in their legal system. *The political question doctrine is still in its embryonic stage in Nigeria. Let us not push it too hard to avoid the possibility of a still-birth.* That would be bad both for Nigerian litigants and the legal system.⁴⁶

The 'political question doctrine' simply restated, is according to Hirschl, the principle of separation of powers that there are 'certain types of political questions that a court ought to refuse to rule on' for the reason that they fall exclusively within the jurisdiction of the legislature and the executive.⁴⁷ Here again, the Court alluded to the sometimes uncritical adoption of the American political and socio-legal arrangements as the model for Nigeria's legal system. Suffice it to say that

⁴⁴ *Ladoja* Case note 36 supra at 43.

⁴⁵ B Ackerman "The Rise of World Constitutionalism" (1997) 83 Virginia Law Review 771, 794-791.

⁴⁶ *Ladoja* Case note 36supra at 20. Emphasis mine.

⁴⁷ Hirschl note 9 supra at 193.

even the American Supreme Court, despite its assumed commitment to upholding the political question doctrine, has been known to take it on in certain cases.⁴⁸

Implied in the foregoing finding of the Court, is the position that the judiciary, through the instrumentality of constitutional judicial review, is set to take on the challenges of the stormy political scene in Nigeria's democratic transition. As will become obvious below, the Court has adopted and is developing a jurisprudential tradition of judicialisation of politics.⁴⁹ The judicial approach is essentially constituted by an increasing incidence of intervention in institutional design and maintenance of democratic political processes similar to what is happening in various parts of the world.⁵⁰

It is significant that the Court unequivocally identified with the socio-political realities of Nigerian society at the material time. It decried, in no uncertain terms, the proclivity of legislative assemblies in various parts of the country for removing state governors. It is no doubt within the constitutional province of legislatures in most democracies to audit, monitor or censure executive action and this is also the case in Nigeria. However, observers of the Nigerian political scene would recognise the fact that the exercise of the prerogative by legislators has been mostly driven by parochial interests and conducted in defiance of constitutional process.

Removal proceedings against governors, usually for self-centred reasons on the part of legislators and in disregard for due process, had unduly heated the polity. The conduct of such proceedings constituted a cause for concern in the context of the country's fragile political transition from authoritarian rule in 1999. The situation required an arbiter capable of intervening with equanimity in the emerging political power contestations and its deleterious effect on governance. Already, in Oyo State, locus of the *Ladoja* Case, many lives and properties had been lost in tensions generated by the flexing of political muscles. This had occurred in some other states caught in political crises too.

⁴⁸ Hirschl note 9 supra at 193-194. See also RA Miller "Lords of Democracy: The Judicialisation of 'Pure Politics' in the United States and Germany" (2004) 61 (2) Washington and Lee Law Review 587, 653-660.

⁴⁹ For a contemporary account of this judicial approach in China, see S Balme "The Judicialisation of Politics and the Politicisation of the Judiciary in China, 1978-2005 (2006) 5 (1) Global Jurist 1 available at: <http://www.bepress.com/gj/frontiers/vol5/iss1/art1>

⁵⁰ R H Pildes "The Supreme Court 2003-Foreword: The Constitutionalization of Democratic Politics" (2004) 118 (1) Harvard Law Review 28, 31 and M Tushnet "Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine" (2002) 80 North Carolina Law Review 1203.

In its decision, the Court restated its preference for substantial, rather than procedural justice, principally in matters that affect the stability of the country. It said

The plethora of removal proceedings in respect of Governors is not only frightening but is capable of affecting the stability of Nigeria. It is almost like child's play...Unless the situation is arrested, Nigerians will wake up one morning and look for where their country is. That should worry every good Nigerian.⁵¹

The Court thus adopted a quintessential transition jurisprudence marked out by its engagement with institutional fortification, in recognition of the unique role of law in societies in transition. As discussed in Chapter Four, these were fundamental issues remarkable for their total absence or obscurity in the transition jurisprudence of the courts notably in the early period of the country's transition from authoritarian rule.

2.2.4. Checkmating Judicial Impunity

Another important feature of the *Ladoja* Case is the judicial attempt at deliberate reformation of the conduct of judicial proceedings by the courts in the absence of legislation. In Nigeria, the transplantation of the common law adversarial system in the absence of socio-cultural foundations supportive of the conduct of its litigation practices and ethics, had led to a culture of delayed justice. Control of the procedural aspects of trials was left (almost) entirely to counsel for the parties in litigation. A culture of instituting litigation to perpetuate impunity in the guise of preserving the sanctity of the judicial process had been perfected. The misuse of judicial process was prevalent amongst the privileged few who could afford the relatively exorbitant cost of legal services. It was unrelentingly employed to the discredit of legal process, and the courts as a proper resort for the resolution of disputes.

Instances abound of ongoing litigation that commenced with injunctive orders to stop all sorts of activities from university convocation ceremonies that involved the careers of thousands, commissioning of public utilities and services like roads and water projects, communal chieftaincy ceremonies, to probate and will disposition matters. And the injunctive orders, sometimes obtained *ex parte*, stayed in place for years. It was common practice for counsel, and or litigants to unscrupulously employ procedural or logistic ploys to delay cases, criminal and civil, without decisive judicial intervention. The situation was exacerbated by

⁵¹ *Ladoja* Case note 36 supra at 41.

years of neglect of the judicial institution and reluctant commitment to law reform by successive military regimes. In a sizeable number of cases, litigants were either frustrated in the pursuit of justice, or in some cases, enjoyment of the fruits of litigation. It was not unusual for litigation to last up to 15 years in the courts. The result was a predictable loss of confidence in judicial resolution of disputes, resort to self-help and impunity.

Given the foregoing state of litigation and resolution of disputes through the courts, it is quite significant for the rule of law and restoration of confidence in the judicial process that trial and appeals in the *Ladoja* Case were decided within a year. The decisive element was the determination of the courts to ensure expeditious hearing of the case. The conduct of the judiciary in the matter is certainly commendable considering the fact that it had to contend with the designs of the Appellants to delay the trial and appeals in the case. The Supreme Court determinedly saw its way through ‘the cocktail or harvest of motions’ deliberately filed by the Appellants to frustrate the hearing of the matter on the merits⁵² and ‘frustrate the course of justice.’⁵³ It also rejected the prayer of the Appellants to have the case sent back for trial in the high court. In this regard, the Supreme Court was right when it stated that

Although the judicial process is slow most of the time, almost taking a snail’s pace, this, is one case which the judiciary must take the fast lane in the relay race and has in fact, taken the fast lane.⁵⁴

It is relevant to note here that delay in the determination of the case and effluxion of time held real promise of a *fait accompli* for the Appellants. Maintaining the status quo was entirely satisfactory to their designs. They had, after all, sworn in the deputy governor as a new governor under the guise of constitutionalism and the rule of law. In this regard, the designs of the Appellants were not lost on the Court.

It rightly noted that acceding to the request to remit the case to the lower court would ensure the matter would not be concluded before 29 May 2007 when the office in contention was due to be filled through elections. All this was happening in the backdrop of public condemnation of the brazen subversion of democracy and the rule of law. The public violence that followed the inauguration of a new governor notwithstanding, the erring legislators further had the support of the

⁵² *Ladoja* Case note 36 supra at 37.

⁵³ Ibid. at 38.

⁵⁴ Ibid. at 38.

police who were complicit in the matter, acting ostensibly on ‘orders from above.’⁵⁵

Despite its federal political arrangement, the Nigerian Police Force (NPF), federally established and controlled, is the only police force in the country. The Inspector-General of Police is appointed by and takes orders from the President. In this case, it was no secret that then President, Olusegun Obasanjo was himself beholden to Chief Lamidi Adedibu, the estranged godfather. Following newspaper reports of the President’s failed intervention to settle the political differences between ‘father’ and ‘son’, he cast his lot behind the ‘father.’⁵⁶

Thus, the ongoing litigation, rather than serving as a legitimate forum for resolution of the important constitutional questions in issue, was presented by a minority but powerful political clique as vindication for trampling on the will of the people and the rule of law. An unwary judiciary, especially in the nature of the Nigerian judiciary in the decades past, would have served to perpetuate this patently illegal design, further discrediting the judiciary, the legal process and the rule of law, in what can be regarded as a form of *judicial* impunity.

2.3 The *Obi Tenure Case* - Speaking Law to Power

If the Supreme Court in particular and the judiciary in general, had aspired to steer clear of the political process after the inevitable judicial intervention in the resolution of election petitions arising from the 2003 general elections, they soon found unfinished business in *Peter Obi v Independent National Electoral Commission & 6 Ors (Obi Tenure Case)*.⁵⁷ The background to the suit is inextricably linked to another intriguing chapter in the annals of election manipulation in the country’s politics.

Peter Obi, Governor of Anambra State, filed a suit at the Federal High Court in a pre-emptive move to stop the planned gubernatorial polls by the 1st Defendant as part of the scheduled general elections all over the country. Emeka Ngige,

⁵⁵ This refers to then President Olusegun Obasanjo. See for instance, “How the Judiciary Stopped Crude Challenge of Constitutionalism by Politicians-Olanipekun” *The Guardian* Online Edition (Lagos Tuesday 15 January 2008).

⁵⁶ The former President left office on May 29 2007 and is now Chairman of the Board of Trustees of the ruling Peoples’ Democratic Party (PDP). To the consternation of many, he was to later describe Adedibu as “The Father of the PDP” despite the latter’s notoriety for furthering the cause of successive military regimes and fomenting violence in Oyo State. See for instance, Emmanuel Ukodolo “Adedibu: Indeed the Father of PDP” *Daily Independent* Online (Wednesday 14 November 2007) available at:
and O Nnana “The Caging of Adedibu” *Vanguard* Online (Sunday 18 November 2007). See also Human Rights Watch note 31 supra at 64-66.

⁵⁷ S.C 123/2007, delivered 13th July 2007; (2007) 7 NILR 1311, 1 available at: <http://www.nigeria-law.org/LawReporting2007.htm>

candidate of the People's Democratic Party (PDP), the party that had dominated the political landscape in the country since the inception of civil rule in 1999, had been wrongfully declared winner by the 1st Defendant and inaugurated as governor in a massively rigged election. The Plaintiff, candidate of the All Peoples Grand Alliance, (APGA), successfully challenged the action of the 1st Defendant in court and reclaimed his mandate. His victory was reluctantly enforced by the PDP government at the centre, following exhaustion of the appellate process. Interestingly, the 1st Defendant issued him with a certificate (of victory at the polls) backdated to 2003. He was sworn in on 10 March 2006, three years after the elections in which he had received the majority of the lawfully cast votes.

Apparently relying on the certificate of returns, the 1st Defendant sought to organise fresh gubernatorial elections in the state, as part of the 2007 general elections in the country. In his summons filed on 28 February 2007, the Plaintiff sought declarative and injunctive reliefs that (a) his four year tenure as governor began to run from the date he was sworn in, 17 March 2006, (b) the 1st Defendant could not conduct gubernatorial elections in the state proposed for 14 April 2007, as he was yet to run the course of the constitutionally stipulated four-year term, after taking the oath of office and (c) the 1st Defendant should not proceed with the proposed election since the office would not be vacant by that date. He relied heavily on section 180 (2) (a) of the Constitution of the Federal Republic of Nigeria, 1999. The subsection is to the effect that the governor shall vacate office at the expiration of a period of four years commencing from the date the Oath of Office and Oath of Allegiance are administered. The other defendants applied to and were joined in the matter as interested parties.

The court of first instance, the Federal High Court declined jurisdiction on the matter on the premise that it was an election matter for which exclusive jurisdiction is vested in the Election Petition Tribunals. Meanwhile, the 1st Defendant proceeded to organise the election in contention despite the ongoing litigation. The Plaintiff further appealed to the Court of Appeal which delivered its judgement on 22nd May, 2007, seven days before the planned swearing in of Andy Uba of the PDP, who had purportedly been elected the incoming governor.

The Court of Appeal dismissed the appeal and affirmed the decision of the Federal High Court. Peter Obi further appealed to the Supreme Court the same day. After the filing of the appeal, but before the hearing of the matter, the Supreme Court expressed displeasure that the 1st Defendant had, in disregard for

the judicial process, held elections for the office of governor in Anambra State. The Court warned that it would not hesitate to order that anyone sworn in as governor vacate the office immediately in the event it determined that the elections were wrongly held.

The constitutional panel of the Court (comprised of seven justices) delivered a unanimous verdict in favour of the Plaintiff on 14th June 2007, the same day it took arguments in the matter. The Court ordered that the new incumbent, sworn in on 29th May, 2007, Andy Uba, should vacate the office of governor and the Plaintiff be reinstated to continue in office until 17th March 2010, when his four year tenure will expire. The Court held that the purported election was in futility as there was no vacancy to be filled as at 14 April, 2007, when the election was held. It then adjourned to 13 July, 2007 to give full reasons for the judgment. In the lead judgement, the Court held that the fulcrum of the case was constitutional rather than electoral, a critical misdirection in law that led the trial court and the Court of Appeal to decline jurisdiction in the matter.

2.3.1. *Towards a New Constitutionalism*

The *Obi Tenure* Case has several implications for constitutionalism, policy and transition politics in the country. The most obvious for those familiar with Nigerian general election practices, is the fact that it re-configures the electoral landscape in the country. It is relevant to an understanding of the case to note that it has been the political convention in Nigeria for the gubernatorial elections, constitutionally organised by a national electoral body, to be held on the same day nationwide. This approach to electoral arrangements, supported by an unbroken chain of repetition, has taken on the semblance of an immutable convention. The contention in support of this position, call this the ‘truncation argument’, had included the need for uniformity, obviate chaos and save costs. All of these were in fact vigorously canvassed by counsel to the INEC, 1st Defendant in the matter.

In rejecting the truncation argument, the Court observed that holding elections at different times in a federation like Nigeria is an affirmation of, rather than anathema to the practice of federalism. The judgement furthered notions of reasonable independence of action and autonomy inherent in the concept. Thus, the Court affirmed that the convention is a product of expedience and imposition through the series of democratic transition programmes organised by various military regimes, rather than compliance with a constitutional requirement. It was this historicity, rather than a constitutional provision, that cloaked the practice with certain seeming inviolability. The Court went further to assert that any

positive provision for such uniformity of practice would be contrary to the principle of federalism, a pivot of the country's political foundations.⁵⁸ The judgement decisively took Anambra State out of the national electoral calendar, with the Court throwing overboard any possible advertence to fiduciary considerations or social expedience of uniformity, in preference for upholding the rule of law. More importantly, the decision rid the country of one more vestige of imposed unitarism, from a legion of authoritarian legacies.

2.3.2. *Timely Intervention*

As one commentator observed, the timing of the decision in the *Obi Tenure* Case, expeditiously determined by the courts, constituted a signal to the society that the judiciary was primed to ensure justice in electoral matters in the country.⁵⁹ The Court demonstrated commendable responsiveness to the need for timeliness in the matter, progressing a new direction away from delayed justice that hallmarked judicial activity in the country during the years of authoritarian rule.

The expedition deployed by the judiciary in the hearing of the case is commensurate with the critical need for preventing the breakdown of law and order that has remain a constant feature of elitist power wrangling in the country's political transition. While there is a need for timely dispensation of justice in all manners of legal disputation, it takes on particular urgency where the resolution of such disputes directly impacts on the stability of the polity, the safety of lives and property, thus reinforcing one of the most important reasons for the existence of the modern state.

Considering the volatility of political related matters, delay on the part of the judiciary can only elicit further loss of confidence in an institution that had hitherto been viewed as complicit in the country's chequered experience of democracy. The judicial handling of the *Ladoja* Case and *Obi Tenure* Case along with a number of others that have followed them, have renewed public hope in the electoral and judicial process, while constituting a signal to the political class that impunity would not be tolerated in the democratic transition.

2.3.3 *Checkmating Electoral Impunity*

In the political realm, the *Obi Tenure* Case constitutes positive affirmation that the highest level of the judiciary is committed to deepening democratic ethos and

⁵⁸ The *Obi Tenure* Case note 57 supra at 19.

⁵⁹ J Kyari Gadzama "Political Engineering Through Law: Section 80(2)(A) 1999 Constitution In Perspective" (July-September 2007) 1 (3) Newsletter 1, (-5) 2 available at www.gadzama.com

combating the scourge of electoral manipulation that has bedevilled the country's political transition. This may be just as well. At no other time in the country's limited history of elections, has it witnessed such undisguised manipulation and determination by a ruling party to foist a *fait accompli* on the political process.

No doubt invigorated by the attitude of the Supreme Court, the Electoral Petitions Tribunals in the country have displayed unusual boldness in their adjudication of electoral disputes arising from the much discredited 2007 general elections. At the last count, the elections of twelve governors had been nullified.⁶⁰ A number of legislators have gone the same way at both the state and national levels, the most prominent of which is the President of the Senate. His case was made more interesting by the fact that he stood to lose his prestigious number four position in the country. Further, he was the third of the three senators from his state, to have their elections nullified by the National Assembly Elections Petitions Tribunal for gross electoral malpractices.⁶¹

Fresh elections have been ordered all over the country, to the relief and acclaim of aggrieved political actors and the general public. This trend inevitably directs keen public attention at the judiciary. The development has put out the judiciary as the institution at the forefront of the social reconstruction of a society with debilitated institutional structures. The judiciary has engaged in the process through its insistence on procedural and substantive fairness by the political branches, in keeping within the ground rules they have laid for securing power and conduct of governance.

The situation that developed in Kogi, a north-central state in the country speaks loudly to the reaches of judicialisation of politics in Nigeria's transition, engendered by unbridled struggle for power among the political elite. The Kogi State Governor was sacked by the Election Petitions Tribunal for gross procedural irregularities that attended his election, the most conspicuous being the exclusion of a leading opposition candidate. After he unsuccessfully exhausted the appeal process, he had to vacate office along with his deputy. In line with constitutional provisions, the Speaker of the House of Assembly assumed office as acting governor preparatory to holding another election to be held within 90 days of the decision.

⁶⁰ K Obiagwu *et al* "How Imoke Lost His Seat in Cross River" *The Guardian* Online Edition (Lagos Tuesday 15 July 2008).

⁶¹ H Jamiu "A Season of Election Annulments in Nigeria" *Daily Independent* Online Edition (Lagos Wednesday 27 February 2008).

The unsettling aspect of the matter however, is the fact that at the time, the election of the Speaker had in fact been nullified too by the state election petitions tribunal. His continued stay in the legislature is only premised on his pending appeal at the Court of Appeal. In other words, his assumption of office was on a tenuous line of legitimacy sufficient enough to distract him from even the most basic affairs of governance. It is difficult to expect the acting governor would administer the state constructively in a situation that he could be thrown out of not just his acting position, but the house of legislature altogether, in the not unlikely event the decision against him was affirmed on appeal.⁶² The drama of the judicialisation of pure politics continued unabated even after the conduct of the first ever court-ordered gubernatorial election in the country's electoral history. Following the declaration that the dismissed governor won the freshly conducted polls, his key opponent immediately returned to the Elections Petitions Tribunal to challenge the results.⁶³

Related to the foregoing is the position of the Supreme Court that the illegality constituted by the three year tenure enjoyed by Chris Ngige should not be allowed to interfere with the right of the Plaintiff to hold office for the constitutionally stipulated tenure of four years though the former was sworn in on the day the latter ought to have come into office. On the face of it, this should be considered a logical consequence, flowing from the judgement of the Court that the Plaintiff's tenure was illegally usurped by the swearing in of Chris Ngige in the first place. But the matter is more complicated when it is considered that Ngige is not a defendant in this case and the rights of a third party, the 5th Defendant, Andy Uba, elected governor while the case was in progress would be adversely affected. In this regard it is important to observe that notwithstanding the Supreme Court decision in the *Obi Tenure Case*, success in a claim for illegally abridged tenure does not automatically entitle the claimant to the effluxed period. Rather, whether the court on a decision of such a nature will grant a reclaim of the deprived term will depend on the specific facts of the case. And this is well demonstrated by the position of the Court in another tenure case decided by the same panel⁶⁴ on the same day as the *Obi Tenure Case*.

2.4 Ladoja (No. 2) - Between Sympathy and the Law

⁶² Editorial "Fresh Governorship Election in Kogi" *The Guardian* Online Edition (Lagos Friday 22 February 2008).

⁶³ A Daniel and R O Agbana "Idris Returns as Kogi Governor, Audu Back to Tribunal" *The Guardian* Online Edition (Lagos Monday 31 March 2008).

⁶⁴ Though the lead judgement was delivered by two different justices of the Court.

The decision of the Supreme Court in *Senator Rashidi Adewolu Ladoja v Independent National Electoral Commission & 3 Ors*, (*Ladoja No.2*),⁶⁵ a contemporaneous tenure matter with the *Obi Tenure* Case, could in a way, be regarded as a denouement of recent judicialisation of politics in Nigeria's transition. It served to define the limits of perceived judicial activism in the adjudication of disputes, in the sometimes complicated terrain of transition politics in a democratising polity. The Court insisted on a rather conservative constitutionalism, demonstrated in this case by supposed judicial deference to the political branches. This is a jurisprudential custom the Supreme Court has continued to struggle with, even as it sometimes displays remarkable radical departures from a deeply-rooted juridical tradition.

The Plaintiff was illegally removed as governor in the in the *Ladoja* Case discussed above.⁶⁶ Following his success at the Supreme Court, he was reinstated. Meanwhile, he had lost eleven months of his tenure during the forced vacation. Obviously following the lead of the *Obi Tenure* Case, the Plaintiff filed a suit at the Federal High Court urging it to determine whether the eleven months during which he was illegally removed from office formed part of his four-year term. He sought injunctive and declaratory orders restraining the 1st Defendant from holding gubernatorial elections in the state until he had completed uninterrupted four-year tenure. He similarly relied on section 180 of the Constitution. Again, like the *Obi Tenure* Case, he also lost his bid at the trial and Court of Appeal.

2.4.1 No to Tenure-Elongation - The Court is Plain

In a rather terse consideration of the claim which the Court considered a case for tenure-elongation, rather than completion of an interrupted term canvassed by the Plaintiff, the constitutional panel of the Court unanimously declared it unmeritorious. According to the Court, the Constitution did not confer a power on it to extend the four year tenure of a governor who had been improperly removed. While it was 'in sympathy with Plaintiff/Appellant's cause,' acceding to his claim it reasoned, would 'do much violence to the constitution,'⁶⁷ because the circumstances of the case was not contemplated by the framers of the Constitution. Apparently justifying a distinction between this case and the *Obi Tenure* Case, the Court reasoned that

In awareness of the possibility that an occurrence may prevent a

⁶⁵ SC 120/2007, delivered 13th July, 2007; (2007) 7 NILR 136, 1 available at: <http://www.nigeria-law.org/LawReporting2007.htm> (last accessed 22 February 2008).

⁶⁶ *Ladoja* Case note 36 supra and accompanying text.

⁶⁷ *Ladoja (No.2)* note 65 supra at 13.

Governor from being sworn in on the same day as his counterparts in the country, Section 180 (2) states that tenure be computed from the date the oath of allegiance and oath of office is taken. There is no similar provision to protect a Governor improperly impeached.⁶⁸

The Court maintained that in the event the wording of the applicable section is clear, (as it found), it was only within the province of the legislature to alter them. Thus, the justices restated the role of the courts, as has been the wont of judges everywhere, (even when they arguably do actually legislate or create new laws), that their employment was ‘the singular task of deciding what the law is.’⁶⁹

In sum, the position of the Court is essentially that the *de jure* effect of the Plaintiff’s removal was that it never occurred. In other words, he is deemed in law not to have left office for one day, notwithstanding the fact that his deputy had been sworn in and exercised executive powers in a substantive, rather than acting capacity during the period.⁷⁰ The justices declined the invitation to read the words ‘uninterrupted,’ four year term canvassed by the Plaintiff, into the provisions of section 180 (2) (a) of the Constitution. In that way, the Court maintained its customary preference for the literal interpretation of the Constitution and statutes.⁷¹

3. THE JUDGE IN THE COURT OF THE PEOPLE

Jurists are wary of advertence to public opinion in analyses of judicial activity.⁷² A distinctive insularity characterises conventional legal analysis of law to the exclusion of other elements with a bearing on the shaping of social behaviour. It is commonly the case that there is little or no advertence to public opinion on judicial activity in the works of leading legal theorists. The general consensus would appear to be the propriety of inadvertence to public opinion since it is usually regarded as fluid rather than stable, political rather than legal in nature. The streams of the legal and the political, in the way it relates to the judicial function, must be kept apart. Although the commonly presented premise for the reserved attitude is the need for judicial integrity and independence, it is also

⁶⁸ *Ladoja (No.2)* note 65 at 13.

⁶⁹ *Ladoja (No.2)* note 65 supra at 22. Emphasis in the text.

⁷⁰ As stated in our discussion of the *Ladoja* Case note 31 supra, they were in fact at daggers drawn consequent upon the swearing in of the deputy as governor.

⁷¹ *Ladoja (No.2)* Case note 65 supra at 22. For a discussion of this jurisprudential attitude see H O Yusuf “The Judiciary and Constitutionalism in Transitions: A Critique” (2007) 7 (3) Global Jurist (Advances Article) 1 (-47).

⁷² See for an interesting and incisive discussion of the place of public reaction in judicial decision-making C R Sunstein “If People Would be Outraged by their Ruling, Should Judges Care” (2007) 60 Stanford Law Review 155.

possible to detect in it, certain deep-rooted arrogance that attaches to western notions of the institution of law and its place in society.

Lawyers everywhere have built and sustained an aura of uniqueness around the theory and practice of law. Consequently, the enterprise of law, lawyers and judges are variously held in awe, admiration, and sometimes, despised and condemned in society. Judges and courts, without doubt, are a major, if not *the* major expression of the nature of law and the legal institution in the public domain. Thus, guarding its integrity is a major, even self-preserving, preoccupation of those in the business of law. This is especially the case in an era of increased interaction between law and politics, with a corresponding increase in the power and relevance of lawyers in society.⁷³

Granted it is desirable, even essential for legal analysts to insist on measures that protect the integrity of the judiciary. In part, this is a mechanism for reinforcing judicial fidelity to law and the decisional independence of judges. Admittedly too, it is the case that the institution of law is unique. But as Friedman counsels, it is not sufficient a premise on which to exclude the equally important force of politics.⁷⁴ And this is even more the case with constitutional law which conditions and is in turn, conditioned by politics.

Public opinion is generically regarded as political but it is still relevant to accord it more recognition as a measure for assessing judicial performance. After all, governance at various levels (including the private sphere) in the contemporary period, is being continually subjected to increased democratic accountability measures of scrutiny, even in previously illiberal societies in Latin America, Europe, Africa and Asia. An exclusivist normative approach, characteristic of conventional legal analysis results in an impoverishment of scholarly analysis of judicial review in legal discourse.⁷⁵ It also undermines the relevance of institutional accountability which is a topical socio-political issue in post-authoritarian polities.

Empirical research conducted largely outside the legal academy strongly suggests judges, especially at the highest levels, pay considerable heed to public consensus on contentious cases before courts.⁷⁶ Judges after all are not superhuman, assuming that is a desirable quality in the endeavour of adjudicating

⁷³ M Loughlin "Constitutional Theory: A 25th Anniversary Essay" (2005) 25 (2) *Legal Theory* 183, 192.

⁷⁴ B Friedman "The Politics of Judicial Review" (2005) 84 (2) *Texas Law Review* 257, 262.

⁷⁵ *Ibid.* at 259.

⁷⁶ Friedman note 72 *supra* at 322 to 325.

the affairs of fallible beings. They live in society, are aware of events and opinions around them, and can be reasonably expected to be influenced by their environment.⁷⁷ Ignoring all of these realities in analyses of judicial activity can hardly constitute scholarly virtue.

In all events, even if legal theorists are disposed to maintaining a demurred attitude towards public consensus as an important evaluative mechanism for judicial performance, there remains the peculiarity of constitutionalism in transitioning paradigms. Constitutionalism, at the core of which is the judicial function, can not productively ignore politics in the event (as is the case), that institutional redesign, viability and fortification constitute integral objectives of democratisation. Thus, evaluative considerations of the judicial function in transitioning polities in particular would be more productive with the adoption of a robust approach that integrates law with politics as suggested by ‘positive scholarship.’⁷⁸ This is even more so if societies with well established democratic systems can only ignore political considerations in assessing judicial review at great costs.⁷⁹

In the Nigerian context, there is ample evidence to suggest that the traditional approach of diffidence to public opinion that characterises juristic considerations of judicial activity may soon change. A plausible reason for this is the active involvement of legal practitioners, mainly (but not exclusively) counsel to political contenders in the power tussles, in making public statements and granting press interviews on decisions in the myriad of cases before the courts. Their colleagues in the academia may not now be so averse to advertising, at least in part, to public opinion in their analyses of the judicial function in Nigeria’s democratic transition. The current willingness of legal practitioners in the country to assess judicial performance in the transition period outside the narrow confines of legal fora, but rather, in the media, may soon extend into scholarly literature on judicial governance in the country. Already, reports indicate this trend. Law professors, respected constitutional lawyers, frontline legal practitioners and socio-legal commentators have joined the fray.⁸⁰ There has been a flurry of public

⁷⁷ Friedman note 72 at 325.

⁷⁸ Friedman note 72 supra at 329 to 337.

⁷⁹ Ibid. at 263.

⁸⁰ See for instance O Omenuwa “We Owe the Supreme Court for the Decision in Obi’s Case-Nwabueze” *Daily Independent* Online Edition (Thursday 11 October 26 2007) in which B Nwabueze, Senior Advocate of Nigeria (equivalent of the Queen’s Counsel in the UK), retired professor of law, eminent constitutional law jurist and lead counsel to Atiku Abubakar, former vice-president (1999-2007) and presidential candidate in the 2007 currently challenging the victory of the incumbent at the Supreme Court, granted an extensive interview commenting on the

commentary by a cross-section of Nigerian society on the phenomenon of judicialisation of politics in the country's transition to democracy.⁸¹ It has also been subject of interest abroad.

Ignoring public opinion in legal analyses of the activities of the judiciary, no matter the traditional normative objections, is arguably counterintuitive. This is especially the case in the context of transitioning polities with otherwise fragile legitimate and democratic political institutions. Taking the Nigerian experience as a reference, the judicialisation of politics has had a profound impact as an avenue for legitimating democratic transition. This has been virtually inevitable in a society made highly sceptical and suspicious of government intentions following on endless civil rule transition programmes, over which huge resources were purportedly expended.⁸² Public response to the conduct of judicial governance is thus very relevant to scrutiny of the transition process from both the legal and political perspective.

It is relevant to consider public evaluations and perceptions in the legal analysis of the judicial resolution of the disputations in the socio-political sphere, in Nigeria's transition.⁸³ The acuteness of the potential departure in a transitioning polity, from the socio-political norm in a liberal democratic setting, justifies this rather extensive quotation of the views of a commentator on the Nigerian experience

All over the country, most governors cannot govern because of their precarious political positions. Their hold on power is very tenuous. To survive, they are now hostage to invidious political forces. To survive, they have opened the patrimony of the people to those who are blackmailing them because they know that if they try to assert themselves before the tribunals give their verdicts, those who rigged them into power will tender the same evidence in court... In which part of Nigeria has there been any meaningful governance in the past nine

Supreme Court decision in a very important political case; A Ibidapo-Obe "Supreme Court on Obi: Reinforcement of its Guiding Angel Role" *The Guardian* Online Edition (Lagos Tuesday 19 June 2007) in which the Associate Professor of Law and socio-legal commentator, analyses the same case (*Obi*), considered above in the legal column of a leading national daily; W Olanipekun "The Bar, the Bench and Democracy in Nigeria" *The Guardian* Online Edition (Lagos Monday 22 January 2007), Senior Advocate of Nigeria and former President of the Nigerian Bar discusses among others the decision of the Supreme Court in the *Ladoja* Case note 31 supra; and O Onagoruwa "The Judiciary and Political Power" *The Guardian* Online Edition (Lagos Monday 22 January 2007).

⁸¹ Omenuwa note 80 supra, R Abati "Amaechi's Victory at the Supreme Court" *The Guardian* Online Edition (Lagos Friday 11 October 26 2007), O Omenuwa "Amaechi vs. Omehia: Supreme Court as Protector of Democracy" *Daily Independent* Online Edition (Friday 26 October 2007), S Akhaine "Balarabe Musa Faults Amaechi's New Status" *The Guardian* Online Edition (Lagos Saturday 27 October 2007) and C Adingupu "Obi's Judgement is Warning to Political Gangsters" *The Guardian* Online Edition (Lagos Sunday 24 June 2007).

⁸² Lewis note 26 supra at 245-255.

⁸³ It is important however to state that this study does not claim to do so.

months?⁸⁴

In fact, the attempt to resist overtures of the nature mentioned above, has landed one governor in trouble at the election tribunal leading to the nullification of his mandate, no thanks to the damning evidence produced against him by his now aggrieved ‘godfather.’ The situation thrown up by the circumstances of transitioning societies on judicial review suggests the need for re-examining the normative parameters for evaluating judicial activity by legal theorists.

Even the Nigerian judiciary, nurtured and developed in the conservatism of the British legal system (a by-product the country’s colonial legacy), recently openly indicated its acknowledgement of the importance of public perceptions of the judicial role in a transitioning polity. The Presidential Elections Petitions Tribunal (the Tribunal) broke away from a long-standing tradition of prohibiting live media coverage of judicial proceedings in the country. In recognition of the intense public interest in judicial proceedings on the contentious 2007 general elections in the country and the petitions challenging the presidential elections in particular, it allowed live-coverage of legal proceedings. The Tribunal allowed national and international organisations in the print and electronic media to its verdict on the consolidated petitions challenging the victory of incumbent President, Umar Yar’Adua. The only limitation was the express condition that faces of the judges or their pictures must not be displayed in any report.

The Tribunal premised its decision for the innovative action on the need for Nigerians and the international community to have first hand, timely access to the verdict as well as demonstrate its transparency.⁸⁵ This action on the part of the judiciary can be regarded as an unequivocal endorsement of the view that the judiciary, like the political branches, must demonstrate sensitivity to public yearnings without compromising institutional integrity. Palpable tension had built up in the wait for the decision all over the country. Shortly before delivery of the verdict, the Inspector General of Police, the country’s top cop, had in fact warned of an impending breakdown of law and order. Over 10,000 policemen had been deployed to volatile areas in the country.⁸⁶ This was not surprising, as it was the first time in its history that the election of an incumbent president was under such

⁸⁴ Amaechi note 15 supra.

⁸⁵ O Ogunmade “Today is D-Day for Yar’Adua, 3 Govs- Presidential Verdict to be Shown Live” *This Day* Online Edition (Lagos Tuesday 26 February 2008).

⁸⁶ J Ogodo “Tension Trials Election Tribunal Ruling” *The Guardian* Online Edition (Lagos Wednesday 27 February 2008).

serious judicial challenge.⁸⁷ Though a separate matter altogether, the administrative response on the part of the judiciary furnishes another reason for devoting more attention to the part played by public opinion in legal analysis of judicial activity.

In the light of the foregoing, it is worthy of note that the Supreme Court of Nigeria has recently been nominated ‘Man of the Year’ by *Daily Independent*,⁸⁸ a respected national daily, no doubt in recognition of its cardinal role in the stabilisation of a floundering political transition and upholding constitutionalism in the country. The Supreme Court, in particular, has received commendation from home⁸⁹ and even unusual quarters abroad.

On the home front, the profile of Supreme Court in governance in the country has become widely writ in the public psyche like never before. As respected professor and former dean of law of one of the foremost law schools in the country put it, the Court has sent out a signal that it is the ‘sentinel...guard for democracy and good governance.’⁹⁰ On the international scene, a number of observers including the United States Congress and the London based *The Economist* have applauded its demonstration of independence, redirecting the country’s democracy away from the precipice and upholding human rights.⁹¹

However, as will be adverted to shortly, just how much of a transformation has taken place in the country’s post-authoritarian transition remains highly debatable. But before consideration of that aspect of the discussion, it is germane to evaluate to the institutional arrangement for judicial reformation and accountability in the democratisation process in the country. It is quite instructive that the exiting military administration tacitly agreed to the urgent need to reform the judiciary during its long hold on power by including provisions for establishment of the National Judicial Council in the ‘transition’ constitution.

⁸⁷ Jamiu note 61 supra.

⁸⁸ O Omenuwa “2007: The Year of the Supreme Court” *Daily Independent* Online Edition (Lagos Thursday 27 December 2007).

⁸⁹ See “Belgore, Oputa, Sagay, Others Hail Supreme Court” *The Guardian* Online Edition (Lagos Sunday 24 June 2007).

⁹⁰ Adingupu note 81 supra.

⁹¹ Constance Ikokwu “Nigerian Judiciary Strong, Independent, Says US Congress” *This Day* Online Edition (Abuja Thursday 19 July 2007) and “Nigeria - Democracy by Court Order” *The Economist* (London Thursday 24 January 2008). But cf. Mo Ibrahim Foundation *Ibrahim Index of African Governance* 2007 available at:

<http://www.moibrahimfoundation.org/index/index2.asp> (last accessed 18th February 2008) in which the country ranked a dismal 37 in a continental survey of 48 countries on issues of rule of law, judicial independence, human rights, etc.

4. INSTITUTIONAL TRANSFORMATION SANS ACCOUNTABILITY? THE CASE OF THE NATIONAL JUDICIAL COUNCIL

Given the rot that had bedevilled the Nigerian judiciary in the authoritarian period as discussed in Chapter 3, it is no surprise that the 'transition' Constitution of 1999 sought to make institutional arrangements for reforming the judiciary. This is captured in the establishment of the National Judicial Council (NJC), a centralised body for the appointment, discipline and promotion of judges in the country. The creation and activities of the NJC, particularly as it relates to the discipline of judicial officers, is relevant to the focus on accountability of the judiciary in this research.

Established as one of fourteen "Federal Executive Bodies" by section 153 of the Constitution, the NJC has very wide ranging powers on recommending judicial officers for appointment across the spectrum of the superior courts of records in Nigeria. It similarly has powers to recommend their removal from office. Further, it has full disciplinary powers over judicial officers of all superior courts of record. It also has powers to 'deal with all other matters relating to broad issues of policy and administration'⁹² of the judiciary.

It is important to note that the constitutional listing of the body, headed by the Chief Justice of Nigeria (CJN), as a federal executive body can be quite misleading. The creation of the body has been traced to the recommendations of the Eso Panel of Inquiry set up in 1993 by the Abacha military regime on the reorganisation and reformation of the Nigerian judiciary referred to earlier.⁹³ In terms of composition, sixteen of its twenty three members are judicial officers, judges and justices of the High Courts, Court of Appeal and the Supreme Court.⁹⁴ The other seven are legal practitioners of 'high professional standing'. Of this latter group, five, nominated by the Nigerian Bar Association only participate in the deliberations regarding the recommendation of persons for judicial appointment.⁹⁵ The other two members who are not 'jurisdictionally' restricted are nominated by the CJN. Thus, the pre-eminent body is essentially a judicial affair.

⁹² Paragraph 21(a-i).

⁹³ O Badejogbin "The National Judicial Council: Weaving a Patchwork of Praiseworthy Accomplishments and Ruinous Shortfalls" (2005) 3 Judicial Observatory Journal available at: http://www.accesstojustice-ng.org/toj3national.htm#Scene_1 (last accessed 27 April 2008). See Chapter Three supra.

⁹⁴ Paragraph 20 (a-h), Schedule 3, Constitution of the Federal Republic of Nigeria, 1999.

⁹⁵ Paragraph 20 (i-j).

In practice, the 'recommendatory' powers of the NJC have been potent, if not decisive, in the appointment and dismissal of judges. Its recommendations on judicial appointments have been the most important factor in nomination of judicial officers by the executive for screening and ratification by the legislature all over the country since the return to civil rule in 1999. It has been quite active in investigating complaints (petitions) of judicial misfeasance and recommending appropriate action on the part of the executive. On its recommendation, a large number of judges have been suspended or dismissed from office thus, within three years of its operation over 50 judicial officers had been investigated for corruption or other judicial misfeasance.⁹⁶ By the end of 2005, more than a dozen had been dismissed as a result of its findings.⁹⁷ And a couple of others have since been similarly dealt with. To date only justices of the Supreme Court have completely escaped the axe of the NJC.

However, the NJC has been criticised for high-handedness, failure to observe fair-hearing and selectivity in its recommendations. In some cases, its decisions have been challenged for eroding rather than affirming judicial independence.⁹⁸ Joseph Otteh, Director of Access to Justice, a leading NGO committed to an independent legal and judicial system in Nigeria made the point very well when he noted that

Although the Council is making an important difference in the fight to control corruption in the judicial estate and strengthen the independence of the judicial branch, many might believe that the signals coming from the Council is now mixed, and that the Council is missing opportunities, compromising consistency, and undermining its own authority.⁹⁹

Interestingly, save in one instance however, judicial challenges to its decisions have been unsuccessful.¹⁰⁰

From the perspective of cohesion, the predominant composition of the body by judicial officers is one of the NJC's strongest points. But it is easily one of its Achilles heels too. Despite its acclaimed role in sanitising the judiciary, leading members of the NJC, including the highest echelons of the judiciary, have

⁹⁶ O Oko "Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria" (2006) 31 *Brooklyn Journal of International Law* 9, 26.

⁹⁷ Badejogbin note 93 supra.

⁹⁸ Editorial "NJC and Oyo Judiciary Saga" *Daily Independent* Online Edition (Lagos Thursday 13 2008)

⁹⁹ J Otteh "Enugu Chief Judge Appointment Saga: How the NJC Shot itself in the Foot" (2005) 3 *Judicial Observatory Journal* available at: http://www.accessstojustice-ng.org/toj3enugu2.htm#Scene_1 (Last accessed 27 April 2008).

¹⁰⁰ H O Yusuf "Calling the Judiciary to Account for the Past: Transitional Justice and Judicial Accountability in Nigeria" (2008) 30 (2) *Law & Policy* 194, 219.

themselves sometimes been mired in allegations of bribery and corruption.¹⁰¹ It is useful to recall in this regard that the judiciary, like all institutions of civil governance in the country, had suffered serious institutional decay. The administration of justice had come to disrepute from 30 years of authoritarian military rule.¹⁰² Virtually all the judicial officers on the membership of the NJC (all of whom are there by various statutory permutations, notably their specific headship of levels of courts), were appointed to the bench by one or the other previous military administration in the first place.

It is pertinent to reiterate that judicial officers were exempted from administrative lustration applied to some public office-holders. The last military regime headed by General Abdusalam Abubakar (July 1998-May 1999), had retired serving military and police officers in government who had held political positions, as part of the transition measures and the demands for a break with the past.¹⁰³ Thus, the NJC, since its inauguration in 1999, has by default been securely in the hands of the 'old-guard' in the judiciary. This is a body of judicial officers who had held office during a part of the authoritarian period. The judiciary as an institution, it has been argued, bears complicity for political illegitimacy, corruption and misgovernance for which it was not brought to account in the transition to civil rule.¹⁰⁴

Thus, not only the spectre of the unaccounted past, but well-founded apprehensions of unchanged ways foreshadows the work of the NJC. Not unexpectedly, critics have identified inconsistencies in its operational procedures as well as a lack of courage in its approach to some cases.¹⁰⁵ All of these have cast a serious slur on the institutional accountability measure which the NJC represents (as far as its disciplinary powers are concerned) in the post-authoritarian period. The continued unsatisfactory state of affairs with regard to the rectitude of judicial officers takes us back to the thrust of the research, namely that a publicly accessible mechanism of accountability in the nature of a truth-commission is well-suited to institutional scrutiny of the judiciary in transitions.

¹⁰¹ Badejogbin note 93 supra

¹⁰² Y Osinbajo "Getting Justice Sector Reform on the Political Agenda: The Lagos State Experience" (Paper delivered by Prof. Yemi Osinbajo, the Attorney-General and Commissioner for Justice, Lagos State, Nigeria at the Conference on Justice Reform in Sub-Saharan Africa: Strategic Framework and Practical Lessons- Nairobi 21-22 November 2006) available at: www.britishcouncil.org/it/prof_yemi_osinbajo_presentation.doc (last accessed 9 April 2008).

¹⁰³ E O Ojo "Taming the Monster –Demilitarization and Democratisation in Nigeria" (2006) 32 (2) *Armed Forces & Society* 254, 263 and H O Yusuf "Travails of Truth: Achieving Justice for Victims of Impunity in Nigeria" (2007)1(2) *International Journal of Transitional Justice* 268, 270.

¹⁰⁴ Yusuf note 100 supra at 211-216.

¹⁰⁵ Badejogbin note 93 supra.

It is not the argument that the truth-seeking process discussed earlier¹⁰⁶ should have taken the place of a body like the NJC. Nor is it the proposition that subjecting the judiciary to public accountability would have cured all its institutional short-comings. Rather, the contention is that ventilating the judicial role in the authoritarian period through the truth-seeking process would have facilitated acknowledgement of its role in the suffering that the authoritarian period brought on the Nigerian society. Perhaps more importantly, it would have facilitated a robust public engagement with the judiciary in the critical task of institutional reconstruction which it has inevitably found itself. Surely, the incidence of widespread judicialisation of politics all over the world has dispelled any hitherto existing doubts as to the ramifications of the judicial function in society and its direct implications for governance in contemporary times. In the light of this reality, serious attention ought to be directed at the judicial function in societies in transition even in the same way as it is in liberal democracies.

As it is, the accountability gap on the institutional role of the judiciary in Nigeria during the country's authoritarian period haunts the judicial function. It has continued to challenge its attempts at self-transformation and regulation constituted by the establishment of the NJC. The task of the NJC is not made any easier by the fact that it is a creation of a constitution foisted on the country through an un-negotiated transition. It is thus no surprise that the NJC, even with best intentions, falls short of transforming the judiciary to a transparent institution in the country.

At a level of evaluation, the operations of the NJC and its continued struggle to sanitise the judicial institution (a task which has continued to prove Herculean), has served as a constant reminder of the judicial accountability gap in the transition period in which the judiciary has been saddled with great expectations.¹⁰⁷ The NJC's apparent inability to curb the level of judicial misfeasance eight years after its establishment gives cause for concern. Just when public confidence in the judiciary had improved considerably with the judicial interventions in the run-up to the controversial 2007 elections, the NJC was saddled with investigating petitions on allegations of alarming sleaze on the part of some judges of the Electoral Petitions Tribunals in various parts of the

¹⁰⁶ See Chapters One to Four *supra*.

¹⁰⁷ I Amaechi "Judiciary and the Burden of Expectation" *Daily Independent* Online Edition (Lagos Tuesday 25 March 2008).

country.¹⁰⁸ Of further significance to this study, keen observation of the Nigerian socio-legal scene suggests judicial misfeasance is sometimes a product of political interference and defective legal and political (structural) arrangements.¹⁰⁹ These implicate the need for a holistic approach to judicial transformation. It has been previously argued that a publicly accessible accountability process is better adapted to that objective.

The claim made here on public accountability of the judiciary as part of the transitional measures is a relatively modest one. Essentially, it is a route which is unlikely to have waived or obviated the need for a body in the conceptual nature of the NJC. Rather, it concedes the relevance of the NJC, designed as a permanent body for the rigorous monitoring, accountability and administration of the judiciary. The truth-seeking process and the opportunity for public accountability it portends, would have provided a forum for constituting the NJC (or any such similar body), in a manner that would have better secured its potential for institutional transformation for which it is conceived. This would have been the case granted the benefit of a public-led inquiry into the judicial function in the past.

In sum, the NJC could, at the least, have been constituted as a more representative body along societal aspirations for social reconstruction. Such a body would arguably assist in better fortifying the judicial institution against the vagaries of judicialised politics which potentially challenges any judiciary, drawn as the Nigerian courts are, into mediating highly contested political choices and questions. A closer examination of how the judicial function has fared in the following circumstances serves to make clearer the point being made about accountability of the judiciary and proper positioning of the judiciary in transitions.

5. TURNING THE TABLES? POLITICISATION OF THE JUDICIARY IN NIGERIA

The purist ambition to insulate law from politics has largely been unsuccessful.¹¹⁰ The gravitation of power from the political branch has been accompanied by immense pressure on the judicial function. It is perhaps presumptuous to expect the political elite would not explore avenues to control a

¹⁰⁸ J Nwankwo “N2.1b Bribe: NJC Probes Allegation against Tribunal Judges” *Daily Independent* Online Edition (Lagos Thursday 10 April 2008).

¹⁰⁹ F Ajayi “The Power to Destroy a Country Lies with the Judiciary: Nigerian Judiciary at a Cross-Roads” (2007) *Nigerian World*. Available at: <http://nigeriaworld.com/columnist/ajayi/040407.html> (last accessed 12 April 2008).

¹¹⁰ C H Schroeder “Foreword: The Law of Politics” (2002) 65 *Law and Contemporary Problems* 1.

visible contender for power like the judiciary. As Ferejohn observes, it is logical that the political branch, in the knowledge that judicial officers who they appoint could become not only their regulators in the public sphere, but in fact, determine their future personal status, would maintain more than a passing interest in the high stakes of judicial composition.¹¹¹

The price the judiciary pays for its potential to control the fortunes of the political elite is the retention by the latter of the power to check judicial power through a number of measures including the naming of judges, control over legislation delimiting judicial jurisdiction as well as the enforcement of judgements.¹¹² On a related note, Domingo has observed that the judicialisation of politics can in turn rebound with dire consequences for the rule of law.¹¹³ In the main, it can result in the politicisation of the judiciary with serious impact on its decisional independence.

The Nigerian judiciary, not atypical of accounts of contemporary transitioning experiences witnessing judicialisation of politics, faces the challenges of the other side of the dynamic, politicisation of the judiciary. It is to be expected that the political branch, having lost or voluntarily conceded some hitherto coveted power to the judiciary, will be keen on obtaining reasonable control of the latter to protect its institutional interests in governance.

One of the forms politicisation of the judiciary can take is the abuse, or perceived abuse, of appointive judicial power as a mechanism for obtaining desirable political results from the judicialisation of politics by the ruling elite. The disquiet that results from this dynamic and its potential for eroding confidence in judicial independence, featured prominently in the controversy generated by the recent nomination of the Chairman of the Presidential Election Petitions Tribunal (the Tribunal) to the Supreme Court by President Umar Yar'Adua. The nomination of Justice James Ogebe of the Court of Appeal was submitted by the presidency to the Senate for confirmation only hours before the Tribunal announced the one week date for delivery of its verdict in the presidential election petitions challenging the victory of President Yar'Adua. His

¹¹¹ John Ferejohn "Judicializing Politics, Politicizing Law" (2002) 65 *Law and Contemporary Problems* 41, 61.

¹¹² M Schor, "The Rule of Law" (2006) 9 *Suffolk Law School Research Paper Series* available at SSRN: <http://ssrn.com/abstract=889472>

¹¹³ P Domingo "Judicialisation of Politics: The Changing Political Role of the Judiciary in Mexico" in Rachel Sieder, Line Schjolden and Alan Angell (eds.) *The Judicialisation of Politics in Latin America* (Palgrave Macmillan New-York 2005) 21, 28.

predecessor had done the same under similar circumstances and the Tribunal ruled in his favour.

Not unexpectedly, the opposition cried foul.¹¹⁴ His nomination, along with that of another Court of Appeal Justice, to the Supreme Court, was on the recommendation of the NJC. Reports indicate the nomination had been submitted by the NJC to the President over two months earlier. It nonetheless raised serious concern and fuelled conspiracy theories, particularly in view of the fact that the Senate, dominated by the ruling party of the President, referred the matter for consideration of the relevant committee on the day the Tribunal was delivering its verdict.¹¹⁵ The situation was further compounded by the judgement of the Presidential Election Petitions Tribunal in favour of President Yar'Adua. From whatever perspective this is viewed, the timing of the announcement echoes apprehensions on the effect of the power of the political branch to appoint judges.

In general, concerns have been raised over the impact of the power on the decisional independence and integrity of judicial officers. In Nigeria, the most prominent of the concerns centres on judicial ineptitude and corruption (or simply apprehensions of it), especially in the lower courts and throughout the system.¹¹⁶ It is instructive that the recent decision of the Presidential Elections Petition Tribunal has not escaped the allegations of corruption that dogged the steps and seriously compromised the adjudication of the 2003 elections in the country. There are serious allegations from certain quarters that the five-man panel that sat over the Presidential Election Petitions had been severely compromised through financial inducement.¹¹⁷ This is quite apart from the rather untidy timing of the elevation of the Chairman of the Tribunal to the Supreme Court discussed above.

While the veracity of such damaging claims of judicial ineptitude remains in doubt, the opposition parties decried the Tribunal's decision for being perverse.¹¹⁸ In agreement, the leadership of the Transition Monitoring Group, a national

¹¹⁴ S Ojeifo "Presidential Election Tribunal Chairman Elevated to S'Court- Ogebe's Nomination Reckless, CNPP" *This Day* Online Edition (Abuja Thursday 22 February 2008). "Justice Ogebe Unfit for the Supreme Court-NCP" *The Nation* (Saturday 8 March 2008).

¹¹⁵ Sufuyan Ojeifo "Senate Refers Ogebe, Coomasie's Nomination to C'ttee" *This Day* Online Edition (Abuja Wednesday 27 February 2008).

¹¹⁶ ARD Inc. *Democracy and Governance Assessment of Nigeria* (USAID) 11 and 28 available at: http://pdf.usaid.gov/pdf_docs/PNADI079.pdf (last accessed 4 September 2008).

¹¹⁷ Sahara Reporters "How the Presidential Elections Petition Tribunal Came to its Decision" *Nigerian Muse* available at: http://www.nigerianmuse.com/nigeriawatch/2007/How_the_Presidential_Elections_Petition_Tribunal_Came_To_Its_Controversial_Verdict (last accessed 4 March 2008).

¹¹⁸ Sahara Reporters "CNPP – 'Presidential Elections Petition Tribunal, A Betrayal of Democracy'" available at: <http://www.saharareporters.com/www/report/detail/?id=516> (last accessed 4 March 2008).

coalition of some leading non-governmental organisations that monitored the elections alongside international observers, dismissed it as ‘A Charter for Dishonest Elections.’¹¹⁹ The persistence of real or imagined corruption in the judiciary is a product of the existential continuity of the institution in the transition process.

Not unrelated to deep-seated public distrust for the judiciary, especially at the lower levels, is the preference for ‘appellate justice.’ By this is meant the high tendency to appeal unsatisfactory judgements by a party in litigation. Litigants commonly treat the trial courts as ‘clearance houses’ for obtaining justice through the judicial process. It is typical to find the response to a ruling by an unsatisfied party expressed in similar refrain to that of a party chieftain recently that ‘The beauty of this whole thing is that the ruling ignites the appeal process.’¹²⁰ In recent times, this propensity has led to an attendant high volume of appeals in the appellate dockets in the country.

The attitude is generally that it is easier to influence the court of first instance almost invariably presided by a single judge. Even in cases like the electoral petitions matters composed of 3 or 5 member-panels, the attitude was the same. It has for instance been the position of all parties to the consolidated presidential elections petition that irrespective of the outcome, there will be ultimate appeals to the Supreme Court. This is despite the composition of the Tribunal by 5 Justice of the Court of Appeal. And it was no surprise that the Petitioners immediately appealed the decision.¹²¹ Thus the Supreme Court appears to be the lone judicial institution that currently enjoys the new-found confidence in the judiciary in Nigeria’s transition.

However, public confidence in the integrity of even the Supreme Court itself must not be overstated. Apart from the relative infancy of such confidence, the Supreme Court itself has not been spared the vagaries of adjudicating politically charged cases. It was nearly brought into disrepute in its upholding of the Court of Appeal findings that a then serving-governor, James Onanefe Ibori, was not an ex-convict in the *Ibori* Case. This was a very controversial case which centred on serious allegations that a serving governor was an ex-convict, and was thus unfit

¹¹⁹ A Obe ‘A Charter for Dishonest Elections’ *Nigerian Muse* available at: http://www.nigerianmuse.com/nigeriawatch/2007/A_Charter_for_Dishonest_Elections_Essay_by_Ayo_Obe (last accessed 4 March 2008).

¹²⁰ E Aziken et al “Oserheimen vs Oshiomhole: AC Hails Judiciary over Ruling” *The Vanguard* Online Edition (Lagos Thursday 20 March 2008).

¹²¹ Ise-Oluwa Ige “Buhari Files Appeal at Supreme Court” *Vanguard Online* (Lagos Monday 3 March 2008).

to hold office in line with constitutional provisions. Critics of the decision were aggrieved that the Supreme Court upheld the finding that there was not enough proof in the case to support the claim that the governor was an ex-convict. It was criticised for ignoring the fact that the judge who convicted him had given evidence at the trial of the matter and positively identified that Governor Ibori was the accused he convicted some years back. It was generally believed that the Court had been improperly influenced by the Presidency who supported the governor against all odds.

It was further alleged by the complainant in the case that the Chief Justice of Nigeria who presided over the case and some of the other justices who sat on the panel, had collected a bribe from the governor.¹²² Surprisingly, the disturbing allegation made in open court, did not earn him a citation for contempt. Rather, the Court invited Interpol to investigate the matter but nothing untoward was discovered against the justices.¹²³ This particular case still hounds the Court as it recently emerged that the ex-governor as well as his wife had in fact been convicted of similar crimes alleged by at least two other courts in the United Kingdom.¹²⁴

Again, the Court has become an unwitting victim of the intrigues that sometimes characterise the conduct of the political process which renders adjudication of cases from it, a daunting task for even the highest levels of the judiciary. Recently, some justices of the Court became defendants in a suit before the high court for alleged unfair conduct and verbal attack (in open court), on a party in *Re: Peter Obi vs. Independent National Electoral Commission (INEC) & 70rs (Re: Peter Obi)*.¹²⁵ The case challenges the decision of the Court in the *Obi Tenure Case* discussed above. It came to light through depositions before the Court that one of the Appellants had collected a substantial amount of money from the Respondent to abandon his claims but failed to do so. Irked by this development, he was called out at the hearing for identification and berated as an opportunistic individual who had perfected the art of making money through contesting elections, challenging the winner through litigation after losing and

¹²² He has since retired on attainment of the statutory age for judicial officers.

¹²³ Following a complaint by the Nigeria Bar Association, the complainant, a lawyer and his counsel were recently debarred by the Disciplinary Committee of the Bar Council. See T Soniyi and T Amokeodo "Two Lawyers barred from Practice" *The Punch on the Web* (Lagos Tuesday 22 April 2008).

¹²⁴ D Omonode "Supreme Court Justices Panic over Ibori" *National Day* available: http://www.nigerianmuse.com/nigeriawatch/Supreme_Court_Justices_panic_over_Ibori (last accessed 4 March 2008).

¹²⁵ Appeal No. SC/123/2007

receiving gratification for withdrawing his case. The Court then struck out his application. Aggrieved at the ‘unguarded statements’ of the justices, he approached a high court claiming huge damages for denial of fair hearing, and bias on the part of the Supreme Court Justices.¹²⁶ The implications of a case like this on judicial authority is better appreciated in the light of the fact that it would likely end up for final determination in the same Supreme Court, presumably by another panel of the Court. Will the Court find itself in breach of the principles of fair-hearing? This would be an interesting test-case.

At the state level, executive and political interference with the judicial process has given cause for concern as to the sustainability of judicial independence. Governors have been known to remove judges who they perceived independent and non-deferential to the executive.¹²⁷ Take the example of political indiscretion, again in Kogi State referred to above. Recently, the Chief Judge was purportedly removed by the acting governor following a resolution of the legislature. He had delivered a judgment in which he declared the political arrangements made by state executive for the scheduled local government councils’ elections illegal in a suit filed by the political opposition. His hurried removal on widely believed trumped up charges of financial misappropriation was accompanied by executive rebuff of his ruling. The state bar, thoroughly miffed by the unbridled abuse of political power, insisted on his reinstatement and vowed to boycott the courts.¹²⁸ He was reinstated three days later.¹²⁹

In certain vindication of critics of judicial involvement in overly political processes, there are indications that public reaction to judicial decisions on electoral cases is placing a lot of undue pressure on the judiciary. It will be recalled that the 2007 general elections in the country had led to unparalleled levels of litigation on electoral matters in the country. As stated earlier, this is traceable to the widespread discontent with the election considered to be the worst in the country’s history. It is thus no surprise that the courts to which recourse have been had for resolving the disputes arising from the elections will be the focus of intense public attention. But this focus sometimes presents a dilemma for

¹²⁶ Funso Muraina “Politician Slams N500M Suit on Supreme Court Judges” This Day Online Edition (Abuja Friday 22 February 2008).

¹²⁷ Editorial note 98 supra.

¹²⁸ R O Agbana “AC, NBA Chapter Demand Reinstatement of Kogi CJ” *The Guardian* Online Edition (Lagos Thursday 3 April 2008).

¹²⁹ S Egwu “Sacked Kogi Chief Judge Reinstated” Daily Trust Online Edition (Saturday 5 April 2008).

the judiciary. The public response to the judicial handling of these cases may be lacking in objectivity. As one observer succinctly puts it

...most judges... are increasingly being labelled not according to the erudition of their judgements but whether, in the perception of Nigerians, their verdicts affirm the vote of no confidence which they had already passed on Obasanjo's eight year misrule. Thus whenever the tribunals uphold any election, it attracts condemnation while annulments attract spontaneous applause.¹³⁰

Thus, there is the potential for the widespread judicialisation of the electoral process to result in the undermining of judicial authority, the very antithesis of seeking judicial intervention in the first place.

In sum, the foregoing instantiations of political interventions in and public focus on the judicial process draws attention to the fault lines of the country's judicial institutional design. These have become accentuated by factors relating to an accountability gap (both judicial and administrative) of its governance in the period of authoritarian rule. Institutional positioning of the Nigerian judiciary, in the context of a volatile democratisation process, leaves it quite predisposed to politicisation. Further, the persistence of real or imagined corruption in the judiciary is a product of the existential continuity of the institution in the transition process. This will arguably remain the case as long as the matter of accountability of the judiciary for complicity in misgovernance during the country's authoritarian past remains completely ignored or under-addressed at best.

CONCLUSION

The cases analysed here demonstrate how political players, in a struggle for hegemony, ascendance and control of power, encourage or even actively initiate the process of judicialisation of politics. They reinforce an important feature of judicialisation of politics in the new constitutionalism, the predilection of political branches of government in matured and young democracies alike for ceding political decisions to the judiciary for varying strategic reasons.

The discussion above suggests the Nigerian Supreme Court in particular has taken a strategic position in the task of democratic institutional building and the reinstatement of the rule of law in the country to the acclaim of the public in the country. The account also discloses that the judiciary, in the course of its

¹³⁰ Amaechi note 107 supra.

numerous interventions, has not only been drawn into overly political disputes that overreach its jurisprudential preferences, but is itself still challenged by the institutional dysfunctions carried over from the authoritarian era.

It emerges from the analyses of the Nigerian experience that the tentative lines of the direction of judicial activity in the country can be drawn from the position of the Supreme Court. It would however be simply misleading to consider its position as representative of the current state of the judiciary as a whole. Despite a few commendable handling of critical and overly political matters, the manner of adjudication and independence of the lower courts remain quite unsatisfactory. In particular, the lower courts have yet to catch on to a consistently progressive role in the country's political transition. The Supreme Court itself is still enmeshed in controversies that speak to the dilemma of an unscrutinised past, a feature of transitional justice in Nigeria and elsewhere.

The Nigerian experience also indicates that a number of situational dynamics, prominent among which is the ceding of power to the judicial branch by political actors for strategic reasons, situates the judiciary as a powerful force for social reconstruction, entrenchment and stabilisation of democratic ethos in post-authoritarian transitions. But the culmination of the dynamics leads back to the need for closer scrutiny of the judicial function in transitional societies.

Accounts of the Nigerian experience of the judicialisation of politics suggest the need to devote more attention to the role of public opinion in analytic considerations of the judicial function. While it is crucial to protect the institutional integrity of the judiciary, public opinion along with other political considerations which, in practice, significantly impact on judicial activity, ought to be given more detailed and systematised consideration by the legal academy in evaluations of the judicial function. The keen public focus on and preference for the judicial resolution of power contestations among the political elite; itself deriving mainly from the divisions within their ranks or the need to secure legitimacy for the exercise of power secured through deficient democratic processes, commends the view that the insufficient attention to public opinion in legal analysis, provides an incomplete empirical account of the role of judicial review. Incidentally, this thesis also omits a complete empirical account on the Nigerian experience. Nonetheless, legal theory will be more in tune with socio-political reality and enriched by the adoption of a robust approach to analysis of the judicial function in general.

The judiciary in transitional societies, and even in well established democracies, is certainly on the march of power. But the political branches which voluntarily or unwittingly ceded some of the powers to it may fight back. The voluntary ceding of critical policy-making powers is usually a strategic move to achieve certain advantages like legitimacy or deflection of public disaffection for unpopular policies. Consequently, while the political branches may facilitate or at least support the judicialisation of politics, an alteration of the balance of power which may result, is usually not welcome.

Institutional distortions may result from the response of the political branches to the active participation of the judiciary in determining highly political matters. These tend to jeopardize the very foundations of the rule of law, ordinarily consolidated by judicial activism. In the event that the judiciary, deriving from its institutional nature, lacks both the power of the sword and the purse, political power-resurgence of this nature challenges the propriety of devolving so much governmental power on the most unlikely branch. From experiential accounts, aspiration of judicial rescue of a troubled transition and consolidation of democracy is a daunting yet vital task.

CONCLUSION

Utilising the specific experience of political transition in Nigeria, this study identified an important but mostly neglected aspect of transitional justice: the need to scrutinise the role of the judiciary in misgovernance. Specifically, the thesis focused on the need for institutional accountability for the judicial role in upholding and legitimising authoritarian rule as part of transitional justice arrangements in the post-authoritarian, democratising polity. The position was canvassed that neglect or failure to include the judiciary, a major actor in the exercise of state power, in the process of accountability for misgovernance and gross violations of human rights, leaves a major gap in accountability for the past. This has potentially wide ramifications for the present and the future.

The study raised normative questions about the propriety of the accountability gap that is thus created. Perhaps more importantly, it argued that this failure also threatens the transformation of the state and its hitherto complicit institutions. This latter point is the case, it was argued, because the judiciary served, even if unwittingly, as an instrument of oppression in the period of authoritarian rule. Yet, as shown by various accounts of the contemporary experience of governance, the judiciary has come to assume an important position in the determination of rights claims, government policy and socio-political reforms instituted by countries in transition.

The assumption by the judiciary of a strategic institutional role in governance in post-authoritarian societies is usually externally-driven. The ascendance of judicial power in governance in such contexts is usually facilitated by the need for the resolution of emergent, sometimes novel, disputes and contestations within the political branch of government. In many cases, the judiciary becomes the forum for the resolution of key political disputes and moral questions generated partly by the chequered institutional memory and experience of the political branch. In light of this situation, it is reasonable to assert that there is merit in paying more attention to the salience of accountability of the judiciary in post-authoritarian societies in particular and transitional contexts in general. Thus the current neglect of critical perspectives on accountability of the judiciary is at the least, an undesirable gap in transitional justice theory and practice.

It was intended to demonstrate that public accountability for the previous judicial role in governance is crucial during *transition moments* in a society. It was argued that in transitional societies, such accountability can be legitimately

and viably pursued through the mechanism of the truth-seeking process as part of a holistic approach to taking stock of the past. Such a public process is easily accessible and accords with certain understandings of the rule of law. The primary advantage of the public accountability process as represented by the truth-seeking mechanism in the context of a transitioning society is the opportunity it provides for securing comprehensive accountability of governance during a period of authoritarianism.

The argument has been made in this thesis that there is something seriously disturbing to find that judges who swore an oath to defend the Constitution going against that oath. The violation of the judicial oath to defend the Constitution includes the act of legitimating unconstitutional (military) governments as in the case of Nigeria. The same goes for according recognition to, and upholding of laws imposed by military usurpers. At the least, the question of the source of judicial power to act comes up for scrutiny in the circumstance that military usurpation of power somehow overturns the very Constitution which presumably grants such powers. Worse still is the realisation that the military, in the exercise of usurped powers legitimised by the judiciary, commit gross human rights violations over a considerable period of time as is the case in Nigeria. With such a record, the judiciary undermines its own institutional integrity. On this view, the judiciary ought, as a matter of principle, to be made to give an account of its stewardship to the society.

Accountability of the judiciary for its past role in governance is an important task that has to be undertaken in the short term before collective amnesia develops. The judiciary should not be allowed to seek protection from accountability through reliance on traditional normative doctrines of institutional independence or immunity for at least three reasons. First, these doctrines are generally conceived within the construct of settled, democratic societies. Second, there is the need for comprehensive accountability to fulfil the obligation of the right of the society to know what went wrong in the past. Third, institutional accountability for the past facilitates transformation, one of the key aspirations of transitioning societies. Thus, where a mechanism like the truth-seeking process is available, the judiciary, like the other two branches of governance, ought to go through it.

A key foundational premise for institutional accountability as advanced in this study is that the role of the judiciary is of a critical nature as the third estate of the realm at all times. It is fast becoming counter-intuitive, if not indeed, a flight from

experiential accounts, to regard the judicial branch as the weakest arm of government. The wave of judicialisation in contemporary times has opened up new thinking about situating the judiciary in the constellation of power in the modern state. The experience in democratising polities has similarly reinforced and in some cases, directly suggested the judiciary now exercises immense powers on political matters. These all point in the direction of a need to pay more attention to the role of the judiciary in governance and corresponding accountability for its exercise of powers at all times. This, as argued earlier, is even more the case in democratic societies.

It has been shown that the gap in the accountability for the judicial role in a society's past is one that ought to be addressed. This is in view of the centrality of the judiciary both in authoritarian and post-authoritarian societies in particular and post-conflict contexts in general. It is now imperative that transitional justice processes accord an important place to accountability of the judiciary for its role in the past. As revealed by the consideration of the role of the judiciary in the authoritarian and post-authoritarian period in Nigeria, the significance of accountability of the judiciary in transitional societies can not be overstated. This stems from critical analysis of specific cases reflecting the sometimes decisive role the judicial institution plays in governance in contemporary society. The situation can hardly be otherwise. The judiciary is after all, the third in the conventional legal and political conceptions of state institutions.

The prevalent phenomenon of judicialisation of politics in liberal, advanced democratic societies as well as democratising polities sharply draws attention to the need for more scholarly scrutiny on the judicial function. The need for accountability of the judiciary for its role in past governance takes on an even more urgent imperative in post-authoritarian contexts where, as is wont to be the case, it bears institutional complicity for gross violations of human rights and impunity. The burden it carries from the past affects its performance and raises concern on the legitimacy of its exercise of power in the present and future.

This research highlights that a notable feature of the judicialisation of politics is the ability and willingness of courts to limit legislative action according to constitutional principles and the values of the rule of law. While the Nigerian experience has not significantly diverged from this paradigm, the account of the judicialisation of politics in the country discloses it has had more profound resonance for governance in the way it has impacted upon executive actions in

governance. The phenomenon has been distinctly discernible in adjudication of disputes on the intersection of individual rights with public interests in a troubled transition from authoritarianism.

The impact of the judicial role in transitioning polities, from Central and Eastern Europe through to South East Asia, Latin America and Africa, outlined in this study, supports the position that it is critical to the democratisation process to ensure the judiciary is properly positioned for the transition from an authoritarian past. It is noteworthy that in virtually all of these cases, new courts were established to take on various socio-political and other challenges of diverse transitional societies. While the creation of such courts at first blush appears to elide the need for accountability of the judiciary, it can be argued that it actually speaks to recognition of the questionable role of the judiciary in past governance. In other words, the creation of new constitutional courts signals the need for a mediator unburdened by a complicit institutional past. The recognition of perceived or actual institutional complicity of inherited judicial structures would appear partly responsible for the usually uneasy relationship between them and the newly created courts.

In societies like Nigeria where new courts were not created, the case for accountability of the judiciary for the past is even more compelling. The judiciary ought to be made to give an account of its role in past governance as part of transitional justice measures to achieve comprehensive accountability and institutional transformation. It is only then that it can be expected to take on the serious challenges of definitive, purposeful judicial governance required for strengthening the democratising transitioning polity.

With respect to the Nigerian experience, the research discloses that the tentative lines of the course of judicialisation of politics in the country can be drawn from the position of the Supreme Court, considering its pride of place in the judicial system. But it would be simply misleading to read off it, the current state of the judiciary in the country as a whole. The outline of the judicialisation of politics in the Supreme Court differs from what is seen in the courts below. Despite some commendable handling of critical and overly political matters, the manner of adjudication and independence of the lower courts continue to give cause for concern. The Supreme Court itself is still enmeshed in controversies as to its integrity and its jurisprudence remains ambivalent at critical moments. All these speak to the dilemma of an unscrutinised institutional past, a feature of transitional justice with regards to the judicial function in Nigeria and elsewhere.

In democratising as well as established liberal democratic societies, protestations of deficient democratic credentials have surprisingly been ineffectual in curbing the geometric increase in, and sometimes preference for, judicial determination and control of public policy as well as highly political and moral questions. The immense powers wielded by the judiciary over key policy aspects of governance, especially in the contemporary new constitutionalism, strongly suggests the need for closer and more systematised scrutiny of the judicial function.

Experiential accounts strongly suggest that newly established constitutional courts have played a significant role in deepening democracy. The courts, through a particular form of judicial activism and sometimes very controversial jurisprudential preferences, are securing the core values of the constitution and securing human rights in transitioning polities. Courts have played (and continue to play) a central role in shaping the direction of key political and moral issues which go to the foundations of the existence of their societies. In the Nigerian case, the judicialisation of politics has taken on remarkable prominence in governance. The voluntary (and sometimes involuntary) ceding of powers by the political branches has witnessed the judiciary becoming the choice mechanism for resolving the debacles arising from a legacy of a dysfunctional system created in the course of almost three decades of military authoritarianism. And yet, the judicial institution itself has been hitherto under-scrutinised in terms of its role in the past and its position in the transition to democracy. This thesis has endeavoured to begin to rectify that gap. But given the high stakes involved in the Nigerian polity, it has been argued here that more remained and remains to be done.

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