Post Authoritarianism and the Judiciary in Africa - The Case of Nigeria


In the last two and half decades, political transition from authoritarianism and conflict has been widespread in Africa. This paper is a critical reflection on the role of the Nigerian judiciary in its post-authoritarian transition from nearly three decades of military rule. The judiciary has become a strategic actor in governance across diverse and critical aspects of governance. The courts have adopted constitutional and extra constitutional principles in mediating intergovernmental contestations and human rights challenges in the turbulent transition in the country. However, the role of the judiciary, in light of its institutional legacy, has been as strategic as it has been problematic. This paper critically assesses challenges, limits and prospects of ‘judicial governance’ as well as the contribution of courts to policy-determination, economic development and stabilisation of the society.

Introduction

The judiciary has become a strategic institution in Nigeria’s post-authoritarian transition. Following the country’s un-negotiated transition from almost three decades of military rule to civil rule,¹ the political elite has found considerable attraction in judicialising political conflict on a number of issues that ought to be resolved through political processes. Political elites, especially in divided societies, sometimes adopt consociation as a political mechanism for resolving power contestations² with a core feature of consociation being the privileging of

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¹ ‘Civil rule’ or ‘civil governance’ is, in the view of certain commentators, the incontestable and appropriate description of what the transition has achieved, rather than the aspirational ‘democratic rule’ as the country can only be minimally described as ‘democratising’ in the reality of very suspect credentials of most elections in the post-authoritarian period.

depoliticised approaches over majoritarian ones. This approach to governance, particularly with reference to intergovernmental contestations has led to an unprecedented judicialisation of politics or governance in the country which was most prominent in the first decade of the transition but has, to varying extents, continued till date.

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 to furthering the transition to democratic rule, the respect for human rights and upholding the rule of law? What has been the nature of judicial intervention in ongoing tensions that emerge from the interplay of a 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 constitutional matters and fundamental rights claims. Such framing brings to the fore the critical nature of the role of the judiciary at times of political change. The theoretical parameters for evaluating such a role has been commendably set out by Ruti Teitel and her work provides some of the theoretical foundations for the analysis that follows. In the main, as Teitel has explained, in a polity undergoing political change from authoritarian rule, the absence of a sustained institutional experience and practice of constitutional democracy may result in the society being saddled with a fragile political branch.

The text is organised as follows. The first part sets out the context of the discussion. It describes the context by highlighting historical, political and constitutional background of the Nigerian society, the nature and role of the judicial institution in it generally and particularly

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5 Ibid. at 2230.
with reference to the focus of this paper. The next part considers several experiences of judicialisation of politics in the post-authoritarian political transition. Politicisation of the judiciary sometimes results from the wide-spread incidence of judicialisation of politics. This has arguably played out in the Nigerian experience with serious consequences for the institutional integrity of the judiciary and analysis of this is presented in the third part of this paper. All through the paper, 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 role of the role, in light of its institutional legacy, has been as strategic as it has been problematic during the period.

CONTEXT - HISTORICAL, POLITICAL AND CONSTITUTIONAL BACKGROUNDS

Historical and Political Context

Nigeria is a federation with a central government and thirty six States. It gained independence from Britain in 1960. Nigeria’s legacy of colonial rule set the stage for military rule which was introduced into the country barely six years after it gained independence from the United Kingdom. For some, Nigeria ‘epitomises the military in government.’ 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. It is well-documented that by the time the military handed over power to a civil-led government in 1999, it had

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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.\textsuperscript{8}

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 into a ruling council, made Decrees under powers for ‘the peace, order and good government’ of the country.\textsuperscript{9} 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.\textsuperscript{10} 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.\textsuperscript{11}

The dynamics of democratic transition in Nigeria after decades of military rule, dictate the inevitability of state and society disputes as an additional layer over intergovernmental disputes. Both levels of contestations, to varying extents, are of interest in this discourse. The military left a legacy of institutional distortions and dysfunctions the result of which is a


\textsuperscript{10} The military named federal and state legislation Decree and Edict respectively.

\textsuperscript{11} See also section 2 (1) of the Constitution (Suspension and Modification) Decree No.1 of 1984
series of ongoing and formidable challenges to the country. 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 of the rule of law, constitutionalism and due process. The Nigerian experience is complicated by the predilection of military rulers for a unified command-structure approach to governance in a heterogeneous society. 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 characterised 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 till 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 never had a constitutional court of the nature in some European countries like Hungary, France, Belgium, Germany, or even African ones like South Africa and Egypt. Nonetheless, the 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 High Courts, state and federal, the Court of Appeal and the Supreme Court of Nigeria (the Supreme Court, the Court) have general constitutional powers augmented by statutory provisions and procedural rules of court of judicial review. The operation of judicial review
within the legal system in the country is similar in that respect to the American system.\textsuperscript{12} 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 sue is only available to individuals or groups that can establish a real stake in the outcome of the case.\textsuperscript{13}

While the Nigerian judiciary has been noted for a restrictive judicial leaning on *locus standi*; 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 judicial practice suggests 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 on the courts with regard to any form of legislation. Consequently, at least in theory, the courts can declare legislation or a part of it void for inconsistency with the Constitution.

Of further relevance as will become clear in relation to the discussion of national and subnational jurisdictional disputes the role of Supreme Court is quite prominent and this is not just because it is the apex judicial institution in the country but also, its ‘exclusive original jurisdiction.’ the Supreme Court, by virtue of Section 232 of the Constitution is conferred with exclusive original jurisdiction over any dispute between the central (federal) and subnational units (states) 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


\textsuperscript{13} The restrictive approach to *locus standi* is mainly an instance of judge-made law than anything else. 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 NCLR 358.
resolution of intergovernmental disputes among the central and subnational units on the numerous occasions where political measures appeared not to have served the interests of the political elite in the post-authoritarian experience.

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 paper. She identifies the judiciary as a critical institution for social transformation in the move away from authoritarian pasts in her evaluation of various regions in the ‘contemporary wave of political change’ across (Eastern) Latin America, Europe and Africa. Despite its important position however, the judiciary, she stated, faces immense institutional challenges in the task of ensuing transitional tensions. This, Teitel notes, is due to the peculiar nature of law and justice in transitional societies. Not only is law an agent for change, but changing circumstances remoulds the law itself. In other words, the exigencies of the transition context require a reconceptualization of law and justice making law all at the same time, ‘transformative…extraordinary and constructivist.’14 This as Teitel notes has been the experience in Unified Germany as well as Hungary for example where the judiciary opted for a transition-sensitive response to the rule of law dilemma. This was despite the difference in the historical and political realities of the two countries.15

Political spaces, as forums for the exercise and expression of power, either at the domestic or international level are highly contested spaces. It is fair to argue that in the Nigeria’s post-authoritarian experience, the political branch actively created a predisposing environment for the judicialisation of politics. Judicialisation of politics has been defined by Alec Sweet as the ‘process by which triadic law-making progressively shapes the strategic behavior of political

14 Teitel note 4 supra at 2014
15 Ibid. at 2019-2027.
actors engaged in interactions with one another." Hirschl defines it as ‘the ever accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions and political controversies.’ Cuoso further points out, that judicialization of politics extends beyond visible judicial control of policy, to the internalisation of formal procedures and language of courts by non-judicial decision-making forums.

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 political transition in 1999. The question is: considering the rather limited liberal democratic credentials of the country, what is driving recourse to constitutionalisation of the political space in Africa’s potentially largest democracy? We can identify a number of interrelated factors responsible for this with the benefit of a hindsight perspective on the last one and half decades of civil rule in the country. Indeed the courts have become critical in governance and holding the country together as demonstrated by its involvement in mediating diverse political issues.

There are two dimensions to the Nigerian experience of judicialisation of politics; one localised, the other globalised. The globalised is an external dimension which can be located in the world-wide 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 has manifested in a notable – though controversial – increase in the involvement of the judiciary

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16 Alec Stone Sweet ‘Judicialisation and the Construction of Governance’ (1999) 32 (2) Comparative Political Studies 147, 164
in governance. As courts take on ‘first-order questions’\(^{19}\) on governance, judicial involvement in policy or political decision-making has become quite significant in the last two and half decades like no other time in contemporary history. Even authoritarian polities have not been left out. Despite variations in local experiences, the main issue has been the same: the power of courts are literally on the rise in so many societies in Africa, Asia, Latin America, and North America as well Europe (including notably too the ‘velvet revolutions’)\(^{20}\). The ongoing situation in Egypt is instructive in this regard too. Thus, from a comparative perspective, an explanation can be found in a globalised experience of the constitutionalisation of politics (as it also known).\(^{21}\)

The local or internal dimension of the judicialisation 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


\(^{21}\) Hirschl note 17 supra.
legacies of an un-negotiated 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 marginalised, 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 as Head of State and Government (President) with a messianic self-imagining contributed substantially to the ascension of judicialisation of politics in the country especially between 1999 and 2007. This phenomenon is well captured by Prempeh as the ‘imperial presidency.’

Finally, Nigeria’s ruling political elite have typically had ‘suspect democratic credentials’ being either former military rulers or their cronies or associates. Due partly to this fact, electoral processes have been largely manipulated. Recourse to judicialisation to legitimise the exercise of power has been 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.’ I argue below that this was inevitable in the circumstances but at this point, it is relevant to consider a number of cases that bears out the judicialisation of politics claim. Critical analyses of some indicative cases will also signpost the challenges of that approach to governance especially in the context of a post-authoritarian experience.

Formalism and Justice in Transitions

Travails of Truth

Right from the inception of the political transition, the courts were inexorably drawn into adjudicating on issues that bothered on recovering justice in the context of change from 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)\(^{25}\) is of utmost significance in this regard. This was a case that 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 the experience of almost three decades of authoritarian rule.

At the dawn of its transition to civil rule, the Federal Government of Nigeria attempted to engage with this past. The main mechanism for this purpose was the establishment of the Human Rights Violations Investigations Commission (Oputa Panel).\(^{26}\) The public hearings of the Oputa Panel included the matter of the murder by letter bomb, of a prominent investigative journalist and editor of newsmagazine, Dele Giwa. It was believed that the circumstances of his death implicated the office of then military Head of State, General Ibrahim Babangida. The solicitor of the late journalist (now deceased), leading human rights and public interest-litigation lawyer in the country, Gani Fawehinmi petitioned the Oputa Panel and at the public hearing, it successfully applied for summons to bring General Babangida and his predecessor, General Muhammadu Buhari and their security chiefs (‘the generals) as witnesses. The generals insisted they would not be attending in person but would rather be represented by a legal team at the public hearing but the move was strongly opposed by the petitioners. There was contention on whether the Oputa Panel had the power to issue

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\(^{26}\) So named after its respected chairman, Justice Chukwudifu Oputa, Justice Emeritus of the Supreme Court of Nigeria.
and serve summons on them and having objected to appear, could the Generals give and cross-examine evidence by proxy? The Oputa Panel took the view that proceedings before a truth-seeking commission like itself did not constitute adversarial proceedings and 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 Tribunal of Inquiries Act (TIA) under which the Oputa Panel was established was not an existing law within the meaning of section 315 of the 1999 Constitution of the Federal Republic of Nigeria 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 concerns 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, (31st October 2001), the Court of Appeal ruled in favour of the Generals and their security chiefs. Further appeals by both sides facilitated the completion of the Oputa Panel in the meantime.

The Supreme Court held that the Tribunal of Inquiry Act was existing law under Section 315 of the 1999 Constitution. However, the Constitution does not confer powers on the National Assembly to enact a general law on tribunals of inquiry for the whole country. So, 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 matter within the exclusive jurisdiction of the states and federal powers of inquiry of such a nature were restricted to the federal capital territory.
On reflection, two, among a number of important disconcerting features of the legal and statutory framework of governance in Nigeria’s political transition can be discerned in the *Oputa Panel Case*. First is the continued extensive reliance on autocratic legislation deriving from the colonial past and authoritarian military regimes by all branches of government. It is now fair to observe that there is 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 placed reliance on the TIA, a pre-republican legislation, to set up a truth commission by executive fiat at a time when it had become standard practice to do so elsewhere under purpose-specific legislation. The Oputa Panel for instance 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 that in Rivers and Osun Sates) 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)*\(^{27}\) 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

\(^{27}\)(1963) 1 WLR 949.
Supreme Court is neither bound in fact, nor 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 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 implicitly at the least, undermined the rule of law.

**What it is to die (or not)**

The engagement of state institutions with 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 a direct acknowledgement of it. This is precisely what the majority decision of the Supreme Court had done in an earlier case, *Peoples Democratic Party & 1Or. v. Independent National Electoral and 4Ors (PDP Case)*.28

The case concerns litigation on elections which ushered in civil rule into the country in 1999. A Governor-Elect (in Adamawa State), Atiku Abubakar 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

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28 (1999) 7 S.C Part II 35.
required, could not automatically take over the position. However, the 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 which stated that ‘If a person duly elected as governor dies before taking and subscribing the oath of allegiance and oath of office, the person elected with him as deputy shall be sworn in as governor.’ 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 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.\(^\text{29}\) 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.\(^\text{30}\) In a split decision (4-3) the bare majority premised their 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,

\(^{29}\) *PDP* Case note 28 supra at 47-48. Emphasis mine.

\(^{30}\) Ibid. at 71-72.
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.’\textsuperscript{31} The fact that since Abubakar who had relinquished the position of Governor-Elect could not (due to his new position), was barred from reclaiming it, his action could be likened to ‘permanent incapacity or even death’\textsuperscript{32} and thus 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 where the latter becomes vacant by reason of death, permanent incapacity or removal for any reason.

The three dissenting justices strongly criticised the majority decision as a law-making and usurping the function of the legislature.\textsuperscript{33} It was for Justice Ogundare a ‘policy’ decision which was not the function of the court. The business of the court was only to interpret what the legislators actually said rather than discover legislative intention.\textsuperscript{34} 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.\textsuperscript{35} He was supported on this point by Justice Mohammed who stated that ‘policy, expediency, political exigency and convenience’ ought to be excluded from constitutional interpretation.\textsuperscript{36} Despite conceding the value of a liberal interpretational approach to deal with ‘eventualities due to changing times, different social environments...not

\textsuperscript{31} PDP Case note 28 at 71.
\textsuperscript{32} Ibid. at 61.
\textsuperscript{33} The dissent was so extensive it doubled the length of the lead judgment and the concurring decisions of the majority put together.
\textsuperscript{34} PDP Case note 28 supra at 91.
\textsuperscript{35} Ibid. at 85 to 99.
\textsuperscript{36} Ibid.at 111.
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. 37

It is interesting to note (and as conceded by the Court) that the provisions of Section 45 unlike section 37(1), only applies 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 must be ‘read together as a whole.’ They stated that the rationale for the provisions, taken as a whole, was to avoid a vacancy in the important office of Governor and ensure a ‘smooth’ succession’ where required.38

A fundamental consideration, as far as the Court concerned was the rights of Bonnie Haruna. 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 but 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 abandons or relinquishes his mandate, the Deputy Governor-Elect does not thereby lose his right to the latter position. Each had acquired individualised rights39 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.’40 It is logical to share this view.

Conflicting Constitutional Values?

Federalism v Corruption

37 PDP Case note 28 supra at 123.
38 Ibid. at 72-73.
39 Ibid. at 50.
40 Ibid. at 148 per Justice Ayoola. Emphasis mine.
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). In the 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 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.

Incoming-President at the time of the move away from 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 Nigerian.

Like many federal systems, there is an allocation of legislative powers between the two tiers of government in the Constitution. The ‘Exclusive Legislative List’ itemises the exclusive jurisdiction of the federal (central) government while the ‘Concurrent Legislative List’ specifies the shared sphere of legislative powers between the two tiers. There is an unwritten Residual Legislative List that is constitutionally deemed the exclusive province of respective state governments on unlisted matters. 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 itemised list of legislative competencies in the Constitution conferring power on the National Assembly to enact law and establish such a body.
amicus curiae rightly noted, 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.’

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 legislate 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 is to be ‘eradicated effectively, the solution to it must be pervasive to cover every segment of the society.’

In contrast, the Court upheld the federalism principle over another claimed anti-corruption measure 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), decided four years after ICPC. The gravamen of the case was the constitutionality of the Local Government Revenue Monitoring Act (RMA) passed by the National Assembly. This law purported to provide for 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 RMA was to ensure allocations from the Federation Account were properly distributed to the local governments since there was strong evidence of widespread practice of deductions from such allocations made through the States. The States raised an objection to this on the premise that it was an unconstitutional

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44 ICPC Case note 41 supra at 17.
45 Ibid. at 28.
interference with their jurisdictional powers for the administration of local governments under Section 7 of the Constitution.\(^{47}\)

The Court gave judgment for the States stressing that, no matter how salutary the objective, legislation must conform to the principle of constitutionality.\(^{48}\) The court emphasised 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 recognised there was some tension in this judgment with its decision in the ICPC Case but restated its support for the anticorruption policy which it however insisted must be executed in line with the Constitution.\(^{49}\) 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 is why the seemingly back-track given its publicly expressed commitment to the anti-corruption policy of the federal government? The answer may lay 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 policy course that severely tested and undermined the federal political arrangement of the country leading to so many cases instituted by aggrieved States, all of which were taken to the Supreme Court as the only constitutionally prescribed judicial forum for disputes. So, if nothing else, the Court was conscious of its rising docket—particularly from cases filed

\(^{47}\) Revenue Monitoring case, supra note 46 at 4–5.

\(^{48}\) Ibid. at 24.

\(^{49}\) Ibid. at 19.
against the federal authorities by States led by opposition parties.\textsuperscript{50} The Court must have become concerned about the implicit abuse of its liberal construction of the powers of the centre in the \textit{ICPC} Case and hence opted for a more restrictive view of the federal principle. This change is consistent with what Teitel considered as the ‘ambivalent directionality of law’\textsuperscript{51} in transitional constitutionalism.

\textbf{Of Political Quiescence}

\textit{Floundering Politics, Strong Judges}

Quiescence or even complete deference of the executive and legislative branches to judicialisation of politics is sometimes a product of the aspiration of the political branch to secure ‘regime legitimization.’\textsuperscript{52} This is a particularly attractive strategy for the political branch in the context of democratising polities which face the challenge of (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 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 for judicialisation 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

\textsuperscript{50} See for instance \textit{Attorney General of Abia & 2 Ors v Attorney General of the Federation & 33 Ors} (2006) 7 NILR 71; \textit{Attorney General of the Federation v Attorney General of Abia & 35 Ors} (No.2) (2002) NWLR 542 S.C.
\textsuperscript{51} Teitel note 4 supra at 2033.
\textsuperscript{52} Pilar Domingo ‘Judicialization of Politics: The Changing Political Role of the Judiciary in Mexico’ in Sieder, Schjolden and Angell note 18 supra at 21-46, 22 and Issacharoff note 20 supra.
since become a veritable feature of the political landscape for the political elite to secure power and public office or legitimate 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)*\(^{53}\) demonstrates very well 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 6,527 of the 6,575 delegates’ votes. To his consternation, after initially submitting his name to INEC, the electoral body, his name was substituted with that of the 2\(^{nd}\) Defendant; Celestine Omehia who did not participate at all in the primaries. The PDP had done this despite a pre-emptive action filed a week earlier by Amaechi to stop it from such action.\(^{54}\) 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 government ‘White Paper’ which indicted Amaechi for corruption (he was 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

\(^{54}\) Ibid. at 54-56.
individual) had no statutory or constitutional right to be sponsored by a party as its candidate for an election.\textsuperscript{55}

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 aspirants at the primaries and a result, there was no room for a candidate which did not contest the primaries to emerge as the party’s candidate at the general elections. Of more 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 where the Constitution did not have a place for independent candidature; all candidates must be sponsored by a political party. The Court justified its position on the premise that in the circumstances, it was the \textit{party}; the PDP that was voted for by the electorate and not the \textit{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 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.’\textsuperscript{56}

In this way, the decision moved the transformed the case from a simple case of a purely ‘intra-party dispute’\textsuperscript{57} or contestation in an electoral process. By this disregard for the role impact of the standing of the candidate in influencing the outcome of an election one way or the other, the decision raises the fundamental question of the propriety of relocating the

\textsuperscript{55} Amaechi v INEC note 53 supra at 57.
\textsuperscript{56} Ibid. at 110.
\textsuperscript{57} Not surprisingly, this is the characterisation of the case by the Court. See the lead judgement per Oguntade JSC, Amaechi v INEC note 53 supra at 111.
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 with the participation of 19 other political parties in addition to the PDP. 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 was PDP’s candidate for the election. While declaring Amaechi the winner of an election he did not participate in, the Court stated an intention to avoid ‘a dangerous precedent’ that would require fresh elections be ordered whenever a wrongly nominated candidate is presented to the electorate in an election, irrespective of whether he goes on to eventually win. The Court reasoned that a sure way out of the quagmire was to disregard the result of the ensuing election.

Invoking the imperative of due process, it stated that ‘In the eyes of the law’, Amaechi’s nomination earlier forwarded to INEC remained intact and so, the candidate that wins in court ‘simply steps into the shoes of his invalidly nominated opponent whether as loser or winner.’ But this decision remains problematic for while it is logical to resolve the nomination issue in Amaechi’s favour on the footing of its pre-election origin, declaring him winner of a general inter-party election he did not participate is quite another matter. The latter decision is arguably as unacceptable 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) is a poster child of how prominent political actors enlist the judiciary to settle the ground rules on participation and exclusion in the

58 Amaechi v INEC note 53 at 111-112. Emphasis mine.
59 Ibid. at 112.
60 Ibid. at 111, emphasises mine.
61 Ibid. at 112.
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 elongate his tenure, a common practice by African incumbent Heads of State. The constitutional amendment proposed for the move fell through on 16 May 2006. 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 were 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 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 neutralise the former’s political influence, but more importantly, exclude 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

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presidential poll as the candidate of his new party, the Action Congress (AC). 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.

In a unanimous decision allowing the appeal, the Court declared that INEC had acted illegally as it lacked constitutional or statutory powers to disqualify any candidate in the elections and only a conviction by a court of law was sufficient to constitute a bar to eligibility to contest for public office. As the court noted, this decision of 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, so the legislators, wary of previous experience excluded the power from electoral law and the Constitution. 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.

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. 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.

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65 Omotola note 63 supra at 278.
66 AC v INEC note 62 at 230, emphasis mine.
67 Ibid. at 265.
69 Issacharoff note 20 supra at 264.
A good number of cases illustrate the claim of judicialisation 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* 70 which concerns a disagreement between the federal authorities and the littoral States for oil resources derivable from the continental shelf of the country. *Attorney General of the Federation v Attorney General of Abia & 35 Ors (No.2)* 71 and *Attorney General of Ogun State v Attorney General of the Federation* 72 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.* 73

**POLITICISATION OF THE JUDICIARY**

There is replication of the foregoing account and instantiation 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’ 74 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.’ 75 It even received commendation from unusual quarters both home and abroad; including the

70 (2002) 4 S.C. Pt I, 1
71 (2002) NWLR 542
72 (2002) 12 SC Pt II, 1
London-based *The Economist* and the United States Congress for demonstrating independence, and swaying the country’s democratisation as well as upholding human rights. From an internal perspective, testimony to how the image of the Supreme Court (and by extension the judicial branch as a whole) especially had become writ large like never before is reflected in the view of a renowned social critic and law professor that the Court has assumed the role of ‘sentinel…guard for democracy and good governance.’ 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.

Politicisation of the judiciary is a possible consequence of the judicialisation of politics. On a general note the concession of power in the political space by the political branch as alluded to earlier is a form of stooping low (to the judicial forum rather than resolution through political channels) to conquer since the political can be expected to maintain an interest in recovering such space at some point. In the Nigerian experience, 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. Consider for instance that most recently, a state Governor who has been embroiled in a political power tussle with the President, Goodluck Jonathan, for reasons which include alleged attempts at influencing who succeeds him, was accused of influencing the acting Chief Judge of the State

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(Rivers) to transfer ‘political cases’ away from ‘four incorruptible’ judges. This implies among others, that there are only four of thirty five judges in the state who are upright.\(^{78}\)

Further, 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. A number of judges have been indicted for corruption in high-profile, mainly political cases; especially election petition matters. 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. 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 essentially carry-overs 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 gratification 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

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independence of this Arm of Government, which is a sine qua non for any democratic Government.\textsuperscript{79} So, the e NJC is responsible for advising on the appointment, promotion, and discipline of judges as well as training and development of the judiciary. There is much to be said for the positive role the NJC has played in sanitising 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.\textsuperscript{80} Suffice it to say that the NJC has within its 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.\textsuperscript{81} 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 he turned down his elevation based on the position that the promotion 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 through 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


\textsuperscript{81}He retired on 12 October 2013 after attaining the mandatory retirement age of 70.
parties; Justice Salami, politicians of the President’s party who were aggrieved because they 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 remains unresolved despite the succession of two other Chief Justices (both of whom found Justice Salami blameless) 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 even despite advice of the NJC following various 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 government at the centre to which the President belongs. The Salami saga can rightly be considered as the lowest point of the dwindling institutional integrity and autocritas of the Nigerian judiciary. As one respected commentator put it, it is clearly ‘one of the ugliest episodes in Nigeria’s judicial history.’

Conclusion

In view of its potential to promote economic development and the rule of law, judicial reformation is a key aspiration in a democratising polity. This is particularly important where the political branches suffer from 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

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turbulent transition in the country. The judiciary has been actively involved in the democratisation 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 judicialisation of politics can result in the politicisation of the judiciary with serious impact on its decisional independence and ultimately, serious implications for the rule of law.  

Courts easily run into difficulties when they are placed in a position of superintendence over political processes. The Nigerian experience of an unaccounted judiciary which becomes privileged in its participation in governance in a post-authoritarian transition eloquently demonstrates some of the challenges. The judiciary has a questionable record of accountability including complicity in the country’s experience of authoritarian military rule. Like dancing on ice, getting a judiciary that has not accounted for its role in past authoritarian governance to perform the role of stabilising the polity and 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 country suggesting that only a transformed judiciary can effectively play this critical role in transitioning and liberal democratic societies.

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83 Domingo note 52 supra at 28.
84 Issacharof note 20 supra at 261.