# CHALLENGES, LIMITS AND PROSPECTS OF 'JUDICIAL GOVERNANCE' IN NIGERIA'S POLITICAL TRANSITION (1999–2014)

***Hakeem O. Yusuf***

## Introduction

The judiciary has become a strategic institution in Nigeria's post-authoritarian transition. Following the country's unnegotiated transition from almost three decades of military rule to civil rule, when the military left power without consulting with diverse relevant stakeholders,[1] the political elite has found considerable motivation to judicialize political conflict on a number of issues that ought to be resolved through political processes. These range from important fiscal policy issues like revenue allocation, public accountability to management of local-level governance. In the Nigerian context, these are matters of critical political importance, which had been long suppressed by a legacy of authoritarian military regimes that followed closely on the heels of colonial rule and ordinarily ought to be resolved through political processes. Analysts of political processes have noted that political elites, especially in divided societies, sometimes adopt consociation as a political mechanism for resolving power contestations,[2] with a core feature of consociation being the privileging of depoliticized approaches over majoritarian ones.[3] This approach to governance, particularly with reference to intergovernmental contestations, has led to an unprecedented judicialization of politics or

[1] 'Civil rule' or 'civil governance' seems to be an appropriate description of what the transition has achieved as against the aspirational 'democratic rule'.

[2] HO Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (Routledge Abingdon 2014) 128.

[3] RB Andeweg, 'Consociational Democracy' (2000) 3 *Annual Review of Political Science* 509–536, 511.

governance in the country, especially in the first decade of the transition; but this continues to varying extents even today.

The judiciary has been the focus of both national and international attention as a forum that ostensibly offers opportunity for resolving ongoing disputes and contestations in the country's troubled political transition. It is thus relevant to consider whether or how the judiciary has been instrumental in furthering the transition to proclaimed democratic rule, in fostering the respect for human rights and the need to uphold the rule of law. What has been the nature of judicial intervention in ongoing tensions that emerge from the interplay of a largely fused federal system in a heterogeneous, resource-rich but increasingly impoverished polity? These issues (and similar ones) have repeatedly been framed and pursued not merely as political, but rather as constitutional matters and as fundamental rights claims. Such framing brings to the fore the critical nature of the role of the judiciary in times of political change. The theoretical parameters for evaluating such a role have been commendably set out by Ruti Teitel, whose work provides some of the theoretical foundations for the analysis that follows.[4] In the main, as Teitel has explained, in a polity undergoing political change from authoritarian rule, the lack of a sustained institutional experience and practice of constitutional democracy may result in the society being saddled with a fragile political branch.[5] In the Nigerian experience, the fragile state of the political branch has facilitated considerable engagement with and contribution of the judiciary to policy-determination, economic development and political stabilization of the society.

[4] RG Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) 106 *Yale Law Journal* 2009.

[5] Ibid. 2230.

Setting out the context of the discussion, the first part describes the context by highlighting the historical, political and constitutional background of the Nigerian society, the nature and role of the judicial institution in it generally and particularly with reference to the focus of this chapter. The next part considers several experiences of judicialization of politics in the post-authoritarian political transition. Politicization of the judiciary sometimes results from the widespread incidence of a judicialization of politics. This has arguably played out in the Nigerian experience, albeit with serious consequences for the institutional integrity of the judiciary, an analysis of which is presented in the third part of this chapter. All through, the discussion is structured in a style that attempts to engage in reflections on the implications of judicial governance in the Nigerian experience in its post-authoritarian period, and the discussion demonstrates that the significant judicial role in governance, in light of its institutional legacy, has been as strategic as it has been problematic during the period.

**Context – Historical, Political and Constitutional Background**

*Historical and Political Context*

Nigeria is a federation with a central (federal) government and 36 subnational units (states). It gained independence from Britain in 1960.[6] Colonial rule, with its culture of violence and

[6] British colonial rule in Nigeria commenced with the cession of Lagos to the British monarch in 1861 though the British had for some time previous to that been interfering in local politics of the people of the territory. See IA Ayua and DJ Dakas, 'Federal Republic of Nigeria' in J Kincaid and GA Tarr, *Constitutional Origins, Structure and Change in Federal Countries* (McGill University Press Montreal & Kingston 2005) 241. A narrative of how the cession came about is provided in *Attorney General of Southern Nigeria v John Holt and Company (Liverpool) Limited and Others* [1915] A.C 1, 4–7.

subjugation,[7] set the stage for military rule, which was introduced barely six years after Nigeria gained independence from the United Kingdom. For some, Nigeria 'epitomises the military in government'.[8] During the period, the country's economic and social fortunes took a nosedive as the military acted on many occasions like an army of occupation ruling captured territory. By the time the military handed over power to a civil-led government in 1999, it had substantially weakened all institutions of state and society in the bid to maintain its hold on power. The unedifying experience of the country under various military juntas over the course of almost three decades with two brief spells of democratic government is documented both in the legal and political science literature.[9]

[7] T Falola, *Colonialism and Violence in Nigeria* (Indiana University Press Bloomington 2009).

[8] J Hatchard, M Ndulo and P Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press Cambridge 2009) 242.

[9] The country was under civil democratic rule from 1 October 1960 to 15 January 1966 and from 1 October 1979 to 31 December 1983. See for example B Owasanoye and C *Nwankwo, Suppressed Rights: Constitutional Rights Violations in Military Decrees 1984 to 1999* (Constitutional Rights Project Lagos 1999); BO Nwabueze, *Military Rule and Constitutionalism in Nigeria* (Spectrum Books Lagos 1992); HO Yusuf, 'Travails of Truth: Achieving Justice for Victims of Impunity in Nigeria' (2007) 1 (2) *International Journal of Transitional Justice* 268; O Oyediran (ed), *Nigerian Government and Politics under Military Rule, 1966–79* (St. Martin's Press New York 1980); E Osaghae, *The Crippled Giant: Nigeria since Independence* (Indiana University Press Bloomington-Indiana 1998).

All institutions of civil governance suffered as the military ruled with authoritarian legislation that undermined the Constitution. The military head of state, usually with an inner cabal of loyalists, formed a ruling council and made decrees under powers for 'the peace, order and good government' of the country.[10] The decrees were declared by the military to be superior to the Constitution. The common feature of military legislation was to either oust or limit the jurisdiction of the courts to question military fiat making laws, which in more than a few instances, abrogated or violated national, regional and international human rights provisions and standards. The first military legislation, Decree No. 1 of 1966, illegally abolished the Parliament.[11] Section 3 of the Decree provided that the Federal Military Government shall have the power to make laws for the peace, order and good government of Nigeria or any part on any matter.[12]

Following decades of military rule, the dynamics of democratic transition in Nigeria already presage state and society disputes in addition to the intergovernmental disputes. Both levels of contestations, to varying extents, are key to this discourse. The military left a legacy of institutional distortions and dysfunctions, as a result of which the country now faces a series of ongoing and formidable challenges. The distortions and dysfunctions extend beyond the economic, social and political sectors to the constitutional and legal order. This is due in part to the nature of military rule with its legendary disregard for the rule of law, constitutionalism and due process. The Nigerian experience is complicated by the predilection of military rulers

[10] I Elaigwu, 'Federalism under Civilian and Military Regimes' (1988) 18 (1) *Publius* 173, 183; Yusuf (n 2) 133–140.

[11] The military named federal and state legislation Decree and Edict respectively.

[12] See also section 2 (1) of the Constitution (Suspension and Modification) Decree No. 1 of 1984.

for a unified command-structure approach to governance in a heterogeneous society. To take an important example, successive military regimes were notably strong in the rhetoric of the pivotal status of federalism in the polity. However, in practice, the command-structured governance that characterized military rule saddled it with a caricature federation. The military legacy, not surprisingly, generated considerable tension between the federal (central) government and the states, thus setting the issue of federalism at the core of most intergovernmental disputations, which were rife in the first decade of the post-authoritarian period and remain significant to date.

*Constitutional Context and Judicial Review*

Irrespective of its authoritarian context, judicial review has always been an important part of the post-independent constitutional arrangements in Nigeria, as testified to by the fact that the courts still exercised powers of judicial review during the period of military rule. The military, it must be noted, were typically interested in 'rule of law' rhetoric. The country has neither had a constitutional court of that nature in some European countries like Hungary (Magyarország Alkotmánybírósága), France (Conseil Constitutionnel), Belgium (Cour constitutionelle / Grondwettelijk Hof), Germany (Bundesvefassungsgericht), or even African ones like South Africa (Constitutional Court of South Africa) and Egypt (Supreme Constitutional Court of Egypt / al-Maḥkama ad-Dustūrīya al-ʿUlyā, المحكمة الدستورية العليا ( nor such a unique innovative concept as in Ethiopia[13] (House of Federation / Yä-Federešən Məkər Bet,ፈዴሬሽን ምክር ቤት). Each of these institutions has a central, purpose-designed

[13] See, in more detail, H Tewfik, 'Contesting Conventional Concepts of States' Normative Spaces: The Innovative Role of Ethiopia's House of Federation and the Council of Constitutional Inquiry' in K Seidel and H Elliesie (eds), *Normative Spaces in Africa* (London & Burlington Ashgate 2015) .

role in resolving fundamental constitutional issues in those countries. Nonetheless, Nigeria's judicial system features a diffusion of the power of judicial review virtually through and across its hierarchical federal/state structure. Principally, courts of superior records, the Federal and State High Courts, the Court of Appeals and the Supreme Court of Nigeria (the Supreme Court, the Court) have general constitutional powers of judicial review, augmented by statutory provisions and procedural rules of court. The operation of judicial review within the legal system in the country is similar in that respect to the American system.[14] Nigerian courts exercise concrete powers of judicial review with a rigorous test for standing to institute action. The position has been that the standing to file a lawsuit is only available to individuals or groups that can establish a real stake in the outcome of the case.[15]

While the Nigerian judiciary has been noted for a restrictive judicial leaning on *locus standi*, or the right or capacity to institute an action in court, it is arguable that a careful reading of relevant constitutional provisions, especially sections 6 and 46 of the 1999 Constitution, and reflection on the judicial practice suggests that the Nigerian legal system accommodates both ex ante and ex post facto judicial review. Equally relevant is the fact that section 315 (3) of the 1999 Constitution vests wide powers of judicial review in the court with regard to any

[14] L Epstein, J Knight and O Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35 (1) *Law & Society Review* 117–164, 117; Ayua and Dakas (n 6) 258.

[15] The restrictive approach to *locus standi* is mainly an instance of judge-made law. As it is not a matter of legislation. Ironically it was formulated by the Supreme Court during the country's four year-interlude of civilian-led government. See *Abraham Adesanya v President of the Federal Republic of Nigeria & Anor* (1981) 2 Nigeria Constitutional Law Reports 358.

form of legislation. Consequently, at least in theory, the courts can declare legislation or a part of it void for inconsistency with the Constitution.

The role of the Supreme Court in judicial review is quite prominent, and this is not just because it is the apex judicial institution in the country, but also as a result of its 'exclusive original jurisdiction'. This is significant, as will become clear in relation to the discussion of federal and subnational jurisdictional disputes. By virtue of section 232 of the Constitution, the Supreme Court is conferred with exclusive original jurisdiction over any dispute between the central and subnational units where there is a dispute on any question (whether of law or fact) on which the existence or extent of a legal right depends. This provision is important, because it is the reason why the Supreme Court became a focal judicial venue for the resolution of intergovernmental disputes among the central and sub-national units on the numerous occasions where political measures appeared not to have served the interests of the political elite in the post-authoritarian era

**The Judiciary as a Strategic Actor in Political Transition**

Teitel provides insight on the role of law and the judicial function in transitional contexts that is germane to the analysis in this chapter. In contexts that have move away from authoritarian pasts, she identifies the judiciary as a critical institution for social transformation in her evaluation of various regions in the 'contemporary wave of political change' across (Eastern) Latin America, Europe and Africa. However, she argues that despite its important position, the judiciary faces immense institutional challenges in the task of mediating ensuing transitional tensions. This, Teitel notes, is due to the peculiar nature of law and justice in transitional societies. On this account, not only is law an agent of change, but changing circumstances also remould the law. In other words, the exigencies of the transition context

require a reconceptualization of law and justice, making law, at the same time, 'transformative […] extraordinary and constructivist'.[16]

It is fair to argue that in Nigeria's post-authoritarian era, the political branch actively created a predisposing environment for the judicialization of politics. Judicialization of politics, as defined by Alec Sweet, refers to the 'process by which triadic lawmaking progressively shapes the strategic behaviour of political actors engaged in interactions with one another'.[17] Ran Hirschl defines it as 'the ever accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions and political controversies'.[18] Javier Cuoso further points out that the judicialization of politics extends, beyond visible judicial control of policy, to the internalization of formal procedures and language of courts by non-judicial decision-making forums.[19]

As a result of the predisposing environment created by the political branches, the judiciary has since become a very strategic actor in the country's political space, following its transition to civil rule in 1999. The question is: Considering the rather limited liberal democratic credentials of the country, what are some factors driving recourse to the constitutionalization

[16] Teitel (n 4) 2014.

[17] A Stone Sweet, 'Judicialisation and the Construction of Governance' (1999) 32 (2) *Comparative Political Studies* 147, 164.

[18] R Hirschl, 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide' (2006) 75 (2) *Fordham Law Review* 721.

[19] JA Cuoso, 'The Judicialization of Chilean Politics: The Rights Revolution that Never Was' in R Sieder, L Schjolden and A Angell (eds), *The Judicialization of Politics in Latin America* (Palgrave Macmillan New York 2005) 105–130, 106.

of political space in Africa's potentially largest democracy? We can identify a number of interrelated factors responsible for this with the benefit of hindsight over the last one and a half decades of civil rule in the country. Indeed the courts have become critical in governance and seek to hold the country together through their active involvement in mediating diverse political issues, especially in spaces where power relations are contested.

Such contested spaces have direct implications for socio-economic arrangements, fiscal policy and economic control, making them the staple of conflict among political elite. As forums for the exercise and expression of power, either at the domestic or international level, political and economic spaces, like geographic spaces, are also highly contested. Analyses of contested spaces are mostly focused on physical territory like colonial territories, urban spaces and sites of physical violence like war.[20] However, it is possible to extend the analysis of contested spaces to sites of political conflict over key public policy issues (like taxation, revenue allocation and public accountability), intergovernmental claims of jurisdiction as well as individual claims of rights.[21] The relevance of such an extension can be located in the fact that both geographic and political spaces as forums of contestation have to do with claims of

[20] See comprehensively for instance L Purbrick, J Aulich and G Dawson (eds), *Contested Spaces Sites, Representations and Histories of Conflict* (Palgrave Macmillan 2007); W Fahmi and K Sutton, 'Greater Cairo's Housing Crisis: Contested Spaces from Inner City Areas to New Communities' (2008) 25 (5) *Cities* 277; J Barr and E Countryman, *Contested Spaces of Early America* (University of Pennsylvania Press Pennsylvania 2014); R Desai and R Sanyal (eds), *Urbanizing Citizenship: Contested Spaces in Indian Cities* (Sage London 2012).

[21] See for instance the contributions in J Unger (ed), *Associations and the Chinese State: Contested Spaces* (ME Sharpe Inc. New York 2008) examining the impact of the exponential growth of associations of various types in China on state and societal action in the country.

authority, ownership, and/or identity bounded up in real or assumed historical experience with direct implications for residents of the contested spaces.[22] Political conflict of this nature and rights claims are commonplace and topical in societies emerging from authoritarianism.

Litigating political conflict, the judicialization of political questions has been an important feature in the Nigerian experience of contested political space in the country's post-authoritarian transition. There are two separate dimensions to the Nigerian experience of the judicialization of politics – one localized, the other globalized. The global dimension is an external dimension that can be located in the worldwide experience of a general rise in judicial power across the world. This tends to be acute in (but by no means limited to) countries experiencing political transition. It is manifested in a notable – though controversial – increase in the involvement of the judiciary in governance. As courts take on 'first-order questions'[23] on governance, unlike any other time in contemporary history, in the last two and a half decades, judicial involvement in policy or political decision-making has gained in significance. Even authoritarian polities have not been left out. Despite variations in local experiences, the main issue remains the same: The power of courts is indubitably on the rise in many societies in Africa, Asia, Latin America, and North America as well Europe

[22] See the contributions in F v Benda-Beckmann, K v Benda-Beckmann and A Griffiths (eds), *Spatializing Law: An Anthropological Geography of Law in Society* (Ashgate Farnham 2009) exploring among others, how legal rules may map on to social and physical spaces or conceptions of them for organizing social, political and legal activities in different societies.

[23] S Issacharoff, 'Democracy and Collective Decision Making' (2008) 6 (2) *International Journal of Constitutional Law* 231, 231.

(notably in countries where the revolutions of 1989 transpired).[24] Thus, from a comparative perspective, an explanation can be found in a globalized experience of what is also known as the constitutionalization of politics.[25]

[24] See, for instance, A Bâli, 'Courts and Constitutional Transition: Lessons from the Turkish Case' (2013) 11 (3) *International Journal of Constitutional Law* 666–701, 666; RH Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Vintage Canada 2010); J Klaaren and T Roux, 'The Nicholson Judgment: An Exercise in Law and Politics' (2010) 54 (1) *Journal of African Law* 143; S Balme, 'The Judicialisation of Politics and the Politicisation of the Judiciary in China 1978–2005' (2006) 5 (1) *Global Jurist Frontiers*; RH Pildes, 'The Supreme Court 2003 Term Foreword: The Constitutionalization of Democratic Politics' (2004) 118 (29) *Harvard Law Review* 28; R Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts' (2008) 11 *Annual Review of Political Science* 93; T Moustafa, *The Struggle for Constitutional Power: Law, Politics and Economic Development in Egypt* (Cambridge University Press Cambridge MA 2007); W Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer Dordrecht 2005); T Moustafa, 'Law Versus The State: The Judicialisation of Politics in Egypt' (2003) 28 (4) *Law and Social Inquiry* 883; A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press Oxford 2004); T Ginsburg, *Judicial Review in New Democracies* (Cambridge University Press Cambridge 2003); J Priban, *Dissidents of Law* (Ashgate Dartmouth Hampshire 2002); T Ginsburg, 'Constitutional Courts in New Democracies: Understanding Variations in East Asia' (2002) 2 (1) *Global Jurist* 1; J Ferejohn, 'Judicializing Politics, Politicizing Law' (2002) 65 *Law and Contemporary Problems* 41; T Ginsburg and G Ganzorig, 'When Courts and Politics Collide: Mongolia's Constitutional Crisis' (2000–2001) 14 (2) *Columbia Journal of Asian Law* 309; H Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*

The local or internal dimension of the judicialization of politics in the Nigerian experience can be attributed to four factors. One, it can be attributed to the incongruous and lopsided federal arrangement handed down by the military to the civilian regime. This is one of the legacies of an unnegotiated political transition where diverse and relevant stakeholders – civil society groups, economic actors, traditional authorities, workers' unions, women groups, youth formations and so on – were not afforded the opportunity of contributing to the shape of the political transitions by the military government that managed the political transition. Another is the rather ironical institutional pedigree of the courts in comparison with the political branches of the state. While the role of the executive and legislative arms had been long fused and assumed by the military, the courts, even if arguably somewhat marginalized, remained at all times separate. Thirdly, the combination of a chequered experience of democratic governance, coupled with the assumption of power by a former military ruler with a messianic self-imagining as head of state and government (as president), contributed substantially to the ascension of the judicialization of politics in the country, especially between 1999 and 2007. This phenomenon is well captured by Prempeh as the 'imperial

---

(Cambridge University Press Cambridge 2000); S Issacharoff, 'Constitutionalizing Democracy in Fractured Societies' (2004) 82 *Texas Law Review* 1861; NC Tate and T Vallinder, *The Global Expansion of Judicial Power* (New York University Press New York 1995); A Stone Sweet, *The Birth of Judicial power in France – The Constitutional Council in Comparative Perspective* (Oxford University Press New York 1997); R Teitel, 'Post-Communist Constitutionalism: A Transitional Perspective' (1995) 26 (1) *Columbia Human Rights Law Review* 167.

[25] Hirschl (n 24).

presidency'.[26] Finally, Nigeria's ruling political elite have typically had 'suspect democratic credentials', dominated as they are by former military rulers, their protégés, cronies or associates.[27] Due partly to this fact, electoral processes have been largely manipulated. Recourse to judicialization to legitimize the exercise of power has proved to be an attractive option for the political class.

As a result of the above dynamics, 'the judiciary has been faced with the difficult task of maintaining the normative balance between pure politics and law in its interpretive institutional role'.[28] It is now relevant to consider a number of cases that bears out the judicialization of politics claim and the opportunity that has afforded the possibility of judicial governance. Critical analyses of some indicative cases also signpost the challenges of that approach to governance, especially in the context of a post-authoritarian experience.

---

[26] H Kwasi Prempeh, 'Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa' (2008) 35 *Hastings Constitutional Law Quarterly* 761.

[27] T Oyekola, 'Ex-Military Officers are Doing Well in Politics – Gowon' *Nigerian Tribune* Online Edition (Lagos Tuesday 4 September 2007 Lagos), H O Yusuf 'Colonialism and Dilemmas of Transitional Justice in Nigeria' (2018) 12 (2) *International Journal of Transitional Justice* 257-276, 273-274, R Joseph, 'Africa: States in Crisis' (2003) 14 (3) *Journal of Democracy* 159–170, 159, 163.

[28] HO Yusuf, 'The Judiciary and Political Change in Africa: Developing Transitional Jurisprudence in Nigeria' (2009) 7 (4) *International Journal of Constitutional Law* 654, 656.

**Formalism and Justice in Transitions**

*Rights and Truth-seeking*

Soon after the inception of the political transition, the courts were inexorably drawn into adjudicating on issues that concerned recovering justice in the context of change from the repressive past. The case, *Justice Chukwudifu Oputa (Rtd.) and Human Rights Violations Investigation Commission and Gani Fawehinmi v General Ibrahim Babangida, Brigadier Halilu Akilu and Brigadier Kunle Togun* (the *Oputa Panel Case*)[29] is of outmost significance in this regard. It had resounding impact on the truth process, which was the basic transitional justice mechanism adopted by the country to address gross violations of human rights after almost three decades of authoritarian rule.

At the dawn of its transition to civil rule, the Nigerian government attempted to engage with this past. The main mechanism for this purpose was to establish the Human Rights Violations Investigations Commission (Oputa Panel)[30] under the Tribunal of Inquiries Act (TIA).[31] The public hearings of the Oputa Panel included the murder by letter bomb (the first in the country's history) of Dele Giwa, a prominent investigative journalist and editor of the

[29] M.J.S.C [2003] 63.

[30] Named after its chairman, Justice Chukwudifu Oputa, Justice em., Supreme Court of Nigeria. For a discussion of the Oputa Panel see HO Yusuf, 'Human Rights Violations Investigations Panel (Oputa Panel)' in L Stan and N Nedelsky (eds), *Encyclopedia of Transitional Justice* 3 (Cambridge University Press New York 2013) 160–165; see also for wider issues of transitional justice in the country, HO Yusuf, 'Country Studies: Nigeria' in L Stan and N Nedelsky (eds), *Encyclopedia of Transitional Justice* 2 (Cambridge University Press New York 2013) 333–339.

[31] Cap. No 447, Vol XXIII, Laws of the Federation of Nigeria 1990.

country's leading newsmagazine in 1986. It was widely believed that the office of the military head of state at the time, General Ibrahim Babangida, was implicated in the murder. The late journalist's solicitor, Gani Fawehinmi, petitioned the Oputa Panel, and at the public hearing, he successfully applied to summon General Babangida and his predecessor, General Muhammadu Buhari, as well as the former's security chiefs ('the Generals') as witnesses. The generals insisted they would not attend in person but would rather be represented by a legal team at the public hearing, a move strongly opposed by the petitioner. There was contention about whether the Oputa Panel had the power to issue and serve summons on them and, having objected to appear, the question remained as to whether the generals could give and cross-examine evidence by proxy. The Oputa Panel took the view that the proceedings before such a truth-seeking commission did not constitute adversarial proceedings and the personal attendance of the summoned generals was required for the fulfilment of its mandate.

The generals, however, resisted and filed an action in the Federal High Court against the summons. Their main argument was that the TIA, under which the Oputa Panel was established, was not an existing law within the meaning of section 315 of the 1999 Constitution of the Federal Republic of Nigeria, which provides for savings and modification of existing laws in the country. They sought to have the summons issued under the compulsive powers of the Oputa Panel under the TIA set aside for being in breach of their fundamental rights guaranteed by sections 35 and 36 of the 1999 Constitution. Section 35 of the Constitution provides for the right to liberty, while section 36 guarantees the right to fair hearing.

A consensual reference of the constitutional issues arising from the case was made to the Court of Appeal. Precisely ten days to the close of the Oputa Panel public hearings (31 October 2001), the Court of Appeal ruled in favour of the Generals and their security chiefs.

Further appeals by both sides to the Supreme Court facilitated the completion of the Oputa Panel in the meantime.

The Supreme Court held that the Tribunal of Inquiry Act was valid under section 315 of the 1999 Constitution. However, the Constitution does not confer powers on the National Assembly to enact a general law on the tribunals of inquiry for the whole country, which means that the president had exceeded his jurisdiction in establishing the Oputa Panel. Such a body could not be established to carry out a national inquiry into the violations of human rights in all parts of the country. This was a matter within the exclusive jurisdiction of the states, and federal powers of inquiry of such a nature were restricted to the federal capital territory.

Upon reflection, two features of the legal and statutory framework of governance in Nigeria's political transition, among a number of others that are important and disconcerting, can be discerned in the Oputa Panel Case. First is the continued extensive reliance of all branches of government on autocratic legislation deriving from the colonial past and authoritarian military regimes. It is relevant to observe that there is now greater consciousness on the undesirability of the situation, but positive action to displace it has been marginal at best. Deriving from this state of affairs, an elected transition government chose to rely on the TIA, a pre-republican legislation, to set up a truth commission by executive fiat at a time when it had become standard practice to do so elsewhere under purpose-specific legislation. The Oputa Panel was aware of this problem and did request for the anomaly to be rectified, but till date, every other truth process that has been initiated in the country (principally at the state level, like in Rivers and Osun States) has continued to rely on the (state equivalent) of the same legislation.

Second is the conventional, uncritical judicial adherence (more acutely, the case in a transition context) to precedents based on principles of the common law imported into the country during the period of colonial rule. This naturally formed the basis of decisions made during the period and even immediately after. Such uncritical adherence accounts for why the Supreme Court relied extensively on the case of *Sir Abubakar Tafawa Balewa & Others v Doherty & Others* (Balewa v Doherty)[32] in the Oputa Panel Case. In *Balewa v Doherty*, the Federal Supreme Court as well as the Privy Council (the latter in its capacity as the final judicial forum for Nigeria in its post-independent but pre-republican period) upheld objections to the compulsive powers and the jurisdictional reach of the Commissions of Enquiry Act, 1961, which had similar provisions to the TIA. Judicial precedent, a core feature of the common law system, has value. However, the point is that the post-republican Nigerian Supreme Court is neither bound in fact, nor by law, by the decisions of both authorities. In light of this, an argument could be made that, with the imperatives of the transitional justice specifically in mind, there was simply no compelling basis in law for the Supreme Court to rely on *Balewa v Doherty*. The adoption of a plain-fact approach by the court, to which it was no doubt accustomed, hit at the root of the transitional context and, at least implicitly, undermined the rule of law.

*What it is to die (or not) – rights in a more 'political' context*

The engagement of state institutions within the context of transition would be required for desired social transformation. In view of the foregoing discussion on the Oputa Panel Case, it is interesting to find that, given a more 'political' context, the Supreme Court could contemplate, let alone deliver a radical, purposive decision in a transition context even if without direct acknowledgement of it. This is precisely what the majority decision of the

[32] (1963) 1 Weekly Law Reports 949.

Supreme Court had done in an earlier case, *Peoples Democratic Party (PDP) & 1 Or. v Independent National Electoral* and 4Ors (PDP Case).[33]

The case concerns litigation on elections that ushered in civil rule into the country in 1999. Atiku Abubakar, the governor-elect (in Adamawa State), was nominated to run as vice presidential candidate and, accordingly, he was no longer available to be sworn in as governor. The electoral body, the Independent National Electoral Commission (INEC) moved to conduct fresh elections for the office of governor as well as deputy governor of the concerned state on the premise that Abubakar's nomination as vice-presidential candidate rendered the position of governor-elect vacant. In a letter on the issue, INEC stated that since he had not been sworn-in, his deputy, having run on a joint ticket as constitutionally required, could not automatically take over the position. However, Deputy Governor-Elect Bonnie Haruna challenged the move in court, arguing that he ought to be sworn in as governor.

The main issue in contention was the interpretation of the provisions of section 37 (1) of the State Government (Basic Constitutional and Transitional Provisions) Decree 3 of 1998, according to which: 'If a person duly elected as governor dies before taking and subscribing to the oath of allegiance and oath of office, the person elected with him as deputy shall be sworn in as governor'. The critical point of the case was the absence of a direct provision in the electoral laws on the situation that arose in the context of an important political transitional process.

The Supreme Court held that to enable the judiciary to play its constitutional role 'effectively and satisfactorily', courts require being 'purposive' in their construction of constitutional

[33] (1999) 7 S.C Part II 35.

provisions. There exists an obligation on judges to prevent a narrow interpretation of constitutional provisions from denying citizens of the rights intended to benefit them by the framers of the Constitution.[34] The Court held that the intention of the framers of the constitutional provisions was to make provision for circumstances where, as a result of any condition or circumstance (the ultimate being death), the deputy governor should step into the office of the governor where the latter is no longer available to take up the position.[35] In a split decision (4–3), the bare majority premised the decision on legislative intent, a radical departure from its customary plain-fact approach to judicial interpretation.

Chief Justice Uwais, in the lead judgment, held that the word 'die' in section 37 (1) was not sacrosanct. Rather, a liberal construction which was to be preferred in the circumstances, accommodated a situation as had arisen on the facts of the case, where the elected candidate was 'unavailable' to be sworn in. A narrow or literal construction failed to advance 'the intention, spirit, objects, and purposes of the Constitution'.[36] In light of the fact that Abubakar, who had relinquished the position of governor-elect, could not (due to his new position), and was barred from reclaiming it, his action could be likened to 'permanent incapacity or even death',[37] and thus would be within the contemplation of the law. To reach its decision, the Court further relied heavily on section 45 (1) of the same law, which provided that the deputy governor was to hold the office of governor once the latter becomes vacant by reason of death, permanent incapacity, or removal for any reason.

[34] *PDP* Case (n 33) 47 f. Emphasis mine.

[35] Ibid. 71 f.

[36] *PDP* Case (n 33) 71.

[37] Ibid. 61.

The three dissenting justices strongly criticized the majority decision as a lawmaking and usurping the function of the legislature.[38] For Justice Ogundare, it represented a 'policy' decision above and beyond the duties of the court of the court. According to him, the business of the court was only to interpret what the legislators actually said rather than discover legislative intention.[39] There was no gap to be filled in the relevant legislation, and even if there was, it was the role of the legislature alone to fill such gaps.[40] He was supported on this point by Justice Mohammed, who declared that 'policy, expediency, political exigency and convenience' ought to be excluded from constitutional interpretation.[41] Despite conceding the value of a liberal interpretational approach to deal with 'eventualities due to changing times, different social environments … not fully contemplated or overlooked at the time the constitution was drawn up', Justice Uwaifo also expressly dismissed the majority's preference for a 'purposive approach' in the case.[42]

It is interesting to note (as conceded by the Court) that the provisions of section 45, unlike section 37 (1), only applied after the governor and the deputy governor had assumed office and to that extent, should be deemed inapplicable on the specific facts of the case. However, the majority took the view that because the legislation in issue was of a constitutional nature, the document had to be 'read together as a whole'. They stated that the rationale for the

[38] The dissent was so extensive it doubled the length of the lead judgment and the concurring decisions of the majority put together.

[39] *PDP* Case (n 33) 91.

[40] Ibid. 85–99.

[41] Ibid. 111.

[42] *PDP* Case *(*n 33) 123.

provisions, taken as a whole, was to avoid a vacancy in the important office of Governor and ensure a 'smooth' succession' where required.[43]

A fundamental consideration, as far as the Court was concerned was the rights of Bonnie Haruna. Whereas INEC argued that the law in question, though of a constitutional nature, was only intended to set the framework for governance of the country in the transition period and not to create individual rights, the Court rejected this argument. The majority held that, although both candidates were elected on a joint ticket, in the event that the governor-elect abandoned or relinquished his mandate, the deputy governor-elect would not thereby lose his right to the latter position. Each had acquired individualized rights[44] of a public nature, which could not accrue to the benefit of an individual who was not elected, and to hold to the contrary was not simply 'fallacious but dangerous to the democratic process'.[45] It is logical to share this view.

**Conflicting Constitutional Values?**

*Federalism v Corruption*

The foregoing purposive approach to judicial interpretation was also adopted by the Supreme Court in another important case in the transition period. This was in *Attorney General of Ondo State v Attorney General of the Federation & 35 Ors* (the ICPC case).[46] In this case, the Supreme Court was required to determine the propriety of federal legislation, the Independent Corrupt Practices Commission Act, which sought to establish a federal agency, the

[43] Ibid. 72 f.

[44] Ibid. 50.

[45] Ibid. 148 per Justice Ayoola. Emphasis mine.

[46] (2002) 6 S.C. Pt I, 1.

Independent Corrupt Practices Commission, for combating corruption in the country. The context was that the country had been declared one of the most corrupt in Transparency International's Corruption Index. The incoming president who took office after the end of the military rule , Olusegun Obasanjo, had, in his inaugural address, affirmed the determination of his government to deal with the menace of corruption, which had become 'a full-blown cancer' and 'the greatest single bane' of the country.[47]

It is relevant that, like many federal systems, there is an allocation of legislative powers between the two tiers of government in the Constitution. The 'Exclusive Legislative List' itemizes the exclusive jurisdiction of the federal (central) government while the 'Concurrent Legislative List' specifies the shared sphere of legislative powers between the two tiers. There is an unwritten Residual Legislative List that is constitutionally deemed the exclusive province of respective state governments on unlisted matters. Under the residuary rule, all matters that can be subject of legislation but not stated in any of the two lists are deemed to form a part of the unwritten Residual Legislative List by virtue of section 4 (7) (a) of the Constitution.[48] Notwithstanding the ostensible merits of a central agency for checking corruption in the country, it is important to point out that there are no specific provisions in the itemized list of legislative competencies in the Constitution conferring power on the National Assembly to enact law and establish such a body. As *amicus curiae* rightly noted,

[47] Nigeria World, 'Inaugural Speech by His Excellency, President Olusegun Obasanjo Following His Swearing-in as President of the Federal Republic of Nigeria on May 29, 1999' available at <http://nigeriaworld.com/feature/speech/inaugural.html> accessed 31 October 2013.

[48] Attorney-General, Ogun State v Aberuagba (2002) 22 (52) *WRN* 77.

the court was faced with a difficult task in the case as the establishment of the ICPC 'impinges on the cardinal principles of Nigeria's federal system'.[49]

In an exceptional unanimous judgment, the Court upheld the validity of the ICPC Act mainly by virtue of section 4 (2) of the Constitution, which provides that the National Assembly has the power to make laws for the peace, order and good government of the federation with respect to any matter included in the Exclusive Legislative List. This was despite the fact that each of the states had similar powers in respect of their territories and there was no provision under the legislative list for the federal government to make laws criminalizing corruption of state (as against federal) officials. Justifying the position of the court, Chief Justice Uwais stated that if corruption was to be 'eradicated effectively, the solution to it must be pervasive to cover every segment of the society'.[50]

In contrast, the Court upheld the federalism principle over another claimed anti-corruption measure in a dispute between the states and the federal government in *Attorney General of Abia State & 2 Ors v Attorney General of the Federation and 33 Ors* (Revenue Monitoring case),[51] which was decided four years after ICPC. The gravamen of the case was the constitutionality of the Monitoring of Revenue Allocation to Local Governments Act, 2005 (MRA), and was passed by the National Assembly. This law purported to enable the federal government to directly disburse and monitor the revenue-share of local governments; the third arm of government, rather than through the states, as was the practice. The ostensible objective of the MRA was to ensure that allocations from the Federation Account – the joint

[49] *ICPC* Case (n 46) 17.

[50] Ibid. 28.

[51] (2006) 7 NILR 71, 1.

national purse – were properly distributed to the local governments, since there was strong evidence of widespread practice of deductions from such allocations made through the federal states. The states raised an objection to this on the premise that it was an unconstitutional interference with their jurisdictional powers for the administration of local governments under section 7 of the Constitution.[52]

The Court gave judgment for the states, stressing that no matter how salutary the objective, legislation had to conform to the principle of constitutionality.[53] The Court emphasized the significance of the supremacy clause, which requires all actions of the three arms of government to be in conformity with the provisions of the Constitution. The court recognized there was some tension in this judgment with its decision in the ICPC case, but restated its support for the anti-corruption policy, insisting, however, that it be executed in line with the Constitution.[54] Interestingly, unlike the ICPC case, two justices dissented based on the unanimous decision in the ICPC case maintaining (with good reason), that the shared objective of checking inappropriate fiscal practices and corruption commended following the precedent set in the earlier decision.

The question, of course, concerns what seems to be a reversal, given its publicly expressed commitment to the anti-corruption policy of the federal government. The answer may lie in the changing context. The ICPC case was delivered against the background of overwhelming national clamour and international support for action against corruption. Following an initial progressive focus on stemming grand corruption, the federal government then proceeded on a

[52] Ibid. 4 f.

[53] Ibid. 24.

[54] Ibid. 19.

policy course that severely tested and undermined the federal political arrangement of the country, leading to a series of cases instituted by aggrieved states, all of which were taken to the Supreme Court as the only constitutionally prescribed judicial forum for such disputes. In effect, if nothing else, the Court was conscious of its rising docket – particularly from cases filed against the federal authorities by states led by opposition parties.[55] The Court must have become concerned about the implicit abuse of its liberal construction of the powers of the centre in the ICPC case and hence opted for a more restrictive view of the federal principle. This change is consistent with what Teitel considered the 'ambivalent directionality of law'[56] in transitional constitutionalism.

**Of Political Quiescence**

*Floundering Politics, Strong Judges*

The quiescence, or even complete deference, of the executive and legislative branches to the judicialization of politics is sometimes related to the aspiration of the political branch to secure 'regime legitimization'.[57] This is a particularly attractive strategy for the political branch in the context of democratizing polities, which face the challenge of the (re)institution of the rule of law as a principal issue, especially in the context of the demands of the dominating liberal capitalist approach to political transition programming. Equally so is the desire to obtain legitimacy in times of crisis where there is a legitimacy-deficit, deriving from

[55] See e. g. *Attorney General of Abia & 2 Ors v Attorney General of the Federation & 33 Ors* (2006) 7 NILR 71; *Attorney General of the Federation v Attorney General of Abia & 35 Ors* (No. 2) (2002) NWLR 542 S.C.

[56] Teitel (n 4) 2033.

[57] P Domingo, 'Judicialization of Politics: The Changing Political Role of the Judiciary in Mexico' in Sieder, Schjolden and Angell (n 18) 21–46, 22; Issacharoff (n 23).

any of a number of dynamics (not least sham elections) of the political branches of government. This legitimacy-deficit has been particularly important in the Nigerian context as a catalyst element in the judicialization of politics. From the inception of the new civil rule era (the fourth republic) to date, there has been a constant and predictable flow of so many pre- and post-elections cases at virtually all levels, but especially at the state gubernatorial and presidential elections, reflecting in part the literal 'winner-takes-all' psyche of the political elite. It has since become a veritable feature of the political landscape for the political elite to secure power and public office or legitimize their hold on it through well-oiled litigation in the face of unresolved political differences. *Rt. Hon. Rotimi Chibuike Amaechi v Independent National Electoral Commission (INEC) & 2 Ors* (Amaechi v INEC)[58] aptly demonstrates how the political elite have adopted this strategic preference for securing power through the grace of the courts.

The remarkable political intrigues in *Amaechi v INEC* led to what can be considered an unprecedented level of judicial intervention in the political process in the country's post-authoritarian period. *Amaechi v INEC* relates to political dissension that arose within the ranks of the Peoples' Democratic Party (PDP) in the lead up to the gubernatorial elections in 2007, which was, at the time, an integral part of the milestone civil-civil-transition elections in the country. Rotimi Amaechi, the plaintiff, had won an overwhelming victory at the party primaries, polling 6527 of the 6575 delegates' votes in Rivers State. To his consternation, after initially submitting his name to INEC (the electoral body), his name was substituted with that of the 2nd Defendant, Celestine Omehia, who did not participate at all in the primaries. The PDP had done this despite a pre-emptive suit filed a week earlier by Amaechi, to stop it

[58] (2008) 1 S.C. Pt. I, 36.

from such action.[59] INEC had accepted the substitution on the premise that it was obligated to uphold the PDP's choice of candidate, which was the right of the latter to determine. INEC further argued that the substitution was justified by a governmental 'White Paper', which indicted Amaechi for corruption (at the time Speaker of the State House of Assembly). It was argued for Omehia that the sponsorship of a candidate for elective office by a party was 'not a guaranteed right of any member' in which case Amaechi (or for that matter, any other individual) had no statutory or constitutional right to be sponsored by a party as its candidate for an election.[60]

While the case was progressing through trials and appeals (and cross-appeals), the general election went on in defiance of court injunctions stopping it from holding, with Omehia declared winner. The case ended up at the Supreme Court, which deplored the party's breach of its own Constitution, which required participation of the candidates in the primaries, and, as a result, there was no room for a candidate who did not contest the primaries to emerge as the party's candidate in the general elections. Of greater interest is the holding of the Court that, as a result of the illegal substitution, it was Amaechi who had been elected Governor in the elections. This was despite the fact that his participation in the electoral process was aborted after the party primaries. This, of course, is curious, but the Court was faced with a context in which the Constitution did not have a place for independent candidature; all candidates are required to be sponsored by a political party. The Court justified its position on the premise that, under the circumstances, it was the party; the PDP,that had been voted in by the electorate, and not the candidate. As Justice Aderemi put it, the fact that 'a good or bad candidate may enhance or diminish the prospect of his party in winning' does not detract from

[59] Ibid. 54–56.

[60] *Amaechi v INEC* (n 58) 57.

the fact that the electoral contest is 'between parties' and 'at the end of the day, it is the party that wins or loses an election'.[61]

In this way, the decision transformed the case from a purely 'intra-party dispute'[62] or contestation in an electoral process. This disregard for the impact of the standing of the candidate on the outcome of an election one way or the other, the decision raises the fundamental question of the propriety of relocating the fundamental majoritarian dimension of elections even in a democratizing polity. It is relevant in this regard to observe that about half a million of the electorate in Rivers State voted in an election in which 19 political parties other than the PDP had participated. In the leading judgment, Justice Oguntade stated that 'the one unchanging feature is that PDP was the sponsoring party' and 'even if Omehia had lost the election', the Court 'would still be entitled to declare' Amaechi as PDP's candidate in the election.[63] While declaring Amaechi the winner of an election he did not participate in, the Court declared that the intention was to avoid 'a dangerous precedent'[64] that would require that fresh elections be ordered whenever an improperly nominated candidate was presented to the electorate in an election, irrespective of whether he or she was going on to eventually win. The Court reasoned that a sure way out of the quagmire was to disregard the result of the ensuing election.

[61] Ibid. 110.

[62] This is the characterization of the case by the Court. See lead judgment per Oguntade JSC, *Amaechi v INEC* (n 59) 111.

[63] *Amaechi v INEC (*n 59) 111 f., emphasis mine.

[64] Ibid. 112.

Invoking the imperative of due process, it stated that '[i]n the eyes of the law', Amaechi's nomination earlier forwarded to INEC remained intact,[65] which meant that the candidate that wins in court 'simply steps into the shoes of his invalidly nominated opponent, whether as loser or winner'.[66] But this decision remains problematic for, while it is logical to resolve the nomination issue in Amaechi's favour on the basis of conditions that persisted prior to the election, declaring him winner of a general interparty election in which he had not participated is quite another matter. The latter decision is arguably as inacceptable, if not more reprehensible, than the action of the PDP and INEC in imposing Omehia illegally as they did.

Like *Amaechi v INEC, Action Congress (AC) and Alhaji Atiku Abubakar v Independent National Electoral Commission* (AC v INEC)[67] is a poster child for how prominent political actors enlist the judiciary to settle the ground rules on participation and exclusion in the political space. In 2006, contemporaneous with Amaechi v INEC, the presidency was also experiencing high politics resulting from the resistance to the attempt by then incumbent President Obasanjo to extend his tenure, a common practice among African incumbent Heads of State.[68] The constitutional amendment proposed for the move fell through on 16 May

[65] Ibid. 111, emphasis mine.

[66] Ibid. 112.

[67] (2007) 6 S.C Pt. II 212.

[68] This was known as the 'Third Term Project.' See, for instance, SJ Omotola, 'Political Globalisation and Citizenship: New Sources of Security Threats in Africa' (2008) 52 (2) *Journal of African Law* 263–268, 268; S Adejumobi (ed), *Governance and Politics in Post-military Nigeria. Changes and Challenges* (Palgrave Macmillan 2010) 173–206; A Isumonah,

2006.[69] Importantly, the resistance was not only from the opposition parties, but also from important and high-ranking members of his party, the PDP. Significantly, the latter group was led by Obasanjo's deputy, Vice-President Atiku Abubakar, who by all accounts had a firmer hold of the political machinery of the PDP at the time.

Aspects of the reprisal measures set in motion by President Obasanjo against his Vice-President foregrounded AC V INEC. Indeed, the case was the only one in a series of over a dozen instituted by Abubakar alone or in conjunction with others (including notably, the Action Congress, a new political party he joined) to ward off the multi-pronged attempts by Obasanjo, not only to neutralize the former's political influence but, more importantly, to prevent him from participating in the 2007 presidential elections. One such measure was a failed bid by Obasanjo to have Abubakar impeached from the office of Vice-President. He was also investigated by the Economic and Financial Crimes Commission (EFCC) in his position as chair of the Petroleum Development Fund. Based on that investigation, Abubakar was indicted for abuse of office by an Administrative Panel of Inquiry (Panel) set up by the federal government. On the strength of this indictment, INEC disqualified him from the presidential poll as the candidate of his new party, the Action Congress (AC).[70] Abubakar and AC challenged this exclusion in a suit filed at the Federal High. The Court found in their favour, declaring the exclusion was illegal. INEC appealed and the Court of Appeal allowed the appeal, leading the plaintiffs to also appeal to the Supreme Court.

---

'Imperial Presidency and Democratic Consolidation in Nigeria' (2012) 59 (1) *Africa Today* 43.

[69] Isumonah (n 69) 57; DK Posner and DJ Young, 'The Institutionalization of Political Power in Africa' (2007) 18 (3) *Journal of Democracy* 126, 127.

[70] Omotola (n 68) 278.

In a unanimous decision allowing the appeal, the Court declared that INEC had acted illegally, as it lacked the constitutional or statutory powers to disqualify any candidate in the elections and only a conviction by a court of law was sufficient to bar the eligibility to contest for public office.[71] As the court noted, this decision of the parliament derived in part from the experience of abuse of the power (as previously provided in legislation) by the electoral commissions. As the Court stated, in the past, candidates had been disqualified on the day of elections, owing to which the legislators, wary of previous experience, excluded the power from electoral law and the Constitution.[72] Thus, disillusionment with the exercise of an otherwise political power informed the decision to cede it to the judiciary with the expectation that it would be neutrally and judiciously exercised. The previous position had been that judicial mediation of the process of nomination and selection of candidates would involve the judiciary in strictly domestic affairs of political parties, which, from a majoritarian perspective, was outside its purview.[73]

Courts play a critical role in confronting the designs of incumbents in power to circumvent democratic competition through artful control of electoral bodies like INEC.[74] In this regard, it is germane that the Supreme Court's decision in this case was central to opening up the deliberate constriction of the democratic space by an incumbent intent on subversion of the rule of law and the democratic process.

---

[71] *AC v INEC (*n 69) 230, emphasis mine.

[72] Ibid. 265.

[73] See for instance, *Dalhatu v Turaki* (2003) 15 NWLR Pt. 843, 300 and *Onuoha v R.B.K Okafor* (1983) 2 SCNLR 244.

[74] Issacharoff (n 23) 264.

A good number of cases illustrate the claim of the judicialization of politics in the context of the democratic transition. Apart from those considered above, some other notable ones include *Attorney General of the Federation v Attorney General of Abia and 35 Ors*,[75] which concerns a disagreement between the federal authorities and the littoral states for oil resources, stemming from the continental shelf of the country. *Attorney General of the Federation v Attorney General of Abia & 35 Ors* (No. 2)[76] and *Attorney General of Ogun State v Attorney General of the Federation*[77] both relate to disputes on fiscal matters (control of revenue and withholding of statutory allocations by the federal government). The Lagos State Government challenged the inherited military legislation, which conferred wide-ranging and ultimate physical planning powers on the Federal Government in *Attorney General of Lagos State v Attorney General of the Federation*.[78]

**Politicization of the Judiciary**

There is replication of the foregoing account of active judicial mediation of politics in many other instances. The experience mainly accounts for the Supreme Court of Nigeria being nominated for two consecutive years (2007 and 2008) as 'Man of the Year',[79] no doubt in recognition of the critical judicial role in 'shaping pathologies of stabilization in a floundering

[75] (2002) 4 S.C. Pt I, 1.

[76] (2002) NWLR 542.

[77] (2002) 12 SC Pt II, 1.

[78] (2003) 6 SC Pt I, 24.

[79] O Omenuwa, '2007: The Year of the Supreme Court' (Lagos Thursday 27 December 2007) *The Daily Independent Online Edition* available at <www.independentngonline.com/?c=129&a=7908> (February 20 2008).

political transition, upholding constitutionalism, rule of law and ultimately, staving-off customary excuses for military incursions in the governance of the country'.[80] It even received commendation from unusual quarters both home and abroad, including the London-based weekly magazine, *The Economist*, and the United States Congress, for demonstrating independence and for swaying the country's democratization process as well as for upholding human rights.[81] From an internal perspective, the words of a renowned social critic and law professor, who argues that the Court has assumed the role of 'sentinel … guard for democracy and good governance'[82] provide a testament to how especially the image of the Supreme Court (and, by extension, the judicial branch as a whole) had become writ large like never

[80] HO Yusuf, 'Robes on Tights Ropes: The Judicialisation of Politics in Nigeria' (2008) 8 (2) *Global Jurist* 1, 29.

[81] See 'Belgore, Oputa, Sagay, Others Hail Supreme Court' (Lagos Sunday 24 June 2007) *The Guardian Online Edition* available at <www.nigerians-abroad.com/news/headlines/belgoreoputa-sagay-others-hail-supreme-court> accessed 18 February 2008, C Ikokwu, 'Nigerian Judiciary Strong, Independent, Says US Congress' (Abuja Thursday 19 July 2007) *This Day Online Edition* and 'Nigeria – Democracy by Court Order' (London Thursday 24 January 2008) *The Economist* available at <www.economist.com/displaystory.cfm?story_id=10567560&fsrc=RSS> accessed 21 October 2013. But cf. Mo Ibrahim Foundation, 'Ibrahim Index of African Governance 2007' available at <www.moibrahimfoundation.org/nigeria> accessed 12 October 2013 in which the country ranked a dismally in a continental survey of 48 countries on issues of rule of law, judicial independence, human rights, etc.

[82] C Adingupu, 'Obi's Judgement is Warning to Political Gangsters' (Lagos Sunday 24 June 2007) *The Guardian Online Edition*.

before. However, this is not the whole story. Indeed, inasmuch as it implicitly presents the image of a model and reformed judiciary, this would be inaccurate.

Politicization of the judiciary is a possible consequence of the judicialization of politics. On a general note, with the concession of its power in the political space, as alluded to earlier, the political branch had stooped low to conquer since the political branch can be expected to maintain an interest in recovering such space at some point.

The institutional legacy of not only a decidedly plain fact jurisprudence, but also corruption, has made the strategic role of the judiciary in governance in the post-authoritarian period even more problematic. The legacy has had noticeable impact on the institutional relevance of the judiciary. As an example, Rotimi Amaechi, a state governor, who was embroiled in a political power tussle with then president, Goodluck Jonathan, for reasons which included alleged attempts at influencing who succeeds the former, was accused of influencing the acting Chief Judge of the State (Rivers) to transfer 'political cases' away from 'four incorruptible' judges. This implies, among others, that only four of thirty-five judges in the state were 'upright'.[83] While the judiciary itself has declared its support for the anti-corruption campaign, it has continued to face the challenge of securing or maintaining an institutional moral high ground. A number of scandals have seriously threatened, if not considerably diminished, the status of the judiciary in a very challenging transitional context, arguably leaving the country in a precarious position in terms of the efficacy of the admittedly problematic concept of the rule of law. Some judges have been indicted for corruption in high profile, mainly political, cases,

[83] 'Amaechi does not Teleguide Judges, Boms Insists' (21 October 2013) *Daily Independent Online* available at <http://dailyindependentnig.com/2013/10/amaechi-doesnt-teleguide-judges-boms-insists> accessed 21/10/ 2013.

especially concerning election petition matters. Corruption in the lower courts has remained a problem in the perception of many. Worse still, the appellate courts have also been seriously enmeshed in questionable conduct, which are essentially carryovers of the authoritarian period.

The constant and widespread recourse to election tribunals for resolving election disputes has constituted the courts into 'Kingmakers' in a winner-takes-all political system. This has raised the stakes and created considerable pressure on judges, right to the top of the judicial hierarchy. Quite commonly, judges have been accused of, and in some cases, proven to have received very handsome bribes in deciding gubernatorial and presidential election petitions. Some judges have been investigated by and removed on the recommendation of the National Judicial Council (NJC), a Federal Executive Body created by virtue of Section 153 of the 1999 Constitution.

The rationale for the creation of the NJC, which is vested with enormous powers is to 'insulate the Judiciary from the whims and caprices of the Executive; hence guarantee the independence of this Arm of Government, which is a sine qua non for any democratic Government'.[84] Thus the NJC is responsible for advising on the appointment, promotion, and disciplining of judges as well as on the training and development of the judiciary. There is much to be said for the positive role the NJC has played in sanitizing the judiciary since its establishment fourteen years ago. However, critics have pointed out that the NJC has sometimes been accused of lack of transparency, as well as a reactive rather than proactive approach to its work, among a number others. Suffice it to say that the NJC has, within its

[84] Nigeria National Judicial Council, 'About the Council' available at <http://njc.gov.ng> accessed 27/10/ 2013.

ranks, too, been faced with challenges to its integrity. A particularly disturbing instance of how the NJC itself has been affected by the general malaise of corruption and lack of principled institutional direction, which the judiciary has struggled with over the years, is illustrated by the 'Salami saga'.

Justice Ayo Salami was the President of the Court of Appeal (PCA), the second highest court in Nigeria's court hierarchy.[85] He had been involved in a long drawn controversy with then Chief Justice of Nigeria (CJN) and head of the judiciary, Chief Justice Aloysius Katsina-Alu. Justice Salami had been promoted to the Supreme Court but turned down his promotion claiming that it was a ruse to get him out of the Court of Appeal, because he rejected a directive of Chief Justice Katsina-Alu to pervert the cause of justice by influencing the decision of a panel of Justices of Appeal sitting as the final court for the resolution of gubernatorial election petitions for a part of the country. The NJC subsequently became divided on the issue. The chair of the NJC, Chief Justice Katsina-Alu, was directly implicated in the allegation raised by Justice Salami. Yet the chief justice headed a meeting that suspended Justice Salami. This was followed by litigation from various parties: Justice Salami, politicians of the President's party who were aggrieved because they had lost out in election petition tribunals set up by Justice Salami in his function as PCA, and some members of the public.

Disturbingly, the issue remained unresolved despite the succession of two other Chief Justices (both of whom found Justice Salami not guilty) after the retirement of Chief Justice Katsina-Alu. This is because the President of Nigeria, Goodluck Jonathan, complicated matters by refusing to reinstate Justice Salami contrary to the advice of the NJC following various

[85] He retired on 12 October 2013 after attaining the mandatory retirement age of 70.

investigations and meetings on the issue. In the end, Justice Salami retired in October 2013, after almost two years of what many perceived to be political persecution for demonstrating judicial firmness against the electoral malpractices of the president's party, which controlled the government at the centre. The Salami saga can rightly be considered the lowest point of the dwindling institutional integrity and auctoritas of the Nigerian judiciary. As one respected commentator put it, it is clearly 'one of the ugliest episodes in Nigeria's judicial history'.[86]

In 2014, the series of self-inflicted or externally generated politicization of the judiciary took a more sinister dimension with direct physical attacks on judges with the complicity of highly-placed government officials, including the law enforcement agencies. In Rivers State (whose governor is at logger-heads with the president), a state high court was the site of a shooting episode while a judge was sitting over a contested political case. In Ekiti State, two state high court judges were beaten up by hired thugs and supporters of one of the parties in Ekiti State while sitting over a petition on a controversial gubernatorial election. The petition involved an incumbent state governor who is a member of the country's main opposition party that had lost the election and the newly elected, but yet to be sworn-in governor-elect from the national ruling party at the time. After a ruling by one of the judges assuming jurisdiction over the matter, one of the judges was virtually stripped naked, while thugs tore

[86] See, for instance, T Dare 'Salami, An Epic Injustice' (13 August 2013) *The Nation* available at <http://thenationonlineng.net/new/salami-an-epic-injustice> accessed 12/10/ 2013; see also A Adedeji, 'NJC, CJN and Justice Ayo Salami Saga' (November 2013) *The Daily Independent* available at <http://dailyindependentnig.com/2012/11/njc-cjn-and-justice-ayo-salami-saga> accessed 31/10/ 2013; Ihuoma, 'No regrets over clash with former CJN – Justice Salami' *The Punch* available at <www.punchng.com/news/no-regrets-over-clash-with-former-cjn-justice-salami> accessed 31/10/11/ 2013.

up court records. In each instance, the courts and the judges were under the watch of law enforcement agents (police and state security services) controlled by the national authorities, who did nothing to secure the safety of the judges.[87] While the NJC promptly condemned the incidents and urged investigation and action on the part of the appropriate agencies,[88] the leadership of the police and respective security agencies as well as the national authorities were ominously silent on it. This was despite widespread media reports indicating that the newly-elected governorship candidate from the national ruling party had instigated the beating up of one of the judges, allegedly for a 'dubious ruling' aimed at depriving him of his electoral victory. The candidate was eventually sworn-in as governor with the national government deploying a massive contingent of soldiers to the state. In this regard, it is relevant to note that disruption of judicial proceedings by members of the public was virtually unheard of in the heydays of military rule. It is also not on record that judges were physically assaulted during the period. The apparent complicity of the federal government in the physical attacks on judges perceived to be against its political interests further undermines the authority of the judiciary and the prospects for deepening the culture of rule of law in the country.

---

[87] G Ariyibi and D Akinrefon, 'Judiciary Attacked: Thugs Beat up Ekiti Judge, Tear his Suit' (26 September 2014) *Vanguard* available at <www.vanguardngr.com/2014/09/judiciary-attacked-thugs-beat-ekiti-judge-tear-suit/#sthash.WKXUxncV.dpuf> accessed 5/11/ 2014; 'Ekiti Election Tribunal Adjourned as Thugs Beat up Judge' available at <www.informationng.com/2014/10/fayose-led-thugs-to-beat-judges-ekiti-state-chief-judge-tells-njc.html> accessed 11/09/2018.

[88] 'NJC Begins Probe of Attacks on Ekiti Judges' (3 October 2014) *This Day* available at <www.thisdaylive.com/articles/njc-begins-probe-of-attacks-on-ekiti-judges/190454> accessed 5/10/ 2014.

**Conclusion**

In view of its potential to promote economic development and the rule of law, judicial reformation is a key aspiration in a democratizing polity. This is particularly important where the political branches have a democratic legitimacy-deficit. The Nigerian courts and, most notably, the apex court, have adopted both constitutional and extra-constitutional principles in mediating intergovernmental contestations and human rights challenges in the turbulent transition in the country. The judiciary has been actively involved in the democratization process, including a central role in the process of political accountability. This forms a critical part of the project of social transformation that underwrites the important process of transition from years of authoritarian military rule. However, the judicialization of politics can result in the politicization of the judiciary with a serious impact on its decisional independence and ultimately, with serious implications for the rule of law.[89]

Courts easily run into difficulties when they are tasked with overseeing political processes.[90] The Nigerian experience of an unaccountable judiciary, with the privilege of participation in governance in a post-authoritarian transition, persuasively demonstrates some of the challenges. The judiciary has a questionable record of accountability and has been accused of complicity in the country's experience of authoritarian military rule. Like dancing on ice, getting a judiciary that has not been accountable for its role in past authoritarian regimes to perform the function of stabilizing the polity and to resolve major political disputes was never going to be easy. The institutional accountability-gap of the Nigerian judiciary resonates in the close involvement of the courts in post-authoritarian challenges of governance in the

[89] Domingo (n 57) 28.

[90] Issacharoff (n 23) 261.

country, suggesting that only a transformed judiciary can effectively play this critical role in such transitioning and liberal democratic societies as Nigeria.[91]

[91] Further references are to be found in AS Mohammed, 'The Masquerade Unmasked: Obasanjo and the Third Term Debacle' in Adejumobi, Said (ed), *Governance and Politics in Post-military Nigeria. Changes and Challenges* (Palgrave Macmillan 2010) 173–206; *Attorney-General, Ogun State v Aberuagba* (2002) Vol 22 WRN 52.

Formatted: Font: Italic