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## Robes on Tight Ropes: The Judicialisation of Politics in Nigeria

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# Robes on Tight Ropes: The Judicialisation of Politics in Nigeria\*

Hakeem O. Yusuf

## Abstract

This account of judicialised politics in the Nigerian transition experience examines the regulation of the judiciary of the political space, through the resolution of intergovernmental contestations in a dysfunctional federation. It analyses the judicialisation of elite power disputes which have resonance for due process and the rule of law in particular and governance in general. A study of the role of the judiciary in stabilising the country, itself a pivot in the West Africa region in particular and Africa in general, is important. This is especially in view of its classification as a 'weak state,' despite its enormous human and natural resources. The analyses here suggest the Supreme Court has taken a strategic position in the task of democratic institutional building and the reinstatement of the rule of law in the country. This strategic measure has received the acclaim of the public. However, the account also discloses that the judiciary, in the course of its numerous interventions, has been drawn into overly political disputes that overreach its jurisprudential preferences. Of even more significance, it demonstrates that the judiciary is itself still challenged by institutional dysfunctions constituting part of the legacies of the authoritarian era. The situation leads back to the need for closer scrutiny of the judicial function in transitional societies.

**KEYWORDS:** judicialisation of politics, transition, constitutional courts, due process, Nigeria, politicisation of judiciary, due process, rule of law

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## 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 unending transitions.

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 unprecedented expansion of judicial power and its impact on governance examined in this article.

But by far the most remarkable feature of the transition from military authoritarianism is the judicialisation of 'pure politics'<sup>1</sup> and the unprecedented rise of judicial power in the country's transition experience. In this regard, one of Hirschl's classifications of the multi-dimensional facets of judicialisation of politics is quite relevant. He observes that the judicialisation of 'mega-politics' (or pure politics) as a type of judicialised politics, manifests in various forms.

Manifestation of the judicialisation of pure politics includes judicial monitoring of executive 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 identity questions of statehood. He further identifies in this category, the judicialisation of democratic electoral processes.<sup>2</sup> Hirschl's definition of pure politics as the transfer to the courts of matters that are of a decidedly political nature and significance is adopted for its aptness to the Nigerian situation analysed here.<sup>3</sup>

In the Nigerian experience, judicialised politics<sup>4</sup> has been cross-cutting. The judicialisation of the process of democratisation, power contestation among

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1 Ran Hirschl "The New Constitutionalism and the Judicialization of Pure Politics Worldwide" (2006) 75 (2) Fordham Law Review 721.

2 Ibid. at 727.

3 Hirschl note 1 supra at 723.

4 In this article, I use the terms 'judicialisation of politics' and 'judicialised politics' interchangeably.

the political elite, inter-governmental policy and legislation issues, have had profound impact on politics and governance in the age of new constitutionalism. 'Judicialization 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.<sup>5</sup>

The literature shows the phenomenon has become widespread across the spectrum of advanced, liberal, young and aspiring democratic polities alike.<sup>6</sup> And as Moustafa recently noted, even authoritarian societies are not left out.<sup>7</sup> In the Nigerian experience of democratisation, the politics of transition has been so judicialised that the Supreme Court, the apex court in the country, has been nominated for the last two consecutive years, as the institution or 'Man of the Year.'<sup>8</sup>

This account of judicialised politics in the Nigerian transition experience examines the regulation of the judiciary of the political space, through the resolution of intergovernmental contestations in a dysfunctional federation. It analyses the judicialisation of elite power disputes which have resonance for due process and rule of law in particular and governance in general. A study of the role of the judiciary in stabilising the country, itself a pivot in the West Africa region in particular and Africa in general, is important, especially in view of its classification as a 'weak state'<sup>9</sup> despite its enormous human and natural resources.

The conduct of governance at the centre, and the tension it has generated within the polity, is a stark reminder of the rather problematic operation of

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<sup>5</sup> Hirschl note 1 supra at 728.

<sup>6</sup> See John Ferejohn "Judicializing Politics, Politicizing Law" (2002) 65 *Law and Contemporary Problems* 41, 43-44, Tom Ginsburg *Judicial Review in New Democracies* (Cambridge University Press Cambridge 2003), Tate C Neal "Why the Expansion of Judicial Power" in Neal C Tate and Torbjorn Vallinder *The Global Expansion of Judicial Power* (New-York University Press New-York 1995) 28; Ruti Teitel "Post-Communist Constitutionalism: A Transitional Perspective" (1995) 26 (1) *Columbia Human Rights Law Review* 167; Jiri Priban *Dissidents of Law* (Ashgate Dartmouth Hampshire 2002); Wojciech Sadurski *Rights Before Courts: A Study of Constitutional Courts in Post Communist States of Central and Eastern Europe* (Springer Dordrecht 2005); Tom Ginsburg and Gombosuren Ganzorig "When Courts and Politics Collide: Mongolia's Constitutional Crisis" (2000-2001) 14 (2) *Columbia Journal of Asian Law* 309; Heinz Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge University Press Cambridge 2000).

<sup>7</sup> Tamir Moustafa *The Struggle for Constitutional Power: Law, Politics and Economic Development in Egypt* (Cambridge University Press Cambridge MA 2007).

<sup>8</sup> Onyema Omenuwa "2007: The Year of the Supreme Court" *The Daily Independent Online Edition* (Lagos Thursday 27 December 2007) available at <http://www.independentonline.com/?c=129&a=7908> (February 20 2008).

<sup>9</sup> Susan E Rice and Patrick Stewart *Index of State Weakness in the Developing World* (Brookings Institution Washington D.C 2008) available at: [http://www.brookings.edu/reports/2008/02\\_weak\\_states\\_index.aspx](http://www.brookings.edu/reports/2008/02_weak_states_index.aspx) (last accessed 11 March 2008).

federalism in Nigeria. As the record of the experience of federalism in other parts of Africa has shown, the Nigerian situation is not unique in this regard.<sup>10</sup> However, as Adamolekun and Kincaid have noted, the problem is due, not so much to the inadequacies of federalism as a form of political arrangement, as to the botched attempts at democratic governance that has plagued post-colonial Africa.<sup>11</sup>

The judicialisation of politics essentially presupposes a more visible presence of the judiciary in political and social life. It 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 the 'social redress and rights claims.'<sup>12</sup> This has been prominent in transitions to democracy in post authoritarian societies of South-East Asia, Central and Eastern Europe and Africa. Thus, it is relevant to this account to proceed with an evaluation of comparative perspectives of experiences of the judicialisation of politics in transitional societies in diverse regions of the world. They provide a viable analytical template for the evaluation of the Nigerian experience to which we return later.

### **Comparative Perspectives**

In a study of the establishment and workings of constitutional courts in political transitions from authoritarian (one-party), communist or military rule in four countries in South-East Asia, Ginsburg observed the dramatic rise of judicial review of legislative and executive action.<sup>13</sup> 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. 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.'<sup>14</sup>

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,

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<sup>10</sup> Ladipo Adamolekun and John Kincaid "The Federal Solution: Assessment and Prognosis for Nigeria and Africa" (1991) 21 (4) *Publius: The Journal of Federalism* 173.

<sup>11</sup> *Ibid.* at 174.

<sup>12</sup> Pilar Domingo "Judicialization of Politics: The Changing Political Role of the Judiciary in Mexico" in Rachel Sieder, Line Schjolden and Alan Angell (eds.) *The Judicialization of Politics in Latin America* (Palgrave Macmillan New-York 2005) 21, 22-23.

<sup>13</sup> Tom Ginsburg "Constitutional Courts in New Democracies: Understanding Variations in East Asia" (2002) 2 (1) *Global Jurist* (Advances Article 4) 1, 3. Available at: <http://www.bepress.com/gj/vol2/iss1/art4>.

<sup>14</sup> *Ibid.* at 9.

courts and judges have played a significant role ‘underpinning and facilitating democratisation.’<sup>15</sup> They have thus become active participants in the democratisation project.<sup>16</sup>

In Central and Eastern Europe, constitutional courts have taken on head long, some of the most vexed social issues and political challenges confronting the liberal democratisation process. They have intervened in and moderated the course of post-totalitarian transitional justice measures, like prosecution of alleged violators of human rights and lustrations,<sup>17</sup> all with considerable resonance for politics and governance in the so-called ‘velvet revolutions’ of Central and Eastern Europe.<sup>18</sup>

Thus, the Constitutional Court of Hungary ruled in the *Zetenyi Law Case*,<sup>19</sup> 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 rule of law.<sup>20</sup> The decision effectively blocked the prosecution of serious crimes committed during the communist era for being inconsistent with the newly amended Hungarian Constitution.<sup>21</sup>

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.<sup>22</sup> More than that, the Czech Constitutional Court has played ‘an enormous role’ in the ‘re-modernisation’ of Czech society.<sup>23</sup>

Assessing the work of the Czech Republic Constitutional Court, Priban observes that ‘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.<sup>24</sup> The Court extended its purview beyond strictly legal

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<sup>15</sup> Ginsburg note 6 supra at 15.

<sup>16</sup> Ibid. at 24.

<sup>17</sup> See Sadurski note 6 supra at 221-262 for detailed consideration of judicial review of lustration legislation and measures in Central and Eastern Europe.

<sup>18</sup> Sadurski note 6 supra.

<sup>19</sup> 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 Ruti Teitel “Paradoxes in the Revolution of the Rule of Law” (1994) 19 Yale Journal of International Law. 239.

<sup>20</sup> Priban note 6 supra at 89.

<sup>21</sup> Teitel note 19 supra at 240-241.

<sup>22</sup> Priban note 6 supra at 100-109.

<sup>23</sup> Priban note 6 supra. at 96.

<sup>24</sup> Priban Note 6 at 96.

contexts, to explication of moral and political requisites for a society based on law and democracy.<sup>25</sup> The trend has been replicated in Poland and Unified Germany.<sup>26</sup>

Teitel agrees with Priban that the jurisprudence of the constitutional courts in Central Eastern Europe have extended the traditional realms of judicial review.<sup>27</sup> She posits that in the process, the courts have gone on to establish a ‘newfound source of political legitimacy.’<sup>28</sup> The legitimating function derives from the liberal locus afforded to individuals (and presumably groups) to actively challenge political action, signalling a ‘new governmental openness.’<sup>29</sup>

I will argue below that despite scholarly scepticism on the democratic credentials of the activist judicial approach, based partly on its perceived potential of fostering legislative irresponsibility,<sup>30</sup> 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.

The constitutional courts have changed the ‘constitutional culture’<sup>31</sup> by limiting hitherto unbridled state power. 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.<sup>32</sup> But there is hardly any contention that constitutional courts in Central and Eastern Europe have generally given force to rights provisions which for decades had not been worth the paper they were written on.<sup>33</sup> They have also limited parliamentary action, striking down legislations and policies they deemed out of tune with constitutional provisions.<sup>34</sup> The courts have actively participated or sometimes taken the lead in setting an agenda of liberalism for the new government.<sup>35</sup>

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

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<sup>25</sup> Priban note 6 supra at 114-155.

<sup>26</sup> Ibid. at 97-99.

<sup>27</sup> Teitel note 6 supra at 182-187.

<sup>28</sup> Ibid. at 186.

<sup>29</sup> Teitel note 6 supra at 186.

<sup>30</sup> Sadurski note 6 supra at 289-299.

<sup>31</sup> Teitel note 6 supra at 169.

<sup>32</sup> Sadurski 6 supra.

<sup>33</sup> But Sadurski cautions however that ‘more nuanced’ evaluation of the records disclose a less rosy picture. Sadurski note 6 supra at 289-290.

<sup>34</sup> Teitel note 6 supra at 176-182.

<sup>35</sup> Ruti G Teitel “Transitional Jurisprudence: The Role of Law in Political Transformation” (1996-7) 106 (7) Yale L.J 2009 at 2009, 2023.

the judiciary and the political branches. The Mongolian experience demonstrates this reasonably well.<sup>36</sup>

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.<sup>37</sup> 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.’<sup>38</sup>

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.<sup>39</sup> It rejected attempts at limiting judicial review, insisted on adequate safeguards for separation of powers as well as structural and fiscal federalism.<sup>40</sup>

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.<sup>41</sup>

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*,<sup>42</sup> have had significant impact on policy and governance in a country struggling to come to terms with a harrowing past for the majority, and aspirations to forge an inclusive, egalitarian future for all. The South Africa Constitutional Court has been noted for holding a delicate balance between competing interests that could threaten the body politic.<sup>43</sup>

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 common

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<sup>36</sup> Ginsburg and Gombosuren note 6 supra.

<sup>37</sup> Klug note 6 supra.

<sup>38</sup> Samuel Isaacharoff “Constitutionalizing Democracy in Fractured Societies” (2004) 82 Texas Law Review 1861 (-1893) 1874.

<sup>39</sup> *In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) (S.Afr); *In re Certification of the Constitution of the Republic of South Africa* 1997 (2) SA 97 (CC) (S.Afr).

<sup>40</sup> Isaacharoff note 38 supra at 1878-1879.

<sup>41</sup> *Ibid.* at 1879.

<sup>42</sup> *Government of the Republic of South Africa & Others v Grootboom & Others* (2000) SACLR LEXIS 126.

<sup>43</sup> Isaacharoff note 38 supra 1893.

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.<sup>44</sup>

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.<sup>45</sup>

According to Moustafa, the Supreme Constitutional Court (SCC) not only effectively assisted the government to push through its new liberalised economic vision through striking down of socialist oriented legislations, it also provided an acceptable forum for the ventilation of hitherto repressed opposition views. It has also played a key role in securing property and advancing political rights of individuals and groups,<sup>46</sup> with the latter especially, to the discomfiture of its authoritarian creators.

Despite its rather moderate activism,<sup>47</sup> the decisions of the SCC opened up the space for the ventilation of opposition views on an institutional platform, with the SCC acting as an interface between state and society.<sup>48</sup> 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.<sup>49</sup>

In testimony to the visible power of the SCC over policy, the government later adopted various extra-legal measures to curb its progressive jurisprudence.<sup>50</sup> Notwithstanding these measures, the SCC 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.<sup>51</sup>

It can be fairly asserted that distrust for inherited, complicit, state institutions in transitioning polities, has played a significant role in the sometimes

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<sup>44</sup> Tate C Neal "Why the Expansion of Judicial Power" in Neal C Tate and Torbjorn Vallinder *The Global Expansion of Judicial Power* (New-York University Press New-York 1995) 28

<sup>45</sup> Tamir Moustafa "Law Versus the State: The Judicialisation of Politics in Egypt" (2003) 28 (4) *Law and Social Inquiry* 883, 895-896.

<sup>46</sup> Moustafa note 43 supra. at 914-921.

<sup>47</sup> Ibid. at 903-907.

<sup>48</sup> Ibid. at 894-903.

<sup>49</sup> Ibid. at 908-913.

<sup>50</sup> Ibid. at 914-926

<sup>51</sup> Ibid. at 926-927.

uncritical social approval of newly created ones. The 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.<sup>52</sup>

However, it is pertinent to reflect on whether the assumption that a new judicial institution is the only viable approach to ensuring judicial promotion and protection of democratic values and rule of law in transitioning polities. The absence of such courts in Nigeria's transition offers an opportunity for such reflection.

### **A flawed federation, inter-governmental relations and the courts**

This aspect of the paper focuses on the judicialisation of politics through the mechanism of what Adrienne Stone refers to as 'structural judicial review.' Structural judicial review is the process, in federal polities with written constitutions, whereby judges interpret and enforce constitutional provisions that relate to the basic structure of government.<sup>53</sup> 'Structural provisions' in constitutional theory, she states further, 'are those that lay down rules about how, where and when institutions of government operate.'<sup>54</sup> The provisions that divide power between constituent parts are some of the most important.<sup>55</sup>

On this view, structural judicial review has played a key role in judicialised politics in Nigeria's most recent judicial and political history. Unlike Stone's objections to structural review,<sup>56</sup> the position taken here is that structural judicial review, particularly in transitional contexts confronting the challenge of distorted federalism among other institutional distortions, constitutes a more reliable mechanism for achieving a balance of power and deepening democracy. The Nigerian transition experience furnishes ample support for this position.

In the post-authoritarian military period in Nigeria, particularly between 1999 and 2006, disputations on the appropriate spheres of power and control between the Federal Government on one hand, and the states on the other, were frequent. As a result, there was seeming endless recourse to the judiciary for resolution. Customisation of this approach to governance and the extensive judicialisation of politics it generated attracted judicial notice and obiter dicta of the Supreme Court, the judicial venue for their resolution.

In a recent decision, *Attorney General of Abia & 2 Ors v Attorney General of the Federation & 33 Ors*,<sup>57</sup> the Supreme Court observed that it was

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<sup>52</sup> Teitel note 19 supra at 246.

<sup>53</sup> Adrienne 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.

<sup>54</sup> Ibid. at 3.

<sup>55</sup> Ibid. at 4.

<sup>56</sup> Ibid. at 20-30.

<sup>57</sup> (2006) 7 NILR 71.

‘yet another open quarrel between the State and Federal Government’ with which the Court had become ‘thoroughly familiar.’<sup>58</sup> The Court noted that the cases revolved around federalism and unitarism from the constitutional and political stand-point. This is not surprising.

The transition away from military authoritarianism has forced on to the centre stage of governance, tensions arising from the country’s *de jure* federal status which has witnessed an accelerated transformation to a *de facto* unitary polity. Inherent tensions between the two leanings were accentuated by a government at the centre, headed by a former military ruler. Despite his internationally recognised status as an African statesman as well as former dictator-turned-democrat, he soon relapsed into instrumentalist understandings of rule of law in the conduct of governance in the country.<sup>59</sup>

There are numerous remarkable cases of judicialised politics in the country in the context of the democratic transition at the inter-governmental level.<sup>60</sup> Some of the most notable ones include *Attorney General of the Federation v Attorney General of Abia and 35 Ors*<sup>61</sup> which deals 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),<sup>62</sup> centres on disputations around the creation of a monolith anti-corruption agency in the federation through federal legislation.

*Attorney General of the Federation v Attorney General of Abia & 35 Ors (No.2)*<sup>63</sup> and *Attorney General of Ogun State v Attorney General of the Federation*<sup>64</sup> both relate to contestations on fiscal federalism, specifically arising from the distribution of revenue and allegations of illegal withholding of statutory allocations by the Federal Government. In *Attorney General of Lagos State v Attorney General of the Federation*,<sup>65</sup> the Lagos State Government,<sup>66</sup> challenged the propriety of inherited military legislation which purported to confer ultimate planning powers on the Federal Government despite the fact that the latter is vested with administrative control of only the federal capital territory.

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<sup>58</sup> Ibid. at 2 *supra*.

<sup>59</sup> See generally, Philip 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.

<sup>60</sup> And that number is by no means exhaustive of this line of cases.

<sup>61</sup> (2002) 4 SC Pt I, 1.

<sup>62</sup> (2002) 6 S.C. Pt I, 1.

<sup>63</sup> (2002) NWLR 542 S.C

<sup>64</sup> (2002) 12 SC Pt II, 1.

<sup>65</sup> (2003) 6 SC Pt I, 24.

<sup>66</sup> One of 36 in the country. The country also has a Federal Capital Territory, Abuja.

*The Electoral Act Case- Taking on the Locals*

However, this account will focus on *Attorney General of Abia & 35 Ors v Attorney General of the Federation. (The Electoral Act Case)*<sup>67</sup> The case, as the present analysis discloses, offers opportunity for a composite examination of the various dimensions of judicialisation of politics as it relates to judicial intervention in, and resolution of inter-governmental disputes in the post-authoritarian period in Nigeria.

The Plaintiffs, all the states of the federation, challenged the constitutionality of certain provisions of the Electoral Act 2001 (the Act), a law passed by the National Assembly (the legislature) and assented by the President, for conduct and regulation of elections into federal, state and local government levels. It thus included provisions on the procedure for local government elections, determination of election petitions arising from the elections and electoral offences, all of which were challenged by the Plaintiffs.

The core of the case for the States/Plaintiffs was that the National Assembly had far exceeded its legislative jurisdictional competence in various provisions of the Act. They alleged the action of the federal executive and legislature threatened the very existence of the country. The Plaintiffs essentially based their claims on section 7 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (the Constitution).

The section guarantees the system of local governments in the country. It further directs state governments to ensure their existence through a law that provides for their establishment, structure, composition, finance and functions. They argued that the Act which sought in part to alter the tenure of local government chairman and councillors, was in clear excess of jurisdiction except as it relates to the Federal Capital Territory, Abuja which was under the direct administration of the President and over which the National Assembly had exclusive legislative competence under the Constitution.<sup>68</sup>

The Plaintiffs further relied on the provisions of Item 11 in the Concurrent List of the Constitution to argue that the National Assembly only had the limited jurisdiction to enact legislation for the purposes of 'registration of voters and the procedure regulating elections to a Local Government.'<sup>69</sup> In addition, the Plaintiffs also had recourse to the provisions of section 197 of the Constitution.

According to the Plaintiffs, the express provisions of section 197 of the Constitution which establish a State Independent Electoral Commission for each state, with enabling powers to conduct local government elections, the Plaintiffs urged the Court to hold that it is the House of Assembly of a State alone that has

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<sup>67</sup> (2003) 3 SC 106.

<sup>68</sup> Ibid. at 113 to 122.

<sup>69</sup> The *Electoral Act Case* note 67 at 122.

the power to prescribe, increase or otherwise alter the tenure of elected local government officers.

They further sought declarations that the National Assembly had no power to make laws for the conduct of elections in to local government councils, delimitation of wards for such elections, setting qualification criteria, the date for the elections and other sundry matters relating to the elections. All of these was, in save as they relate to the Federal Capital Territory, which as mentioned earlier, was a constitutionally created mayoralty of the Federal Government. In sum, the Plaintiffs urged the Court, in view of their claims that sections 15-73 and 110-122 of the Electoral Act contravened the Constitution, to declare the Act as a whole null and void.

The States/Plaintiffs claims of excess of jurisdiction were vigorously contested by the Federal Government/Defendant. The Defendant contended that the constitutionally allotted powers of the Plaintiffs with regards to regulation of elections into local governments were intact. The Federal Government argued the National Assembly acted under the provisions of section 4 (2) of the Constitution. The provisions vested the National Assembly with the power to make laws for the 'peace, order and good government' of the federation or any part of it in relation to matters under the Exclusive Legislative List. The Defendant also claimed that the National Assembly had 'inherent constitutional powers' to determine the tenure of elected officers of local government councils.<sup>70</sup>

For an understanding of the context of the case, it is essential 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 them. In Nigerian constitutional theory and practice, there is a deemed *Residual Legislative List*, a fact adverted to by the Plaintiffs in the case, to be the exclusive jurisdiction of respective state governments on unlisted matters.

The Court found for the Plaintiffs that the National Assembly could not validly pass legislation to alter the tenure of elected local government officers except as it relates to the Federal Capital Territory. While the Court rejected the claim for a declaration that the National Assembly could not legislate for the registration of voters, the justices nonetheless upheld the argument that the National Assembly could not legislate for the delimitation of wards for the local government council elections.

The Court further held that the National Assembly was not the proper authority to set a date for the conduct of the elections, stipulate qualification criteria for candidates and the conditions for vacation of office by elected officials

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<sup>70</sup> Ibid. at 118.

of the councils, again with the exception of the Federal Capital Territory as canvassed by the Plaintiffs. In this, the Court rejected the ‘peace, order and good government’ argument of the Defendant. The power, the Court stated, applied only to those matters over which the National Assembly had legislative authority.

In response to the Plaintiffs’ prayer that the Act be completely voided, the Court preferred to carry out a section-by-section examination to determine the constitutionality of the provisions. In the process, the Court struck down various sections of the Act for being inconsistent with the constitution, duplicity or for lack of legislative competence on the part of the National Assembly.

It also dismissed the Defendant’s argument that the Act was passed pursuant to inherent powers of the National Assembly. It emphasised that the National Assembly as a creation of the Constitution, derives all its powers from the latter. ‘Inherent powers,’ as the Supreme Court noted, were exclusively conferred on the courts by the Constitution.<sup>71</sup> Justice Kutigi in the lead judgement aptly summed the position of the Court on the matter when he observed that:

“[...] the Electoral Act as a whole is a mix-up, a confusion, because the National Assembly seemed to have treated its powers with respect to Federal elections as if it were co-extensive with its powers over Local Government elections. They were wrong...a few provisions of the Act are good but quite a large number of them are bad and had been struck- out.”<sup>72</sup>

#### *Judicial Pacifism versus Executive Lawlessness*

A significant feature of the judicial attitude in this case is a discernible pacifist approach adopted by the learned justices of the Supreme Court to blunt the sometimes rather sharp edges of the disagreements that characterised the relationship between the states, especially those governed by opposition parties, and the Federal Government in the Obasanjo administration. Executive excesses and outright violations of the most basic elements of the federal principle were so common as to be a customised approach to governance by the Federal Government during President Obasanjo’s tenure. The considerable litigation it generated constituted an unwarranted diversion of resources and attention from governance at all levels.

But notice that despite the declaration that the National Assembly busied itself with making laws clearly ultra vires, the Court applied the ‘blue pencil rule’ to sever the unconstitutional provisions of the Electoral Act and saved the non-offending sections of it. In this, the Court was following its precedent in a number of earlier decisions on this point. It was repeated in several cases challenging

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<sup>71</sup> *Electoral Act* Case note 67 supra at 185-186.

<sup>72</sup> *Ibid.* at 132.

federal legislative excess or unconstitutionality usually with positive results.<sup>73</sup> As the Court noted, ‘The function of the Court in a situation like this is to save as much as possible the provisions of the legislation that is under attack.’<sup>74</sup>

The measured judicial approach was however not reciprocated by the Federal Government. For one, rather than abate, the spate of similar legislation, usually generated as executive bills, multiplied. And so did the legal challenges to them. For another, the President Obasanjo-led executive (who invariably had control over execution of most of the respective judgements) became notorious for non-execution of the various judgements against it. The attitude of the Federal Government brought to the fore, Schor’s observation that the effectiveness of courts in promoting due process depend not so much on judicial power itself, but the willingness of other relevant actors to implement its decisions.<sup>75</sup>

The proclaimed determination of President Yar’Adua, Obasanjo’s successor, to prompt enforcement of judicial decisions affecting the government however suggests that the judicial commitment to trumping the ‘un-rule of law’<sup>76</sup> should be encouraged, even in the face of seemingly intractable disregard for due process.

Judicial independence and candour is quite important in reinstating rule of law in post-authoritarian transitions. In such settings, concerted efforts are required to wean the political branch, commonly dominated by an elite largely composed of ‘transformed autocrats’ and acolytes or protégés of former authoritarian rulers now in positions of power, from an instrumentalist rule of law approach to governance.<sup>77</sup> At the least, the judicial decisions which insist on constitutional due process, to paraphrase Dyzenhaus, prominently stands out as a rebuke to leaders who insist on arbitrariness in governance. The decisions of the courts will at least wait till the political elite in particular and society in general, develops a ‘rule-of-law sense.’<sup>78</sup>

From the perspective of both law and politics, perhaps the most salient feature of the *Electoral Act* Case in the context of the democratic transition in the country is the firm position of the Supreme Court against the attempt of the federal government to control all incidences revolving around securing political

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<sup>73</sup> See for instance *ICPC* Case note 62 supra at 32-33.

<sup>74</sup> *Electoral Act* Case note 67 supra at 208.

<sup>75</sup> Miguel Schor “The Rule of Law” (2006) Paper 30 Suffolk University Law School Faculty Publications 1(-12), 6-7 available at: [http://papers.ssrn.com/sol3/PIP\\_Journal.cfm?pip\\_jrnl=955029](http://papers.ssrn.com/sol3/PIP_Journal.cfm?pip_jrnl=955029)

<sup>76</sup> *Ibid.* at 4-8.

<sup>77</sup> For an insight on how this class dominate the political transition in Nigeria, see Hakeem O. Yusuf “The Judiciary and Constitutionalism in Transitions: A Critique” (2007) 7 (3) *Global Jurist* (Advances) 1, 9-10. Available at: <http://www.bepress.com/gj/vol7/iss3/art4>

<sup>78</sup> David Dyzenhaus *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press Cambridge 2006) 233.

power at all levels of governance in the country. This is a design the party in power at the centre sought to achieve through its majority control of the National Assembly. The significance of this aspect of the matter is easily lost in the circumstance that the full context of the political terrain in Nigeria's transition from military to civil rule is not elaborated here.

But it is important to this account to note that the Constitution provides for independent electoral commissions for the conduct of elections at the three tiers of government reflecting the country's federal structure. It is the case that the electoral commissions are substantially manipulated and controlled by the respective governments at the centre and the states respectively, with the result that successive elections in the country have been any thing but transparent between 1999 and 2007 following the transition to civil rule.<sup>79</sup>

Thus, jurisdiction-poaching, with its potential for extending the reach of those controlling the relevant election commission, in the electoral process remains quite attractive in political power configurations. The practice has been promoted, even where, as in this case, the route to achieving the objective is manifestly unconstitutional. The relevant constitutional provisions are so clear that the passage of the offending parts of the bill by the National Assembly can only be explained by the dominance of the ruling People's Democratic Party (PDP) in the legislature and a preference for political disregard for constitutional values. Though judicial action of resisting jurisdiction-poaching is not likely to rectify the untoward incidence of electoral manipulation rampant in the country, it at least puts the political elite on notice to conduct power struggles within the ground rules.

It is significant that barely three months later in the *ICPC Case*<sup>80</sup> the Court validated the Federal Government's establishment of a monolith anti-corruption agency for the country on the basis of the 'peace, order and good government' clause of section 4 of the Constitution. And at least one of the justices expressly conceded an explicit breach of the fundamental principles of federalism.<sup>81</sup> This was justified by the Court's evaluation of the enormity of the challenge corruption posed to governance and development in the country.

The justices rightly noted its inapplicability in the *Electoral Act Case*. The obligation to prevent or combat corruption in issue in the *ICPC Case* was constitutionally conferred on all tiers of government, thus distinguishing it from the facts of the present case. Here, the Constitution expressly and exclusively vested the powers for the conduct of local government councils' elections on the states, with the stated exception of procedure regulating elections and registration

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<sup>79</sup> See for instance International Crisis Group *Nigeria: Failed Elections: Failing State Africa* Report No.126 (30 May 2007).

<sup>80</sup> *ICPC Case* note 62 *supra*. For a discussion of this case see Yusuf note 77 *supra* at 26-32.

<sup>81</sup> *ICPC Case* note 62 *supra* at 59-61.

of voters reserved for the National Assembly. As Justice Ogundare stated, the legislature, state or federal, is bound to exercise its power only within the confines of stipulated parameters of the country's written Constitution.<sup>82</sup>

The position of the Court that the political branches operate within constitutionally defined limits is a critical measure for the reinstatement of rule of law in governance. It is a principle that was routinely observed in the breach by successive military regimes in the country. The transition to civil rule notwithstanding, the indecorous attitude of the political branch towards rule of law and constitutionality has fostered the culture of impunity in all facets of national life.

### **'Pure' political disputes and separation of powers**

*Attorney-General of the Federation & 2 Ors v Alhaji Atiku Abubakar (Vice President, Federal Republic of Nigeria) & 4 Ors (Atiku v Obasanjo)*<sup>83</sup> is a poster child for the incidence of judicialisation of politics in Nigeria's democratic transition. The case is one of several suits filed by the 1<sup>st</sup> Respondent/Plaintiff (Plaintiff) to challenge attempts to remove him from office and prosecute him for alleged corruption. The situation is a direct fall-out of the long-drawn political differences between him and President Olusegun Obasanjo (the President).

#### *Atiku v Obasanjo- Taming Ambition*

The Plaintiff had been sworn in as Vice-President of the Federal Republic of Nigeria on May 29 2003 alongside President Olusegun Obasanjo, for a second and final constitutionally prescribed four year-term on the ticket of the People's Democratic Party (PDP). However, the relationship between the two steadily deteriorated in the build-up to the 2007 elections because of what came to be known in Nigerian politics as 'The Third Term Project.'<sup>84</sup>

The Third Term Project refers to the surreptitious attempt by President Obasanjo to secure a third term in office through a constitutional amendment. The bid generated furore among the political elite and serious opposition from the public. The country breathed a sigh of relief at the rejection of the attempt by the legislature on 16 May, 2006.<sup>85</sup> The Plaintiff, the incumbent Vice-President who

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<sup>82</sup> *Electoral Act* Case note 67 supra at 186-187.

<sup>83</sup> (2007) 4 NILR 202. Available at: <http://www.nigeria-law.org/LawReporting2007.htm>

<sup>84</sup> Gilbert da Costa "Nigerian Senate Denies Obasanjo Third Term" *Voice of America* available at: <http://www.voanews.com/english/archive/2006-05/2006-05-16-voa68.cfm?CFID=269274608&CFTOKEN=30412515> (last accessed 6 March 2008).

<sup>85</sup> Editorial "Triumph of The National Assembly" *This Day* (Abuja Wednesday 17 May 2006) available at: <http://www.thisdayonline.com/nview.php?id=48372> (last accessed 11 March 2008). See also Daniel K Posner and Daniel J Young "The Institutionalization of Political Power in Africa" (2007) 18 (3) *Journal of Democracy* 126, 127.

had never hidden his ambition to succeed President Obasanjo stood up boldly to be counted in the opposition ranks. He publicly denounced the Third Term Project. Thus an open rift developed between him and the President.

In the heat of a series of verbal altercations between the two, the Plaintiff also made disparaging comments on the government's programmes and policies. At a point, the President ordered him out of the Federal Executive Council meeting. He was suspended from the ruling PDP in September 2006 for three months and later expelled. In December 2006, he declared his membership of the Action Congress (AC) and his presidential candidature on its platform for the 2007 elections.

Attempts by President Obasanjo to move the National Assembly to remove the Plaintiff as Vice-President were stoutly resisted by loyalists of the latter who had a strong following there. Eventually, President Obasanjo declared the office of the Plaintiff, who was on holiday outside the country, vacant. He was also to be tried for corruption and abuse of office on his return. The President then notified the 3<sup>rd</sup>-6<sup>th</sup> Defendants of his intention to send a nominee to replace the Plaintiff.

President Obasanjo premised his action on, among others, the disloyalty of the Vice-President (who had by then defected to another party), to the PDP and the Presidency. The Plaintiff filed this action to challenge his purported removal and the withdrawal of all his privileges, entitlements, rights and benefits as the Vice-President of Nigeria. He sought, *inter alia*, judicial declarations that the President had no power under the 1999 Constitution or any other law, to declare the office of Vice-President vacant and that his term subsists till 29 May 2007, in consonance with the constitutional stipulation of four-year tenure.

The suit was filed on 4 January 2007 at the Court of Appeal in line with section 239 of the Constitution vested with original jurisdiction on issues relating to the cessation and vacancy of the offices of president and vice-president. On 20 February 2007, the Court of Appeal decided in favour of the Plaintiff. It declared as illegal, unconstitutional and void, the President's declaration of vacancy in the office of the Vice-President.

On the issue of the Vice-President's defection to a rival, newly-formed party, the Action Congress (AC), the Court of Appeal cited the freedom of association in support of the Plaintiff's action. Dissatisfied, the Attorney-General of the Federation (1<sup>st</sup> Appellant/Defendant) on behalf of the Federal Government and two others, appealed to the Supreme Court (the Court).

In support of the case for the Federal Government (under the leadership of President Obasanjo), the 1<sup>st</sup> Defendant argued that a vice-president ought to act as an associate of, a 'co-pilot' with the president and not antagonise the latter. Where

the Vice-President no longer feels comfortable in this role, he must first resign his office before he can validly criticise the President or even join another party. To allow otherwise would tantamount to defeating the intention of the drafters of the Constitution. The 1<sup>st</sup> Defendant further argued that the Plaintiffs action in decamping to a rival political party, after resignation from the party that sponsored his candidature, should be construed as an automatic resignation from his position as Vice-President.<sup>86</sup>

The 1<sup>st</sup> Defendant complained about what it considered the narrow construction placed by the Court of Appeal on the totality of the provisions relating to the tenure, resignation and vacancy of the office of vice-president. The 1<sup>st</sup> Defendant contended it would amount to foisting an absurdity on the presidency and the mechanism of governance at the highest level, to allow the Plaintiff ride on the crest of the gap in the constitution and continue in office in the light of the foregoing facts.

The narrow interpretation and the absurd result it produces, it was contended, could not be the intendment of the drafters of the Constitution. In refutation, it was argued for the Plaintiff that the Constitution does not envisage a relationship of 'master and servant' between the president and vice-president since both positions are individual offices created by the Constitution.<sup>87</sup>

Thus, the main issue for determination by the Supreme Court was the nature of the relationship between the President and Vice-President. Perhaps more crucially, what should happen where there is a breakdown in the (expected) harmonious relationship between the two?

In its consideration of the issues, the Court affirmed its jurisprudential preference for the literal, plain-fact interpretation of statutes including constitutions.<sup>88</sup> It then outlined other cardinal interpretive parameters that must be observed in the intricate task of judicial interpretation.

One of these is the need to consider the history of the legislation in issue where that would assist the understanding of the Court in its interpretation of the relevant law. The Court stated that consideration of the historical circumstances of legislation assists in the determination of legislative intent. Another factor that must be considered in constitutional interpretation is the need to be liberal in construing the provisions of the Constitution. It is also germane in constitutional adjudication to bear in mind, the 'susceptibilities of the Nigerian society.'<sup>89</sup>

The Court noted that the offices of President and Vice-President are creations of the constitution. But unlike the United States and Indian

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<sup>86</sup> *Atiku v Obasanjo* note 83 supra at 11.

<sup>87</sup> *Ibid.*

<sup>88</sup> For a critique of the literal, plain-fact jurisprudential approach in the context of a post-authoritarian transition see Yusuf note 77 supra at 3-22.

<sup>89</sup> *Atiku v Obasanjo* note 83 supra at 22.

constitutions, the Nigerian Constitution of 1999 vested all executive powers of the federation on the President without assigning any role to the Vice-President. The executive powers are to be exercised by the President directly, through ministers of the government and officers in the public service of the federation. Thus, the role of the Vice-President is limited to the specific duties assigned to him by the President, just like ministers and other officials of the Federal Government.<sup>90</sup>

The Court however stated a crucial distinction in the position of the Vice-President and the ministers of the government. Unlike the ministers of the government, the President can not remove the Vice-President from office at will, except in accordance with the provisions of section 143 of the Constitution which also provides for the procedure for the removal of the President. A requirement of the section in this regard, is that a case of gross misconduct must be established against the Vice-President in proceedings initiated and conducted by the National Assembly. Judicial intervention regarding the proceedings on the matter before the National Assembly are ousted by section 143 (10) of the constitution.<sup>91</sup>

In the lead judgement, Kutigi JSC held that since the two were elected under a joint ticket, the Constitution envisaged a single executive and a unity of purpose and conduct in the presidency that transcends the election. According to the Court, the relationship must persist throughout the joint term of the President and Vice-President. It faulted the position of the Court of Appeal on the prerogative of the Plaintiff to exercise of his fundamental rights of expression and association as valid basis for joining another party while maintaining his position as Vice-President.

He had to resign his position before he could join and campaign on the platform of another party for the position of President. The Court further held that as incumbent Vice-President, the Plaintiff was precluded from criticising the policies of the federal executive. It stated that the fact of suspension or expulsion from the ruling party did not justify that course of action. Even after his resignation, the Vice-President can not dissociate himself from collective responsibility for the decisions taken by the cabinet when he was in office.

But it maintained it was not the duty of the Court to pronounce on the propriety or otherwise, of the actions or behaviour of the Plaintiff in the case. It similarly had no power to declare his office vacant for whatever reason. It however affirmed the position of the Court of Appeal that the power to remove the Vice-President was also *ultra-vires* the President, rejecting the argument of constructive resignation presented by the 1<sup>st</sup> Defendant. The power to do both resided exclusively with the legislature, the National Assembly.<sup>92</sup>

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<sup>90</sup> Ibid. at 12.

<sup>91</sup> *Atiku v Obasanjo* note 83 supra at 12-13.

<sup>92</sup> Ibid. at 15

The vacillation of the National Assembly to act on the matter, canvassed by the 1<sup>st</sup> Defendant, was in the opinion of the Court, not sufficient justification of the unilateral action of President Obasanjo to declare the office of the Vice-President vacant. The President or the executive branch of government was not conferred with the powers to fill the void on an issue clearly within the constitutional competence of the National Assembly.

The Court concluded that in the event the Vice-President's tenure had yet to expire and since he was not removed from or resigned his office as constitutionally provided, he was entitled to continue in office. Like Pontius Pilate, the Court, in the lead judgement, washed its hands off the case with the concurrence of the other six justices of the panel of seven. However, and this is a point we return to shortly, the seeming unanimity of the justices on closer scrutiny, is more of a concurrence of result than process. There was dissent on a significant aspect of the case, the tension between fundamental rights and collective duty.

*When Elephants Fight- Neglect, Democracy and Due Process*

The importance of this decision on the politics of a troubled transition in Nigeria can not be overemphasised. Although the instance of political disagreement and power struggle between President Obasanjo and his deputy, Atiku Abubakar was the most prominent virtually, the only one resolved by judicial intervention, it was by no means the only instance of executive power bickering in high places in the country. Many state governors were at loggerheads with their deputies in similar succession disputes.

As a consequence of the dispute between the two highest officers of state, there were violent clashes between supporters of their two factions. Public administration at both the federal and state levels were seriously impeded or completely stalled. The ruling party was seriously polarised and this generated schisms even in the national and state legislatures. Alliances were formed across political divides that kept the country on crisis-alert. The political crisis occasioned palpable vacuums in governance, loss of lives, resources and property.

Even fragile, and at the best of times, less than optimal emergency relief services were not spared the vagaries of the power tussle between President Obasanjo and Vice-President Atiku Abubakar. Recent congressional hearings in the National Assembly revealed that the National Emergency Management Authority (NEMA), one of the agencies under the withdrawn schedule of duties of Vice President Atiku had its yearly allocation for 2007 withheld and was thus crippled for a whole year. Appeals to the President for rectification of the dire situation did not produce results.<sup>93</sup> This is only an indicative instance of a series

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<sup>93</sup> 'Obasanjo/Atiku Rift Crippled NEMA' *This Day* (Abuja Saturday 19 January 2008) available at: <http://www.thisdayonline.com/nview.php?id=100823> (last accessed 8 March 2008).

of officially-induced neglect and abdication of responsibility on the part of the political elite in public governance.

The economy suffered greatly from the factionalisation and publicly conducted struggle for power among public officials. The business of legislation and legislative oversight of executive action stalled or moved at snail speed as a result of political fragmentation that trailed executive disagreements and contestations for power in high places. All of these were happening in a country that had been victim of decades of pillage and misgovernance by the military and their civilian acolytes. The diversion of attention from salient issues of governance led to deprivations of the benefits of democratic governance referred to in Nigerian political as the ‘dividends of democracy.’

A critical aspect of the case is the insistence on what the Court regarded as due constitutional process in the removal of the Vice-President. While issue may be taken with the desirability of a literal interpretation as the appropriate jurisprudential approach in a transitional context,<sup>94</sup> especially granted the position of the Court that judges ought to consider the ‘susceptibilities’ of the society in adjudication,<sup>95</sup> it is, as noted above, very important for the democratic process and governance in the country that due process be entrenched in the body politic.

A situation where the President or governor, frustrated in the face of a stalemate in his attempts to unseat his deputy due to political differences, resorts to all sorts of underhand tactics and neglect of governance at the highest levels is to be unequivocally deprecated. Such a position is even more apposite in a country whose economy and basic social infrastructure relies heavily on the public sector. Inaction in the public sector has dire consequences for socio-economic well being of the country.

For sure, executive bickering and high (negative) politics witnessed in the Obasanjo/Atiku conflict, imperilled societal aspirations for development and the rule of law in a polity where a top-down approach is a customised form of political expression of power. The top-down power dynamic is a crucial factor in public and private governance in Nigeria.

Notwithstanding its constitutionally stipulated federal status, the plenitude of powers constitutionally conferred on the federal government, largely exercised through an executive presidency ensures a socio-political and economic dynamic in which when the President (or the presidency) sneezes, the whole country catches a cold. This results from the unitarisation of the country by successive military administrations that paid lip-service to the federal status of the country but concentrated political and economic powers at the centre in consonance with command-structured military ethos.<sup>96</sup>

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<sup>94</sup> Yusuf note 77 supra.

<sup>95</sup> *Atiku v Obasanjo* note 83 supra at 22.

<sup>96</sup> Yusuf note 77 supra at 1, 25-33.

*Robes on Tight Ropes*

A remarkable feature of *Atiku v Obasanjo* is the way it demonstrates the tight rope judges tread in adjudicating the sphere of ‘mega’ or ‘pure politics’ in the world of new constitutionalism.<sup>97</sup> The waters, so to speak, of judicialised adjudication in established democracies can be quite rough *a la Bush v Gore*.<sup>98</sup> But in transitional contexts with inevitable institutional quagmires, the waters of judicialised adjudication can be quite treacherous. Recall the consequentialist jurisprudence of the Supreme Court in its holding that the Nigerian Constitution required the unity of the President and Vice-President to be transcendental, reaching beyond the joint-electoral mandate to actual governance.

However, the lead judgement refrained from asserting the illegality of the action of a Vice-President who it agreed had departed from the constitutionally envisioned relationship. This was an incumbent Vice-President who joined another political party and openly declared his presidential candidature of a party not even in existence when he was elected on a different political platform. He thus abandoned the party on whose mandate he was Vice-President to not only contest the constitutionality of his associate, the President, but also, actualise his own ambition.

Vice-President Atiku had openly confronted the President and refused to resign his membership of the party that sponsored their joint-candidature. Even more, he did not resign his position as Vice-President of a government whose policies he turned round to openly criticise after six years in office. It is pertinent to note that all these were happening in a system where it is a constitutional requirement that candidates for elective office are party-sponsored.

Notice how the court navigated, albeit with questionable deftness, the balance between fundamental individual rights and highly moral questions of collective political responsibility. It is quite instructive that while the lead judgement refrained from commenting on the consequences of the Vice-President’s acts of disloyalty to the President, Justice Onnoghen in one of the six

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<sup>97</sup> Hirschl note 1 supra.

<sup>98</sup> *Bush v. Gore*, 531 U.S 98 [2000]. It is futile to attempt a tracking of the immense body of scholarly work in law, politics and the social sciences generally embodying critiques of the decision. The decision was heavily criticised in the media. But the criticism that also trailed the earlier judgement 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 overly political and controversial cases. There is a considerable body of socio-legal critique on the *Bush v Gore* and related cases. See for instance E J Dionne Jr. and William Kristol (eds.) *Bush v Gore-The Court Cases and the Commentary* (Brooking Institution Press Washington D.C 2001) and Jack M Balkin “*Bush v Gore* and the Boundary between Law and Politics” (2001) 110 Yale Law Journal 1407.

concurring decisions, went as far as to suggest that the actions of the Vice-President, in defecting to another party and castigating the administration of which he was a part, could amount to gross misconduct as defined by section 143 (11) of the Constitution which lays down the circumstances under which the National Assembly could remove the Vice-President.

In a less restrained tone than the lead judgement, Onnoghen JSC declared that ‘what amounts to gross misconduct...is wide enough to include the situation we find ourselves in this case.’<sup>99</sup> Onnoghen JSC’s dicta not only negate the rather evasive attitude of the Court in confronting a delicate political situation headlong; it also had the potential to ignite the ‘political solutions to political problems,’<sup>100</sup> (his description of relevant constitutional provisions on the matter) proposition His Lordship ventured further:

Even though a situation of defection of the Vice President from the party which sponsored his election into that office to another political party does not form part of the grounds for removal of the said Vice President particularly by court process, it could amount to gross misconduct as defined by section 143 (11) of the 199 Constitution.<sup>101</sup>

These are by no means innocuous obiter dicta in the context of the volatile political situation in Nigeria at the relevant time. It is quite plausible to contend that it took the strong political following of the Vice-President in the National Assembly and the history of a rather frosty relationship between President Obasanjo and the legislature to firmly shut out recourse to the tentative *judicially sanctioned* lead on removing the Vice-President from office.

#### *Fundamental Rights versus Collective Duty*

At the least, the tenor of Onnoghen JSC’s decision, though in concurrence, was in tension with the overall neutral position of the Court as laid out in the lead judgement. It is quite interesting in this regard that others like Tabai JSC who though in similar concurrence, also delivered a detailed opinion, disagreed with the view that the Plaintiff’s movement to another political party constituted gross misconduct as envisaged under section 143 of the Constitution.<sup>102</sup> Interestingly too, while Mohammed JSC condemned as ‘unconscionable and immoral,’ the actions of the Plaintiff in moving to another party and criticising the policies of an administration he was a part of at the relevant time, he found nothing illegal in it.

The latter had no difficulty in according the Plaintiff the exercise of his fundamental right of association as provided under section 40 of the Constitution.

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<sup>99</sup> *Atiku v Obasanjo* note 83 supra at 36.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Atiku v Obasanjo* note 83 at 48.

On this, he affirmed the position of the Court of Appeal on a point deprecated in the lead judgement of Akintan JSC. In fact, it would, in the view of Mohammed JSC, amount to an ‘illegality, injustice and constitutionality’ to refuse or deny a citizen such a right.<sup>103</sup> He was supported in his views by Aderemi JSC.<sup>104</sup>

Such is the sometimes variegated jurisprudence that emerges in cases that combine political importance with fundamental novelty in the adjudicatory jurisdiction and scarce precedent for reference in comparative constitutionalism. Notably in this regard, one of the justices declared the complete absence of any precedent on the peculiar facts of the case.<sup>105</sup>

Suffice it to say the view that the Vice-President must be regarded as a relatively free agent rather than an appendage of the President, incapable of independent thought, is in consonance with the decision of the Court in an earlier and equally important transition case. In *People’s Democratic Party v Independent National Electoral Commission (PDP v INEC)*<sup>106</sup> the central issue in the case turned on the legal status of the governor-elect and the deputy governor-elect under rather unusual circumstances.

In *PDP v INEC* the former voluntarily relinquished his position before inauguration and his deputy sought to be sworn in as governor. This was opposed by the electoral commission and the party that lost the election. The Court held that though the two were elected on a mandatory joint ticket, they were *sui generis* and acquired independent rights. The Court stated that after their victory at the elections, the two did not ‘swim or sink together for all purposes.’ Rather, they were free to chart independent courses including the prerogative of one of them not to take office for which they were elected.<sup>107</sup>

It is interesting to note that only one of the learned justices referred to this relevant case in considering the ambit of a Vice-President’s independence of action or status under the constitution. This was despite the important fact that the duo, president and the vice-president, as well as governor and deputy governor, hold office (and can be removed) under similarly worded *impari materia* constitutional provisions. The near-total inadvertence of the Court to its own precedent is a likely consequence of the parallel jurisprudential approach in the two decisions. While the Court declared its preference for a ‘purposive’ jurisprudence in *PDP v INEC*, it treaded a declared part of plain-fact, literal interpretation in *Atiku v Obasanjo*.

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<sup>103</sup> Ibid. at 53-57.

<sup>104</sup> Ibid. at 63.

<sup>105</sup> Aderemi JSC, *Atiku v Obasanjo* note 83 supra at 61.

<sup>106</sup> *PDP v INEC* (1999) 11 NWLR pt 625, 200. See Yusuf note 71 supra for an evaluation of this case.

<sup>107</sup> Ibid. at 265.

It is equally important that in invoking the notion of ‘collective responsibility’ the Court, perhaps unwittingly, sought to extend the scope of the Code of Conduct for Public Officers (the Code) provided in the Constitution. In this endeavour, the Court engaged with a ‘primarily deep moral’ and political question rather than one of a judicial nature.<sup>108</sup>

It is relevant to state that although Nigeria’s constitutions of 1979 and 1999 contain the Code as part of its schedules, the clearest expression of the existence and operation of it has been the creation of a Code of Conduct Tribunal with jurisdiction largely on verification and trial of public officials on matters relating to false declaration of or illegal acquisition of assets.

The Code is silent on political responsibility as suggested or conceived by the Court in *Atiku v Obasanjo*. Further, there is no legislation in the country that establishes a clear or even strictly implied legal concept of collective responsibility as enunciated in the case.<sup>109</sup> The concept, which sits more comfortably in the parliamentary political arrangement though elucidated by some prominent constitutional scholars<sup>110</sup> in the country, has yet to be given serious recognition in practice within Nigeria’s presidential political arrangement.

Thus, *Atiku v Obasanjo* discloses certain friction between black letter law and strong unwritten ethics and codes of expected political behaviour which the Court at first blush resolved in favour of the former. However, characteristic of the judicial dilemma when confronted with overtly political questions, the resolution was not without skirmishes that left some doubt as to the clarity of the judicial leaning in the case. The judicial affirmation of the principle or more properly stated, enunciation of it in the absence of clearly stated constitutional or statutory foundations, is in tension with iterations of judicial deference recurrent in the judgements of all the justices who proffered a detailed opinion,<sup>111</sup> to the political branches which undergird the decision in *Atiku v Obasanjo*.

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<sup>108</sup> Hirschl note 1 supra at 728.

<sup>109</sup> It is noteworthy that President Obasanjo took the unprecedented step of having his ministers and special advisers subscribe to a ‘Code of Conduct’ which was clearly aspirational since it was meant to ‘assist’ the ministerial appointees to uphold the constitutional provisions on the Code of Conduct for Public Officers in Schedule V of the Constitution. Its legal enforceability is thus in doubt. In any event, it is instructive that it excluded the Vice-President, an implicit recognition of his distinct status.

<sup>110</sup> Benjamin Nwabueze *Constitutional Democracy in Africa-Forms of Government* Vol.4 78-79 (Spectrum Books Ibadan 2004)

<sup>111</sup> The stern warnings of Aderemi JSC are perhaps the most representative of these dicta. See *Atiku v Obasanjo* note 77 supra at 66 (‘...foraging into the exclusive territory of the legislators would make the judiciary lose its authority and legitimacy...Let there be no incursion by one of government into that of the other.’).

*Courts in the Web- Law, Morals and Politics*

A fundamental moral and political issue was swept under the carpet in the decisions of both the Court of Appeal and the Supreme Court in *Atiku v Obasanjo*.

Briefly articulated, it is the subversion of the democratic will of the majority expressed in the election of the President and Vice-President on the joint ticket of the PDP. This issue derives from the position canvassed by the 1<sup>st</sup> Defendant that an affirmative decision on propriety of the Plaintiff retaining his position as Vice-President on the facts of the case would lead to anti-majoritarian consequences.

Specifically, it engenders the real possibility that the country could be ruled by a person who has abandoned the manifesto and ideology of the party on the strength of which he was elected, having decamped to a party with a different ideology and manifesto. This was of course in the event that the incumbent, for any of a number of reasons, ceases to hold office.

Observers of the Nigerian political scene would not dismiss this latter possibility lightly. In fact, President Obasanjo had faced two previous serious attempts at removing him from office. Let's assume (for a moment) that President Obasanjo left office before the end of his term and he is succeeded, as constitutionally envisaged by Vice-President Atiku. Given the prevailing dissension at the presidency, would such a situation not constitute an antithesis of the principle of majority rule? Certainly, the millions of people who reportedly voted for the joint-candidacy of Obasanjo/Atiku, under electoral arrangements where valid candidature is premised on sponsorship by a political party, must be notionally taken to have endorsed the programmes of the party in question and expect each of the candidates to be bound to implementing their (party) manifesto?

It is pertinent to note that this issue formed a key part of the case made for the 1<sup>st</sup> Defendant. It constituted the basis for Federal Government's insistence on the constructive resignation from office by the Plaintiff for which the latter should be estopped from denying. It is discomfiting that the courts sidestepped the issue, its customary preference for the literal jurisprudential approach to the interpretation of legislation.

However, the silence of the courts on this admittedly thorny issue again reflects a fundamental dilemma of the judiciary in the complicated terrain of adjudicating politics. Courts are caught in the web of resolving difficult moral and highly (divisive) political questions. The increasingly moral and political questions the judiciary is confronted with can sometimes not be resolved by recourse to black letter law. In such circumstances, there is a high possibility of, at the least, implicit reference back to politics and society at large. This is precisely what the Supreme Court in *Atiku v Obasanjo* emphasised when it declared per Aderemi JSC that:

It may be said that the act or conduct of the Vice-President in defecting to the Action Congress after he has won the ticket on the platform of the P.D.P for that position is morally reprehensible. *But until the law (in this case, the Constitution) declares the defection unlawful and prescribes in clear language punishment for such an act, there is nothing anybody can do. The remedy, if there is one, lies in the hands of the legislators.* It must always be noted that *what is morally reprehensible may not be legally punishable.*<sup>112</sup>

### **Judicialisation of politics – the driving force**

It is pertinent to note that a political environment conducive to the judicialisation of politics in Nigeria is provided by the enigmatic prevalence of a democratically elected but authoritarian executive presidency. The phenomenon, referred to by Prempeh as the ‘imperial presidency’,<sup>113</sup> which has continued to plague African countries, despite the ‘new wave’ democratic transition, found extensive expression in Nigeria between 1999 and 2007.

The Nigerian experience of an imperial presidency derives essentially from a history of military authoritarianism. The military modelled governance and the distribution of power in a centrifugal construct that consistent with its institutional command-based operational structure. The country witnessed an accelerated, convergence of powers in a dictator at the centre.

This was anathema in a polity which had gained independence with a strong regionalised federal structure in many important aspects of governance. With the country’s infant post-independent democratic structures sacked by military adventurism perpetuated with brief intervals of civil governance for the better part of four decades,<sup>114</sup> the military eventually left power through a non-negotiated transition. It bequeathed a constitutional legacy of a centre saddled exclusively or in concurrence with the federating states, with almost every aspect of governance. The foregoing context of political power contestations has led to an exponential and 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. The fodder for the phenomenon has been abundantly provided by the

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<sup>112</sup> *Atiku v Obasanjo* note 83 supra at 63.

<sup>113</sup> H Kwasi Prempeh “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).

<sup>114</sup> By 1999 when the military relinquished power, the military had ruled the country for three decades of its thirty nine years post independence.

seriously flawed electoral process that hallmarked the hand-over of power by one civilian administration to another. This suggests deficient legitimacy of the political class is another important motivation for the judicialisation of politics.

### **Politicisation of the judiciary**

In the light of the foregoing account of active judicial mediation of politics and its replication in many other instances, it is noteworthy that the Supreme Court of Nigeria was nominated 'Man of the Year' by *The Daily Independent*,<sup>115</sup> a respected national daily. This is no doubt in recognition of the critical judicial role in shaping pathologies of stabilisation in a floundering political transition, upholding constitutionalism, rule of law and ultimately, staving-off customary excuses for military incursions in the governance of the country.

The Supreme Court, in particular, has received commendation from home<sup>116</sup> and even unusual quarters abroad, including the United States Congress and the London based *The Economist* for its demonstration of independence, redirecting the country's democracy away from the precipice and upholding human rights.<sup>117</sup> The profile of the Supreme Court in governance in the country has become more conspicuously writ in the public consciousness like never before. As respected professor and former dean of law of one of the foremost law schools in the country stated, the Court has sent out a signal that it is the 'sentinel...guard for democracy and good governance.'<sup>118</sup>

But the foregoing account would be incomplete if it presents a picture of a model and reformed judiciary, particularly in view of the glaring absence of

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<sup>115</sup> Onyema Omenuwa "2007: The Year of the Supreme Court" *The Daily Independent* Online Edition (Lagos Thursday 27 December 2007) available at <http://www.independentngonline.com/?c=129&a=7908> (February 20 2008).

<sup>116</sup> See "Belgore, Oputa, Sagay, Others Hail Supreme Court" *The Guardian* Online Edition (Lagos Sunday 24 June 2007) available at: <http://www.nigerians-abroad.com/news/headlines/belgore-oputa-sagay-others-hail-supreme-court/> (Last accessed 18 February 2008).

<sup>117</sup> Constance Ikoku "Nigerian Judiciary Strong, Independent, Says US Congress" *This Day* Online Edition (Abuja Thursday 19 July 2007) available at: <http://www.thisdayonline.com/nview.php?id=84004> (last accessed 18 February 2008) and "Nigeria- Democracy by Court Order" *The Economist* (London Thursday 24 January 2008) available at:

[http://www.economist.com/displaystory.cfm?story\\_id=10567560&fsrc=RSS](http://www.economist.com/displaystory.cfm?story_id=10567560&fsrc=RSS) (last accessed 11 May 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 2007) 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.

<sup>118</sup> Charles Adingupu "Obi's Judgement is Warning to Political Gangsters" *The Guardian* Online Edition (Lagos Sunday 24 June 2007) available at: <http://www.nguardiannews.com/ArchiveIndex07.html?pdate=240607&SUBMIT=Submit> (last accessed 18 February 2008).

judicial accountability as part of the transitional justice measures in the country.<sup>119</sup> Notwithstanding public acclaim of the judicial role in Nigeria's democratisation process, judicial malfeasance, particularly in the lower courts, has continued in a manner that undermines the image of self-reformation otherwise presented by an evaluation of the judicial activity at the highest level in the country.

Perhaps the most topical concern about the judiciary is the continued incidence of corruption and attendant questionable adjudication, especially in the high courts, and sometimes, the Court of Appeal. There were confirmed incidents of corruption on the part of some judges who adjudicated at the various elections petitions tribunals all over the country in the aftermath of the 2003 elections.<sup>120</sup> This led to the dismissal of a number of judges. Conscious of the damage this has done to the image of the judiciary, the President of the Court of Appeal, the second highest court in the country, while inaugurating the election tribunals for the 2007 elections, warned judges against being compromised by politicians.<sup>121</sup>

Allegations of judicial turpitude that dodged the steps and compromised the adjudication of the 2003 elections in the country have returned in even more sinister dimensions. In this respect, the recent decision of the Presidential Elections Petition Tribunal composed of 5 Court of Appeal Court Justices has not escaped the common allegations of corruption.<sup>122</sup> The situation was not helped by the unusual and comical style, both in content and delivery, of the judgement.

While the veracity of such damaging claims remains in doubt, the opposition parties decried the judgement for being perverse.<sup>123</sup> In agreement, the leadership of the Transition Monitoring Group, a national coalition of some leading non-governmental organisations that monitored the elections, alongside international observers dismissed the decision as 'A Charter for Dishonest Elections.'<sup>124</sup>

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<sup>119</sup> For an analysis of the relevance of judicial accountability in transitions and the Nigerian context as a case study see Hakeem O Yusuf "Calling the Judiciary to Account for the Past: Transitional Justice and Judicial Accountability in Nigeria." (2008) 30 (2) *Law and Policy* 194.

<sup>120</sup> Oko Okechukwu "Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria," (2006) *Brooklyn Journal of International Law* 9.

<sup>121</sup> Efe Ebelo "Abdullahi's Salvo At Politicians" *The Daily Independent* Online Edition (Lagos Thursday 27 December 2007) available at: <http://www.independentngonline.com/?c=137&a=7938> (last accessed 16 March 2008).

<sup>122</sup> Sahara Reporters New York "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](http://www.nigerianmuse.com/nigeriawatch/2007/How_the_Presidential_Elections_Petition_Tribunal_Came_To_Its_Controversial_Verdict) (last accessed 4 March 2008).

<sup>123</sup> 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).

<sup>124</sup> Ayo 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](http://www.nigerianmuse.com/nigeriawatch/2007/A_Charter_for_Dishonest_Elections_Essay_by_Ayo_Obe) (last accessed 4 March 2008).

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 judicial accountability for past complicity remains completely ignored or at least, under-addressed.

Not unrelated to deep-seated public distrust for the judiciary 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 regard the trial courts as ‘clearance houses’ for obtaining justice through the judicial process. The 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 but not always 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 had for instance been the position of all parties to the consolidated presidential elections petition that irrespective of the outcome, there will be an appeal to the Supreme Court vested with appellate jurisdiction over the high-powered Tribunal, itself composed of 5 Justice of the Court of Appeal. And it was no surprise that the Petitioners immediately appealed the decision.<sup>125</sup> 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 even in the integrity of 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. Thus, it was nearly brought into disrepute in its upholding of the lower courts decision findings that a then serving-governor was not an ex-convict in the *Ibori* Case even when the judge who convicted him had given evidence at the trial of the matter in that he was the person convicted. 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 then 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. 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. This particular case still haunts the Court as it recently emerged that the ex-governor as well as his wife had in fact been

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<sup>125</sup> Ise-Oluwa Ige “Buhari Files Appeal at Supreme Court” *Vanguard Online* (Lagos Monday 3 March 2008) available at: [http://www.nigerianmuse.com/nigeriawatch/2007/Buhari\\_defies\\_governors\\_files\\_appeal\\_at\\_S\\_Court](http://www.nigerianmuse.com/nigeriawatch/2007/Buhari_defies_governors_files_appeal_at_S_Court) (last accessed 11 May 2008)

convicted of similar crimes alleged by at least two other courts in the United Kingdom.<sup>126</sup>

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. They 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 predisposed to politicisation.

## **Conclusion**

A notable feature of the judicialisation of politics is the ability and willingness of courts to limit legislative action.<sup>127</sup> 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 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 and Africa, briefly outlined above, supports the position that it is critical to the democratisation process, to ensure the judiciary is properly positioned for the transition from a troubled 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 transitioning polity. It is easily the case that newly established constitutional courts have played a significant role in deepening democracy. The courts, through a particular form of judicial activism, are securing the core values of the constitution and human rights.<sup>128</sup>

The analyses here suggests the Supreme Court has taken a strategic position in the task of democratic institutional building and the reinstatement of

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<sup>126</sup> Dickson Omonode "Supreme Court Justices Panic over Ibori" National Day available: [http://www.nigerianmuse.com/nigeriawatch/Supreme\\_Court\\_Justices\\_panic\\_over\\_Ibori](http://www.nigerianmuse.com/nigeriawatch/Supreme_Court_Justices_panic_over_Ibori) (last accessed 4 March 2008). However, 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 Tobi Soniyi and Tony Amokeodo "Two Lawyers barred from Practice" The Punch on the Web (Lagos Tuesday 22 April 2008) available at: <http://www.punchontheweb.com/Articl.aspx?theartic=Art200804221304975>

<sup>127</sup> Ferejohn note 6 supra at 41.

<sup>128</sup> Margit Cohn and Mordechai Kremnitzer "Judicial Activism: A Multidimensional Model" (2005) 18 Canadian Journal of Law and Jurisprudence 333, 348-351.

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 numerous interventions, has not only been drawn into overly political disputes that overreach its jurisprudential preferences, but is itself still challenged by the morass of institutional dysfunctions carried over from the authoritarian era. The situational dynamics leads back to the need for closer scrutiny of the judicial function in transitional societies.

The tentative lines of the course of judicialisation of politics in Nigeria 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 discussed here differs from what is seen in the courts below.

Despite a few commendable handling of critical and overtly political matters, the manner of adjudication and independence of the lower courts remain quite unsatisfactory. 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.

In democratising and established liberal democratic societies alike, protestations of deficient democratic credentials have surprisingly being 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, *apolitical* perceptions of the courts seem to fuel it.

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. This is even more pertinent in transitional societies contending with 'reinvented' centres of power while simultaneously responding to the establishment of new judicial institutions which predictably attract considerable support from various publics. Everywhere, the ever-widening reach of the courts in governance and public decision-making has left little to the doubt that the men in (usually) dark robes are treading with new confidence, the unpredictable ropes of power.