Chequered Accounts: Truth, Justice and the Judiciary in Post Authoritarian Nigeria

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INTRODUCTION

While it has been recognised that the judiciary plays an important role in contemporary governance,[1] accountability of the judiciary for its role in authoritarian polities remains a largely elided issue in transitional justice arrangements. The role of the judiciary in Nigeria's truncated experience of truth-seeking draws attention to the need for accountability for its role in post-authoritarian societies and potential pitfalls inherent in the continued lack of focus on the issue in transitional contexts. The purview of the truth-seeking process, as a transitional justice mechanism, ought as a matter of policy, to be extended to scrutiny of the judicial role.

Judicial accountability for its role in past governance is important. On one hand, it has emerged that the judiciary plays a significant role in governance in authoritarian societies.[2] On the other, experiential accounts strongly suggest that the judiciary usually assumes a strategic role in post-authoritarian transitions.[3] This is especially the case with regard to issues of human rights, governance, efforts at democratic consolidation, and (re) institution of rule of law.[4] The accountability gap on the judicial function saddles the transitional society with an untransformed judiciary, challenged by unresolved legitimacy questions. The set of dynamics at play in post-authoritarian contexts suggests the need for more critical focus on the judicial function in transitional justice processes.

This chapter argues that neglect of judicial accountability for the past has resonance for achieving the aims of truth and justice for victims of gross violations of human rights as well as wider issues of transitional justice. Moreover, the contextual analysis suggests that neglecting judicial accountability for its role in past governance as a

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[1] For an interesting sample of the expanding body of literature on 'judicialisation of politics' and 'constitutionalisation of politics' in liberal democracies as well as authoritarian societies see LEE EPSTEIN, *et al* ''The Role of Constitutional courts in the Establishment and Maintenance of Democratic Systems of Government'' (2001), 35 (1) *Law & Society Review* 117, RAN HIRSCHL (2004), Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard University Press, Cambridge, MA 2004), RAN HIRSCHL ''The New Constitutionalism and the Judicialization of Pure Politics Worldwide'' (2006) 75 (2) 721, TOM GINSBURG *Judicial Review in New Democracies* (Cambridge University Press New York 2003), SAMUEL ISAACHAROFF ''Democracy and Collective Decision Making,'' *International Journal of Constitutional Law* (2008) 6 (2) 231-66 and HEINZ KLUG *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge University Press Cambridge 2000).

[2] MOUSTAFA TAMIR *The Struggle for Constitutional Power: Law Politics and Economic Development in Egypt* (Cambridge University Press New York 2007) TOM GINSBURG and MOUSTAFA TAMIR *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge New York 2008).

[3] JOHN MORISON, KIERAN MCEVOY and GORDON ANTHONY (eds.) *Judges, Transition and Human Rights* (Oxford University Press Oxford 2007) 2

[4] See JOHN MORISON, KIERAN MCEVOY and GORDON ANTHONY "Judges, Transition and Human Rights: Essays in Memory of Stephen Livingstone" in MORISON, MCEVOY and ANTHONY note 2 supra 2-3 and WOJCIECH SADURSKI *Rights Before Courts: A Study of Constitutional Courts in Post Communist States of Central and Eastern Europe* (Springer Dordrecht 2005)

measure of transitional justice threatens institutional transformation, an important aspect of post-authoritarian state-building.[5] The absence of transformation at times of political change threatens not only rule of law but also, the transition project as a whole.

The rest of the chapter is organised in this way. Part I examines the authoritarian past providing a glimpse of the contextual background to the discussion. It briefly describes the circumstances that necessitated the truth-seeking process in Nigeria. The process of political change to civil rule and the transitional justice measures that accompanied it, especially the course of the truth-seeking process embodied in the Human Rights Violations Investigation Commission (the Commission or Oputa Panel) is examined in the next part. In Part III, the focus turns to the tension generated by the interaction of the judiciary and the truth-seeking process. The discussion in this part sets the foundation for advancing the need to incorporate judicial accountability for the past into transitional justice arrangements. The case for judicial accountability in post-authoritarian societies is argued in Part IV. Normative arguments for and against the case for judicial accountability for the past are analysed in this part. In Part V, the chapter takes further the discussion in the Part IV by extending it to an experiential account of the Nigerian situation. The chapter concludes that the neglect of judicial accounts, apart from providing an incomplete account of the past, ill-situates the judiciary for the usually challenging responsibilities it has to shoulder in societal transformation following the experience of authoritarianism.

1. THE AUTHORITARIAN PAST

Like many other countries in sub-Sahara Africa, most of Nigeria's post-independent political experience was one of authoritarian rule. The military ruled the country for nearly three decades with two short intervals of civil governance.[6] Military authoritarianism virtually destroyed the fabric of state and society. Economic and social well being of the people nose-dived as the military acted like an army of occupation misruling captured territory. All institutions of civil governance suffered debilitation as the military ruled with draconian decrees that undermined the constitution. These 'laws' either suspended parts of or asserted supremacy (and were judicially so upheld) over the constitution.[7]

Gross violations of human rights were rampant to the extent that the country acquired pariah status within the international community. State security agencies, the armed forces and police alike commonly applied lethal force against the civil populace especially those actively engaged in organised opposition to authoritarian rule. Journalists, labour unions, student groups, political associations, market associations, human rights activists and organisations and the Bar Association were usual targets of state violence. Government measures against these and similar groups included

[5] RAMI MANI Dilemmas of Expanding Transitional Justice or the Nexus between Development and Transitional Justice" (2008) 2 (3) *International Journal of Transitional Justice* 253-265, 255-265 and NATASCHA ZUPAN and SYLVIA SERVAES *Transitional Justice and Dealing with the Past* (Working Group on Development and Peace, FriEnt, Germany 2007) available at: www.frient.de/en/ (24 May 2009) 1-32.

[6] The country was under civil democratic rule from 1 October 1960–15 January 1966 and from 1 October 1979 to 31 December 1983.

[7] HAKEEM O. YUSUF Calling the Judiciary to Account for the Past: Transitional Justice and Judicial Accountability in Nigeria (2008) 30 (2) *Law & Policy* 194-226, 207-219.

proscription, illegal arrests, detention, seizure of property and arson, mysterious disappearances as well as state-sponsored murder.

There were public executions in violation of constitutional provisions on due process. The execution of leading environmental activist and renowned author Kenule Saro-Wiwa and some other members of the Movement for the Survival of the Ogoni People (MOSOP) referred to as the 'Ogoni nine' particularly caught international attention leading to the suspension of Nigeria from the Commonwealth. The administration of General Sanni Abacha (November 1993-June 1998) was especially noted for its ruthlessness to political opposition and the struggle for democracy in the country.

Successive military regimes perfected plunder, compromised all institutions of state and generally directed them towards flagrant violations of human rights of the people. Regime after regime declared an intention to pursue a development agenda, economic rectitude, unity and peace of the country. None of these commendable objectives was achieved by the numerous putsches and coups. Rather, the military institutionalised corruption even as the country moved rapidly down the ladder of development descending into one of the twenty poorest nations in the world despite abundant human and natural resources. [8] Predictably, rule of law took the uncomfortable back seat in affairs of governance.

2. POLITICAL CHANGE AND TRANSITIONAL JUSTICE IN NIGERIA

On the sudden death of General Sanni Abacha in June 1998, his successor, General Abdusalam Abubakar, embarked on an accelerated civil transition program. This culminated in the election and hand-over of power to political office holders at the three levels of governance and the exit of the military on 29 May 1999. Even as the political transition programme of the Abubakar regime progressed, the foregoing state of affairs in the country set up the imperative to put in place some measure of transitional justice to counter impunity. It had become important to ensure state acknowledgment for the misrule of the country by the military and secure reparations for victims of gross violations of human rights.

The first measure took the form of prosecution. This was a half-hearted attempt by the departing Abubakar regime to prosecute a handful of some of the most prominent actors in the Abacha regime generally believed to be involved in gross violations of human rights. There was also at the time, a largely symbolic internal lustration of 'political' military officers from active service - those who had participated in governance at various levels in the country- and were still serving in the armed forces. However, the truth-seeking process initiated by the (then) newly inaugurated civil administration of President Olusegun Obasanjo remains the notable transitional justice mechanism adopted in the post-authoritarian period.

Barely two weeks after assuming office President Obasanjo announced the establishment of the Oputa Panel to investigate gross violations of human rights that took place in the country during the period of military rule.[9] Addressing gross violations of human rights, ensuring justice for victims as well as the need to 'heal the

[8] World Bank Group: *World Development Indicators* available at: http://devdata.worldbank.org/dataonline/ (7 November 2006).
[9] It was inaugurated on 14 June 1999.

nation' had featured as topical issues in the presidential election campaigns. Not surprisingly, at his inaugural address to the country, President Obasanjo could not ignore it. He commended 'home-based fellow Nigerians' for their fortitude in bearing 'unprecedented hardship, deprivation of every conceivable rights and privileges that were once taken for granted.'[10]

The Oputa Panel was established under the hand of President Obasanjo through Statutory Instrument No.8 of 1999[11] pursuant to Tribunals of Inquiry Act (TIA). [12] Its mandate was principally to ascertain all incidents of gross violations of human rights committed in Nigeria between 15 January 1966 and 28 May 1999, the last day of military rule in the country. It was also to recommend appropriate measures to redress past injustices and prevent future violations of human rights in the country. The Oputa Panel was further mandated to suggest measures to foster rule of law which had been violently displaced during the years of military dictatorship.[13]

Constrained by factors like limited personnel, time and financial resources, it heard only 200 petitions at its public hearings out of some 10,000 it received. There was thus a great disparity between the petitions submitted to the Oputa Panel and those actually heard in public. While the number of cases selected for the public hearings was limited, it took testimony from some 2,000 witnesses; received 1,750 exhibits related to them and publicly named alleged perpetrators of gross violations of human rights. In recognition of the need to address the large number of unheard cases of human rights violations, the Oputa Panel commissioned research reports by experts. These reports played an important part in the work of the truth-seeking process inasmuch as they reached out to areas and victims the Oputa Panel did not cover thereby providing a vital voice to an otherwise 'voiceless' majority.

The public hearings were of a general and institutional nature. They were held in the six geo-political zones of the country from 24 October 2000 to 9 November 2001. The general hearings centred on individual complaints. The institutional hearings were organised for civil society, human rights groups and specialised professional organisations. The latter hearings featured testimonies and submissions from the National Human Rights Commission, the Armed Forces, the Police, State Security Service, the Nigeria Prisons, about ten civil society and human rights organisations and a few individuals. The choice of state institutions, with the notable exception of the National Human Rights Commission, may have been informed by the popular view that they constitute notorious sources of human rights violations. The National Human Rights Commission for its part was set up precisely to monitor human rights implementation in various aspects of national life, ironically by the Abacha junta. The

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[10] Nigeria World "Inaugural Speech by His Excellency, President Olusegun Obasanjo following his Swearing-in as President of the Federal Republic of Nigeria on May 29, 1999" available at: http://nigeriaworld.com/feature/speech/inaugural.htm (1 September 2007).

[11] This was amended by Statutory Instrument No.13 of 1999. See *Foreword* by the Chairman, *Synoptic Overview Oputa Panel Report: Summary, Conclusions and Recommendations* (2004) available at:http://www.dawodu.com/oputa1.htm (17 May 2009). The site also has the full report.

[12] No. 447, Laws of the Federation of Nigeria, 1990, this was originally enacted as colonial legislation.

[13] For a detailed account of the work and challenges that confronted the Oputa Panel see HAKEEM O. YUSUF 'Travails of Truth: Achieving Justice for Victims of Impunity in Nigeria' (2007) 1 (2) *International Journal of Transitional Justice* 268-286.

hearings on the Police and the Prisons Service, institutions intimately connected to the criminal justice system, highlighted the need for the third key player, the judiciary to be brought to accounts for its role in governance but the Oputa Panel neglected to advert to it.

A broad spectrum of stakeholders, including the political elite, journalists, legal practitioners, former political officer holders (and civil society leaders took their turn to give testimony at the public hearings). [14] The human rights violations they suffered were allegedly perpetrated by the army, the security agencies and the police. There were also some claims against corporate bodies. By the time it left office, the military establishment had instituted a 'vicious cycle' of violence exhibited in domestic violence, armed robbery, brigandage, religious riots, impunity and lawlessness in the polity.[15]

According to the Oputa Panel, the criteria for hearing the chosen petitions were consideration of the nature of the rights involved and the extent or degree of the infringement(s) alleged. The nature of the violations disclosed in the petitions centred principally on the right to life, the right to personal liberty and the right to human dignity. In line with these criteria, petitions were further scrutinised to determine whether the alleged infringement was 'gross.' What constituted 'gross violations' of human rights was nowhere defined in the terms of reference or legislation which established the Oputa Panel. The Oputa Panel had recourse among others to the definition of the term in section 1 of the South Africa TRC Act, international human rights instruments and the Nigerian constitution which guaranteed the rights it identified to be in issue.

In view of its expansive mandate, expectations were high that the Oputa Panel would contribute extensively to social reconstruction in Nigeria. With the awareness of the nature of public expectations and the benefit of its liberally worded mandate, the Oputa Panel's recommendations extended beyond investigations of alleged violations of human rights to include a propositional agenda for transformation of Nigerian society. It proceeded on the premise that the truth-seeking process provided an opportunity to lay the foundations for social reconstruction and reconciliation. However, the aftermath of the truth process was disappointing. Finally, it is apt here to mention an important feature of the TIA under which the Oputa Panel was set up. This is the power to *subpoena* witnesses and documents. The Oputa Panel also had powers to order the arrest of any individual it determined was or had acted in contempt of it. These 'coercive' powers, as will be discussed below led to contentious litigation against the Panel by former military rulers. Wary of the accountability process, their challenge of these powers laid the foundations for the unsavoury judicial role in truncating the implementation of the Oputa Panel's wide-ranging recommendations.

3. UNDOING TRUTH AND JUSTICE: THE DELE GIWA PETITION AND THE JUDICIARY

The judiciary remains not only unaccounted for its role in the period of authoritarian rule but played a significant part in the current experience of a failed transitional

[14] Included in the ranks were former President Shehu Shagari, the country's first executive president and President Olusegun Obasanjo in his erstwhile capacity as military head of state.
[15] *Synoptic Overview* note 11 supra.

justice process in the country. This came about by its jurisprudential choices in the litigation that was generated by the Dele Giwa petition.

Dele Giwa was a Lagos-based investigative journalist, editor in chief and publisher of *Newswatch*, renowned for seminal and credible reporting of sensitive matters of public interest in the 80's. His professional career was cut short in 1986 by a letter-bomb allegedly delivered by military intelligence on the orders of the (then) military ruler, General Ibrahim Babangida. The police investigation into the matter was abandoned and closed prematurely. Efforts by his solicitor, Gani Fawehinmi, to investigate and secure private as well as public prosecution of the alleged perpetrators of the dastardly act were frustrated by the military government through the passage of special legislation.[16]

Fawehinmi submitted a petition on the matter to the Oputa Panel calling for investigation into the murder to be reopened. The latter issued summons for the appearance of the ex-military ruler and his two security chiefs accused of complicity in the matter. To stave off the summons, the generals rushed to the High Court with an *ex parte* application to restrain the Oputa Panel from having them testify before it. This was in *Justice Chukwudifu Oputa (Rtd.) and Human Rights Violations Investigation Commission and Gani Fawehinmi, v General Ibrahim Babangida, Brigadier Halilu Akilu and Brigadier Kunle Togun* (the *Oputa Panel* Case). [17] They sought among other things a declaration that the President lacked the powers to act under the existing law to establish a body like the Oputa Panel for the whole country. They also claimed the summons contravened their right to liberty.

Meanwhile, a legal team applied to represent the generals at the public hearing. This move, opposed by the petitioners, raised important questions about the proper role and capacity of legal counsel in the truth-seeking process. The contention was whether the Oputa Panel had the power to issue and serve summonses on them and having objected to appear, could the generals give and cross-examine evidence by proxy? The issue as framed by the Oputa Panel itself was whether or not proceedings before a truth commission constituted a suit at law or a judicial proceeding. The Oputa Panel took the view that proceedings before a truth-seeking commission like itself did not constitute adversarial proceedings. Thus, personal attendance of the summoned generals was required for the proper fulfilment of its mandate. It maintained that witnesses were bound to attend in person in order to be entitled to the rights of legal representation, and (cross-) examination.

The foregoing appeared to be novel issues at the time they were raised in objection before the Nigerian court during the proceedings of the Oputa Panel. It is unclear

[16]Despite the frustrations he met in his quest to bring the killers of the prominent journalist to justice, he remained vocal and committed to the matter till his death in 2009. See for instance, O Ojo "21 Years after Dele Giwa's Murder- Fawehinmi to Govt: Reopen Case" *The Guardian* Online Edition (Lagos Saturday 20 October 2007.

[17] [2003] M.J.S.C 63. This is the report of the defendants' appeal to the Supreme Court following the victory of 'the Generals' at the Court of Appeal. Reference will however be made in a composite manner to the matter through the court of first instance (Federal High Court) through to the Supreme Court. Reference to 'Courts' in the following context will cover all three courts except as specifically stated. For discussion of the case and others in the context of transformative constitutionalism see HAKEEM O YUSUF 'The Judiciary and Constitutionalism in Transitions: A Critique' (2007) 7 (3) *Global Jurist* 1-47.

whether they have been raised in objection to any other truth-seeking process after the Oputa Panel. The TIA did not provide for proxy representation of witnesses. However, if the settled position of the law (at least in common law jurisdictions) on witnesses in civil and criminal litigation can be extrapolated, legal counsel can not take the place of witnesses. In other words, testimony is a personal issue that can not be delegated and stands apart from the right to legal representation.[18] It arguably would have amounted to a fundamental contradiction in terms in a *truth-seeking* process for alleged perpetrators of rights violations to testify by proxy.

Nonetheless, the generals, with the sanction of an injunction granted by the trial court, held out throughout the public hearings.[19] The matter eventually found its way to the Supreme Court (the Court). It held that the Constitution does not confer powers on the National Assembly to enact a general law on tribunals of inquiry for the whole country and so it was a matter within the competence of the states only. The president exceeded his jurisdiction in establishing the Oputa Panel with a remit to carry out a national inquiry into the violations of human rights in all parts of the country. The Court also upheld the lower court's finding that certain sections of the enabling statute were unconstitutional and invalid for conferring the power on a tribunal of inquiry to compel attendance or impose a sentence of fine or imprisonment.[20] The sections, the Court held, contravene sections 35 and 36 of the Constitution of Nigeria 1999 that provide for the right to liberty and fair hearing respectively.

The *Oputa Panel Case* eloquently calls attention to two of a number of unsettling features of the legal and statutory framework of governance in Nigeria's political transition. First is the extensive reliance by all branches of government on autocratic legislation deriving from the colonial past and authoritarian military regimes. This is reflected in the way an elected civil government placed reliance on the TIA, a pre-republican legislation to set up a truth commission by executive fiat at a time it had become standard practice to do so under purpose-specific legislation.[21] Secondly is a customary, uncritical adherence to judicial precedent by the courts even at the highest level. The courts relied on and referred extensively to *Sir Abubakar Tafawa Balewa & Others v Doherty &Others* (*Balewa*)[22] in which the then Federal Supreme Court (FSC) and the Privy Council had both upheld objections to the compulsive powers and the jurisdictional reach of the TIA. The contentious value of judicial precedents particularly in the common law legal tradition is outside the scope of this work.[23]

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[18] This position is consistent with practise elsewhere. For example Legal Notice No.5 of 1986 in Uganda which created the country's Commission of Inquiry into Violations of Human Rights (1986-1994) provides that '…any person desiring to give evidence to the Commission shall do so in *person*'. Emphasis added.

[19] The first decision in the matter, by the Court of Appeal, was delivered on 31 October 2001, ten days after the conclusion of the public hearings.

[20] Sections 5(d) 11(1) (b), 11 (4) and 12(2) of the Tribunals of Inquiry Act.

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

[22] (1963) 1 WLR 949

[23] For a succinct discussion of the role of precedent in the work of judges see LEE EPSTEIN and JACK KNIGHT 'Courts and Judges' in AUSTIN SARAT (ed.) *Blackwell Companion to Law and Society* (Blackwell Publishing Malden MA and Oxford 2004) 184-187.

Suffice to note however that since 1963,[24] the Court is neither bound in fact nor law by the decisions of both authorities. On one hand, the FSC from that year became the Court of Appeal and the (then) newly constituted Supreme Court (the Court), not the Privy Council in London, was constitutionally designated the highest judicial forum for the country. Thus, in relying on *Balewa*, the Court effectively relied on a lower court's decision to deny the opportunity for truth and justice for victims of gross violations of human rights in the country.

Clearly, the political branch, in its failure to inaugurate the truth-seeking process through a purpose-designed legislation bears considerable responsibility for the shaky legal foundations of the Oputa Panel. Such reliance in the aftermath of three decades of authoritarian rule that earned the country international censor[25] raises fundamental questions. It puts to doubt the administration's commitment to justice, human rights and the reinstitution of rule of law in the country. Notwithstanding the neglect of the political branch, there is cause to question the attitude of the transition judiciary. Considering its opportune institutional memory, its continued preference for legal formalism is out of tune with the times.

The preference for legal formalism with its emphasis on plain-fact jurisprudence[26] is at the heart of judicial imperviousness to the dynamics of transition that ought to be a paramount consideration in the *Oputa Panel* Case. The plain-fact jurisprudential approach of the judiciary in this case betrayed the fundamental lack of engagement with the socio-political circumstances of the country and legal developments in the international arena. It reflected judicial resistance to much desired need for socio-political change. In coming to a decision that struck at the root of the truth-seeking process, the Nigerian judiciary in the *Oputa Panel* Case arguably undermined the rule of law at an important juncture in the country's transition to civil governance.

The Court obviously accorded primacy to protecting the *federal character* of the polity over the rights of victims of gross violations of human rights. Moreover, there is the part of the Court's decision that held mandatory attendance at a truth commission as contrary to the right to personal liberty. This aspect of the decision in the *Oputa Panel* case, even from the purely formal legal point of view, is, with respect, not sustainable. The Court held that constitutionally, only a court of law can make an order to deprive a citizen of the right to liberty.

However, under the Nigerian constitution of 1999 as well as earlier constitutions, and indeed in line with international human rights law and practice, the right to liberty can be derogated from in defined circumstances. One such context is where there is reasonable suspicion of the commission of an offence, which was precisely in issue before the Oputa Panel. Section 35 (1) (b) provides in part that personal liberty may be curtailed *in order to secure the fulfilment of any obligation imposed upon him by law.*[27] The Court, on the basis of this proviso, ought to have upheld the 'coercive'

[24] When the country became a republic.
[25] STUART MOLE "The 2003 Nigerian Elections: A Democratic Settlement?" (2003) 370 *The Round Table* 423,424.
[26] DAVID DYZENHAUS *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid*
Legal Order (Hart Publishing Oxford 2003) 16.
[27] Emphasis mine.

powers of the Oputa Panel under the 1999 Constitution. After all, the Oputa Panel was constituted under a law and the duty to attend its summons challenged by the Plaintiffs was a statutory one.

In this regard, it is essential to recall that a truth commission has an extended form of inquiry as its core function. This core function can be easily frustrated or defeated if it lacks the power to summon witnesses and issue *subpoena* for the production of evidence. Indeed, as a matter of practice, such power is not at all novel for quasi-judicial bodies in the Nigerian context. Similar powers are statutorily conferred and exercised with judicial sanction by some professional disciplinary bodies in the country.[28]

It was also imperative in the context of the *Oputa Panel* Case to consider the imperatives of the *transition moment*. The need for restoring the rule of law, securing reparations for victims of gross violations of human rights and transformation of societal institutions, required an activist consideration of the issues arising from the truth-seeking process. It is pertinent that in the context of the transition in Nigeria, the rights of victims to obtain a remedy in view of executive choices devolved largely on the outcome of the truth-seeking process. The Court, in handing down the *Oputa Panel* decision the way it did, neglected to reckon with the fact that the nation was at the threshold of history, in transition and making a decisive break with a past of human rights violations. It was quite open to the Supreme Court as the judicial forum of last resort to have taken the expansive view of the facts and law and opt for a jurisprudence reflecting not a 'legalistic' consideration of the issues in contention but an activist posture sensitive to the 'ideals of the nation'.[29]

Indeed, the socio-political circumstances of the country at the time required the courts to adopt a reflexive jurisprudence in the determination of the *Oputa Case*. A broader perspective commends the view that the issues involved may no doubt 'offend'[30]individual rights. Yet, they also border even if implicitly, on the obligation of the country to ensure that victims of gross human rights violations are provided with an opportunity to be heard and provided an effective remedy. The Court's position could have been different if it took a purposive approach to the legislation in question. Such an approach would allow it to uphold the establishment of the Oputa Panel for investigating past human rights violations as a measure for ensuring 'order and good government of the Federation or any part thereof.' [31] This power is conferred on the federal government by section 4(1) of the Nigeria constitution of 1999.

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[28] See for instance, the Medical and Dental Practitioners Act Cap 221 (now Cap M8, 2004) Laws of the Federation of Nigeria 1990 which establishes the Medical and Dental Council of Nigeria (MDCN). The Act empowers the MDCN to enact rules of professional conduct for medical practitioners as well as establish the Medical and Dental Practitioners Disciplinary Tribunal (MDPDT). The MDPDT is mandated to determine cases of professional misconduct against medical personnel and appeals from its decisions go straight to the Court of Appeal. It is thus accorded the status of a High Court, a superior court of record in the country.

[29] BENJAMIN O NWABUEZE *Judicialism in Commonwealth Africa-Role of Courts in Government* (C Hurst &Company London 1977) 75.

[30] *Brigadier-General Togun (Rtd.) V Hon. Justice Chukwudifu Oputa (Rtd.) & 2 others and General Ibrahim Babangida & 1 Other* [2001] 16 NWLR pt 740, 597 at 662 (cases consolidated on the orders of the court). Hereafter, *Togun v Oputa* (No.2), 645.

[31] For a discussion of the sometimes progressive but wavering judicial construction of this constitutional provision see HAKEEM O YUSUF 'The Judiciary and Political Change in Africa:

Objectionable still is the finding that the powers of the Commission contravened fair-hearing provisions of section 36 of the Nigerian constitution. It is a basic procedural practice that has been judicially upheld (in Nigeria and elsewhere) that evidentiary rules weigh against a party who fails to utilise reasonable opportunity provided to present her case. In such circumstances, the defaulting party can not be heard to complain about lack of fair hearing. In vindication of this position, the Court was to hold in a later case that such a defaulting party can not 'turn around to accuse the court of denying him fair hearing.'[32] It is a matter of the records that in the *Oputa Panel* Case, the generals roundly and publicly rebuffed all available opportunity to testify before the Oputa Panel.

The *Oputa Panel* Case brought to the fore the tension that may arise between the truth-seeking process and the judiciary in transition. It highlights the dangers inherent in the existence of an accountability gap for the past with respect to the judiciary. Such an accountability gap bequeaths a polity with a judiciary that may be immune to the changes taking place in the transition environment all around it.[33] In short, the *Oputa Panel* case laid bare the pitfall constituted by the neglect of judicial accountability for past governance in post-authoritarian societies.

4. JUDICIAL ACCOUNTABILITY FOR THE PAST

4.1. The judiciary, power and governance

Any institution or group that is able to influence how others experience the 'vulnerabilities' of existence, both as individuals and groups wield 'social power.'[34] This ability to change an existing state of affairs is the defining feature of power. In the power game, there are different groups in active contest for dominance each utilising specific inherent advantages to achieve supremacy. The different power bases in the struggle to undermine the influence of others become constrained in that quest by certain self-limiting factors.[35] Notwithstanding the 'self-limiting' factor of the judiciary, namely that it does not initiate the process for the exercise of its power, contemporary social experience demonstrates it is endowed with the resources with which it can and does influence society.

The judiciary wields power in governance of a nature that can not be ignored. It hardly stands to contest that the executive and legislature exercise political power. However, the judiciary, in furtherance of its interpretational role mediates political power. In the mediatory role, the judiciary stands between the executive and the citizen in resolving conflicts in the same way it adjudicates between individuals. It is

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Developing Transitional Jurisprudence in Nigeria' (2009) 7 (4) *International Journal of Constitutional Law* (forthcoming).

[32] See the position of the Court in *Hon. Muyiwa Inakoju & 17 Ors v Hon. Abraham Adeolu Adeleke & 3 Ors* [2007] 4 NWLR pt. 1025 p.423 and (2007) 7 NILR 136. Available at: http://www.nigeria-http://www.nigeria-law.org/LawReporting2007.htm (23 May 2009) per Justice Niki Tobi 35. Emphasis mine.

[33] See generally Yusuf note 7 supra.

[34] GIANFRANCO POGGI *Forms of Power* (Polity Press Cambridge 2001) 203-204.

[35] POGGI supra.

empowered to review the actions of the executive to determine their legality.[36]This important role of the judicial function is not obliterated even in authoritarian societies.[37] For the most part however, transitional justice research, particularly with reference to institutional accountability, has focused on the role of the executive and the legislature in societies that have witnessed gross violations of human rights and impunity with scarce attention paid to the judicial function. Yet, so critical is the role of the judiciary in the exercise of powers in the modern state that '…a government is not a government without courts.'[38]

The commonly articulated transition reform agenda focused on the political branches of government at the expense of attention to the judicial situation in transitioning polities, is one of the marked failures of the current transition paradigm.[39] But the nature of its role constitutes the judiciary as a major element in the machinery of the state. In that vantage position, the judiciary 'can not avoid the making of political decisions'[40] in upholding the rule of law in society.

4.2. The judiciary and the rule of law

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

It is suggested that a conception of the rule of law that emphasises or relies on 'people-power' or in more formal terms, popular sovereignty holds strong promise for enduring fundamental changes aspired for in transitioning societies. The American transition from colonialism, struggle for independence and the pivotal role of the people in its constitutional development in the late 18th century in particular, provide strong precedent for societies seeking to assert popular power in transitioning states. [41]

It can be argued that institutional accountability for the past with a view to strengthening weak or transforming dysfunctional state institutions is one of the fundamental ways to foster the viability of democracy and rule of law. Such accountability facilitates acknowledgement of institutional shortcomings crucial to

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[36] MURRAY GLEESON "Public Confidence in the Judiciary" (Judicial Conference of Australia, Launceston, 27 April 2002) available at: http://www.hcourt.gov.au/speeches/cj/cj_jca.htm (7 March 2007) 5.
[37] MOUSTAFA note 2 supra.
[38] HENRY M HART AND HERBERT WECHSLER *Federal Courts and the Federal System* (2nd Edition Mineola New York Foundation Press Inc. 1973) 6
[39] H KWASI PREMPEH "Judicial Review and Challenge of Constitutionalism in Contemporary Africa" (2006) 80 Tulane Law Review 1239-1323, 1299.
[40] JOHN A G GRIFFITH *The Politics of the Judiciary* (5th Edition Fontana London 1997) 292-3.
[41] LARRY D KRAMER *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press Oxford 2004).

achieving transformation of state institutions. It also constitutes a definitive progression to democratic governance and movement away from repression.[42]

Proceeding on our adopted view of rule of law, a publicly accessible process of scrutiny offered by the *truth-seeking* mechanism can be expected to restore some measure of judicial credibility and public confidence in the judiciary in such post-authoritarian contexts. To insist otherwise namely that any institution is beyond public scrutiny conducted in a *plainly public* manner afforded by a truth-seeking process amounts to conceding to the judiciary 'a real omnipotence.'[43] This is precisely a privilege the judiciary has been all too ready to deny the political branches of government through the instrumentality of judicial review. More crucially, such a proposition is tantamount to a direct inversion of popular sovereignty and the imposition of 'judicial supremacy.'[44] Further, the truth-seeking mechanism offers the opportunity for obtaining comprehensive accounts for past governance and the institutional role of the judiciary in it.

4.3. Integrity v accountability: two normative arguments

There are however, a number of possible objections that can be raised against the case for judicial accountability for its role in past governance as part of transitional justice arrangements. The most important are essentially of a normative character. Most prominent in this category is the integrity argument. For clarity, this will be considered from two related but distinct perspectives, the need for institutional independence and immunity of judicial officers.

4.3.1 Judicial independence

It is possible to argue that there is an evident tension between the doctrine of judicial independence and the truth-seeking mechanism even in the context of transition. In other words, the imperative of judicial independence can not be reconciled with bringing the judiciary to account for its role in past governance through a public mechanism like a truth commission. The fundamental doctrinal basis of the principle of judicial independence is the desire to obviate potential constraints to the exercise of judicial power. Institutional independence is necessary to secure the role of the judiciary as the institution charged with protection of the individual from oppression. In view of this essence of the judicial function, public accountability of the nature proposed here has the potential to erode, if not critically subvert the integrity of the judiciary.

It is important to acknowledge that judicial integrity is a value which needs to be maintained perhaps even more in the context of transitional societies than any other. This was in fact a major argument in the resistance of the South Africa judiciary to the attempt to bring it to account for its role in apartheid before the Truth and

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[42] FIONNUALA NI AOLAIN and COLM CAMPBELL "The Paradox of Transition in Conflicted Democracies" (2005) 27 *Human Rights Quarterly* 172, 184, 207.
[43] Ibid at 178.
[44] WILLIAMS J WATKINS JR. "Popular Sovereignty, Judicial Supremacy and the American Revolution: Why the Judiciary Cannot be the Final Arbiter of Constitutions" (2006) *Duke Journal of Constitutional Law and Public Policy* 159 [Online Edition] 1, 41.

Reconciliation Commission.[45] In his analysis of the South Africa experience, Dyzenhaus offers valuable insight that challenges this position. The judicial branch, he argues, ought to be held up to scrutiny on its allegiance to law or what he refers to as 'fidelity to law.' This is what the judicial oaths of office require. What is to be considered as law and fidelity, to which judges are bound, is an approach that 'accords recognition to reciprocity between the rulers and the ruled.'[46]

The point then is that judicial independence should not be constituted into a shield against giving public accounts of the judicial role during an authoritarian period. An account of the judicial role during the period provides opportunity for an assessment of whether the judiciary did maintain its independence at the relevant time. Public scrutiny of the nature afforded by a truth-seeking mechanism provides opportunity to examine whether the judicial function was performed in a manner that accorded primacy to law as required by judicial (oath of) office. Or, in the converse (and this is the crux of the matter), did any extraneous but contextual factor intervene to compromise judicial independence *properly* conceived? The necessity for this would appear self-evident. Stated a bit differently, judicial independence as a shield against accountability of the judiciary for the past can be challenged on its own terms. In all of its importance for the adjudicatory role, and dispensation of justice, it ought not to be allowed to override the need for accountability for powers conferred on any institution of state in terms of the process and outcomes of the exercise of such powers.

In its conception, judicial independence, like judicial power itself, is designed for the benefit of citizens.[47] While the argument for judicial independence may be a strong one, it ought to be borne in mind that judicial independence is not a perquisite of judicial office. It is commonly recognised that respect for courts is essentially directed at the institution and not the person of the individual judge. Respect for and compliance with judicial decisions rest (at least to an appreciable extent) on the belief in the impartiality and independence of the judiciary. It is not designed to cast a sanctimonious cloak around individual judges. This is central to any power or authority the judiciary can aspire to have in society.[48]

4.3.2. Judicial immunity

The other aspect of the argument as stated earlier is the related but distinct case for protecting judges from fear (of suit) in the discharge of their duties. This is the principle of judicial immunity. Legislation, statutory or constitutional, barring litigants or other interested parties from taking out legal action against judicial officers is one of the most potent measures for securing the independence of judicial officers. Political office holders are also sometimes protected from suit in the discharge of their functions. But this is normally for a limited period. Judicial immunity from suit is however usually more comprehensive and enduring in its operation, commonly extending beyond the tenure of judicial office.

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[45] DYZENHAUS note 26 supra.

[46] Ibid at 183.

[47] MURRAY GLEESON "The Right to an Independent Judiciary" (14th Commonwealth Law Conference London, September 2005) available at: http://www.hcourt.gov.au/speeches/cj/cj_sept05.html#fn1 (7 March 2007) 1

[48] "Judges Must Strive for Neutrality" *Chicago Tribune* (Chicago August 15 1981) p.7

The principle has been institutionalised to extinguish any threat of litigation on the judge for performing the normal functions of the office. Discernible in the entrenchment of judicial immunity is the view that the nature of judicial function requires an independence of 'mind' that addresses itself to ensuring justice according to *law*. The position is further strengthened by the view that judicial misconduct is appropriately addressed through 'structural' mechanisms of appeal procedure and in extreme cases, dismissal from office.[49]

The judicial calling must stand outside of the whims of individuals as well as institutions and particularly one that trumps the common weal. Where it is possible to surmise that the judiciary has been complicit in the violations of human rights by the state under an illiberal regime, this supports a case for accountability for what could well amount to judicial abdication of its role. In other words, there ought to be a valid departure from the norm of traditional conceptions of judicial independence in troubled societies where there is ample causes to believe judges have deviated from keeping faith with their judicial oaths of office. This should be the case where such oaths-as they commonly do- required the discharge of the functions in a manner consistent with the constitutional values of the country as against the wishes of authoritarian rulers. Whether this is factually the case or otherwise has to be tested through a process of public accounting, at the least, to set the records straight.

Scrutiny of the judiciary through a *truth-seeking* process during a period of fundamental political change as proposed here is distinct from subjecting individual judges to the indignity of civil suits for their judgements. In the event there is some measure of consensus that the judicial function has been conducted in some inappropriate manner, the need to reach beyond the shield of judicial immunity assumes an imperative. This is important for achieving societal transformation and reconstruction, pivotal objects of transitional justice in societies with an experience of authoritarianism or conflict. It serves to further scrutinise the validity of these normative objections to public accountability of the judiciary for the past in the context of the Nigerian post-authoritarian experience.

5. AN UNACCOUNTED JUDICIARY AND A TROUBLED TRANSITION

The military left the Public Service structures intact throughout the period of authoritarian rule.[50] But it took over the executive and legislative functions all over the country along with a ban on political activities. Throughout the period of authoritarian rule, the judiciary remained the only institution that survived the suspension and take over of the institutions of governance.[51] The military did arrogate to itself the power to appoint judges but the judiciary did not experience any institutional truncation. By default, the judiciary took an active part in governance throughout the period. It is thus arguably complicit in the misgovernance and violations of human rights in the country in the three decades of military.

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[49] PAMELA S KARLAN "Two Concepts of Judicial Independence" (1999) 72 *Southern California Law Review* 535, 539 and ROBERT C WATERS "Judicial Immunity vs. Due Process: When Should a Judge be Subject to Suit?" (1987) 9 (2) *Cato Journal* 461, 470.

[50] ABIOLA OJO *Constitutional Law and Military Rule in Nigeria* (Evans Brothers Nigeria Publishers Limited Ibadan 1987) 116.

[51] Ibid.

5.1. The judiciary in authoritarianism

Despite their disdain for constitutionalism and human rights, authoritarian rulers usually exhibit a paradoxical interest in obtaining some veneer of legality for their illegitimate hold on power.[52] Even the military class in its foray into governance is obliged to secure a veneer of legitimacy for the effective exercise of political power. In the pursuit of that objective, they usually leave the judicial institution intact, unsuspended like the political branch.[53] The military find an opportunity for legitimation through retaining the judicial institution. And this was the case in Nigeria. The self-serving motive has been aptly described by Tayyab Mahmud:

> "Usurpers appear to recognize that judicial pronouncements about the nature and merits of the change and quantum of their legislative capacity have an impact on the legitimacy of the new regime, because words like law" and "legality" function as titles of honor…*Securing judicial recognition appears to be the key to gaining political legitimacy*."[54]

Apart from the legitimacy value, there is the unavoidable necessity for the judicial institution even in authoritarian societies. In contrast to executive and legislative governance, the more nuanced requirements of adjudication or judicial governance are well beyond the disposition or capacity of military adventurers in power. The incapacity on the part of the military to administer the judicial function necessitates the retention of the judiciary in governance. The specialised nature of the judicial function constitutes a positive force which the judiciary ought to have utilised in the quest to maintain its institutional integrity, uphold human rights and rule of law irrespective of the *duress* constituted by authoritarian military rule.[55]

Successive military administrations foisted untold hardship and suffering on the mass of the people.[56] What role did or could have the judiciary played in that suffering? This ought to have constituted an important thematic focus of the truth-seeking process in Nigeria in view of its broad terms of reference. Part of its remit was to 'identify the person or persons, authorities, institutions or organisations which may be held accountable' for gross violations of human rights and determine the motives for the violations or abuses. The judiciary had become largely impotent in upholding the rights of individuals in the era of military rule in the country. In frustration, a Justice of the Supreme Court boldly advised victims of rights violations to seek redress through means other than the judicial process. He concluded that the military left no one in doubt as to the inviolability of their decrees.[57]

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[52] ANTHONY W. PEREIRA "Of Judges and Generals: Security Courts under Authoritarian Regimes in Argentina, Brazil and Chile" in Ginsburg and Moustafa note 2 supra 23-57, 55.

[53] TAYYAB MAHMUD "Jurisprudence of Successful Treason: Coup *d'etat* & Common Law" (1994) 27 Cornell International Law Journal 49-140, 103, and LISA HILBINK "Agents of Anti-Politics: Courts in Pinochet's Chile" in GINSBURG and MOUSTAFA note 2 supra at 102.

[54] MAHMUD note 54 supra at 103-104. Emphasis mine.

[55] TUNDE I OGOWEWO "Why the Judicial Annulment of the Constitution of 1999 is Imperative to the Survival of Nigeria's Democracy" (2000) 44 *Journal of African Law* 135-166, 157-159.

[56] *Synoptic Overview* note 11 supra.

[57] *Nwosu v Environmental Sanitation Authority* [1990] 2 NWLR Pt.135, 688.

Such judicial *apologia* was borne as much out of a sense of frustration of the courts with the importunate and contemptuous treatment of judicial decisions (and the institution as a whole) by successive military administrations as from an attempt at self-preservation. In a way though, it reinforces the need for accountability for the nature of judicial governance during the years of authoritarian rule. How or why was this possible? The root of judicial apologia in the Nigerian context is not unconnected with the legitimation of military rule in the first instance by the judiciary.

On the onset of military rule, the courts, after a brief and in retrospect, weak resistance, upheld the illegal putsch as a 'revolution.' The Supreme Court held that the coup d'etat legitimately upstaged the *Grundnorm* as represented by the country's republican constitution of 1963.[58] The legitimation of authoritarian rule then came back in its turn to haunt the judiciary. As the Oputa Panel found, at the end of military rule, the courts and judges had become 'toothless bull dogs.'[59] This ought not to have been the case considering that the judges at all times owed a duty to the Constitution. In this regard, it is significant for instance that the judicial oaths of office were contained in the Constitution at all times. All the constitutions in operation throughout the period of authoritarian rule contained supremacy clauses. All judges were in fact sworn on the constitution rather than military legislation hence the legal and moral justification for holding them to their constitutionally prescribed oaths of judicial office.

It is thus arguable that the empirical record of the Nigerian judiciary in the period of authoritarian rule commends the imperative of accountability for the performance of the judicial function. This state of affairs commends the need for an enquiry on why the judges took to the path of compromise when their judicial oaths of office require fidelity to law as stated by the Constitution rather than military legislation. The compromised status of the Nigerian judiciary is further exacerbated by a legacy of questionable appointments characterised by nepotism and prebendalism. The compromised and corrupt judicial function generated a lacklustre attitude within the public for recourse to due process of law in the resolution of disputes. This is the state of the judiciary at the point the country moved to civil governance on 29 May 1999.

5.2. The judiciary in the post-authoritarian period

Governance in Nigeria is confronted by several complexities in this period of its longest experience of civil rule in its post-independence. A good number of the complexities derive from the peculiar dynamics of a post-colonial, post-authoritarian state with heterogeneous identities. The complexities include rising crime rates, poverty, unemployment, the deplorable state of social infrastructure, and the failure of transitional justice measures for past victims of gross violations of human rights in which the judiciary as discussed above is implicated. Further, the fallouts of a grossly manipulated electoral process and the legitimacy deficit concomitant to it have deep resonance for the emergence of the judicialisation of politics as a prominent feature of governance in the country, particularly from 2003 to date.

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[58] *E O Lakanmi and Kikelomo Ola v The Attorney –General (Western State), The Secretary to the Tribunal (Investigation of Assets Tribunal) and the Counsel to the Tribunal* (1971) *University of Ife Law Reports* 201.

[59] *Synoptic Overview* note 11 supra at 39.

However, the most serious challenge to Nigeria's continued viability as a functional state has been posed by intergovernmental disputes over spheres of power in a lopsided federation.[60]These have been accompanied by an unhealthy wrangling for power among the political elite, pervasive corruption and the absence of effective dialogue to foster a consensual basis for the continued existence of the polity among various stakeholders. The judiciary, particularly the appellate courts, has been inundated with 'political cases' and has become a strategic actor in policy-decision making and governance at a level unprecedented in Nigeria's history.[61]

One can conveniently cite over a dozen remarkable cases of judicialisation of politics in the country in the context of the democratic transition at the inter-governmental level.[62] A topical survey would include *Attorney General of the Federation v Attorney General of Abia and 35 Ors*[63]dealing with disputed claims between the federal and littoral States for oil resources derivable from the continental shelf of the country; *Attorney General of Ondo State v Attorney General of the Federation & 35 Ors* (the *ICPC* Case)[64] dealing with the establishment of a monolith anti-corruption agency in the federation; *Attorney General of the Federation v Attorney General of Abia and 35 Ors* (No.2)[65] and *Attorney General of Ogun State v Attorney General of the Federation*[66] both dealing (again) with fiscal federalism and allegations of illegal withholding of funds by the Federal government.

Attorney General of Lagos State v Attorney General of the Federation[67] centred on disputations over the propriety of inherited military legislation that confers ultimate planning powers on the federal government, possessed only of complete geo-political control over the federal capital territory. All the states of the federation challenged the constitutionality of certain sections of the Electoral Act (promulgated by the National Assembly), in as much as it sought to make provisions for elections into local (government) authorities in *Attorney General of Abia and 35 Ors v Attorney General of the Federation.*[68]

The disputations over the appropriate spheres of power and control in the country between the federal government on one hand, and the states on the other, were so frequent. In the result, there was a seeming endless recourse to the judiciary for resolution. Customisation of this approach to governance and the extensive judicialisation of politics it generated attracted notice and *obiter dicta* of the Supreme Court. In one case, it observed that 'this is yet another open quarrel between the State

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[60] SOLA AKINRINADE "Constitutionalism and the Resolution of Conflicts in Nigeria" (2003) 368 *The Round Table* 41-52, 49.

[61] HAKEEM O. YUSUF "Robes on Tight Ropes: The Judicialisation of Politics in Nigeria"

(2008) 8 (2) *Global Jurist* 1-33, 8–9. Available at: http://www.bepress.com/gj/vol8/iss2/art3. See also MAXWELL ODITA "Democracy at 10: Symphony of Elections, Petitions and the Judiciary" *Daily Independent* (Tuesday 19 May 2009, Lagos).

[62] And that number is by no means exhaustive of this line of cases.

[63] (2002) 4 SC Pt I, 1.

[64] (2002) 6 S.C. Pt I, 1.

[65] (2002) NWLR 542 S.C.

[66] (2002) 12 SC Pt II, 1.

[67] (2003) 6 SC Pt I, 24.

[68] (2003) 3 SC 106.

and Federal Government' with which it had become 'thoroughly familiar.'[69] The situation in the country is attributable to the un-negotiated transition from decades of military rule. This has forced to the centre stage of governance, unresolved and unmediated tensions arising from the country's *de jure* federal status that has witnessed a transformation to a *de facto* unitary state. These remain critical issues that were left unaddressed in the process of political change.

However, the impact of the judicialisation of politics has raised serious concerns on the decisional independence and integrity of judicial officers. In Nigeria, the most prominent of the concerns centres on judicial ineptitude and corruption (or simply apprehensions of it), especially in the lower courts and throughout the system.[70] It is instructive that the recent decision of the Presidential Elections Petition Tribunal (PET) on the 2007 elections did not escape the allegations of corruption that dogged the steps and seriously compromised the adjudication of the 2003 elections in the country.[71] Even the Supreme Court which finally decided the matter was not spared. This led Justice Tobi, one of the justices who sat on the panel of the decisive final appeal in the highly contentious election petition[72] to warn litigants (politicians) to stop calling judges 'all sorts of names.' In obvious exasperation, the learned justice wondered why judges are not trusted by the public in the administration of justice.[73]

It is suggested that the persistence of real or imagined corruption in the judiciary is a product of the existential continuity of the institution in the transition process. The ambivalence towards the courts will arguably remain the case as long as the matter of judicial accountability for past complicity in misgovernance during the country's authoritarian past remains completely ignored or under-addressed.

6. CONCLUSION

At all times, but especially in the circumstances of transition and political change from an authoritarian past, the judiciary must be wary of designs through recourse to judicial process to frustrate transitional justice measures. This is particularly important for the restoration and fortification of rule of law in a transitional setting. Such awareness appears to have been lost on the Nigerian Courts in the *Oputa Panel* Case. The judiciary thus fostered a situation whereby the strong determination of the generals not to appear before the Oputa Panel introduced a twist to the truth-seeking process from which it never recovered.

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[69] *Attorney General of Abia & 2 Ors v Attorney General of the Federation & 33 Ors* (2006) 7 NILR 71, 1, 2.

[70] ARD Inc., *Democracy and Governance Assessment of Nigeria* (USAID) 11 and 28 available at http://pdf.usaid.gov/pdf_docs/PNADI079.pdf

[71] SAHARA REPORTERS NEW YORK, "How the Presidential Elections Petition Tribunal Came to its Decision" *Nigerian Muse* available at: http://www.nigerianmuse.com/nigeriawatch/2007/How_the_Presidential_Elections_Petition_Tribunal_Came_To_Its_Controversial_Verdict (Last accessed 20 May 2009).

[72] This is reflected in the decision by a bare majority of 4-3 upholding the earlier unanimous decision of the 5-justice PET.

[73] *Atiku Abubakar GCON & 2Ors v Alhaji Umar Musa Yar'Adua & 6Ors* (2008) 36 NSCQR 231, 402-403.

It has been argued that the role of the judiciary in governance in authoritarian societies necessarily raises the need for scrutiny of the judicial function as an integral aspect of transitional justice arrangements. This is because a critical assessment of judicial impact on the course of governance and the exercise of state powers provides a comprehensive account of the past. Such accountability for the past also confronts the judiciary with its role in governance, facilitates acknowledgement and opens the way for desired institutional transformation where required. This is premised in part on contemporary social experience that the judiciary as one of the institutions of the state participates in governance at all times. The conduct of that role in authoritarian societies merits account at times of socio-political change.

What emerges from the Nigerian experience is that accountability for the role of the judiciary in governance during an authoritarian period is relevant because of certain standards and societal expectations of the institution. Where such expectations are not met, it leads to the lack of public trust and confidence in the judicial system which is fatal to societal cohesion, peace and development. Since the judiciary commands neither the money controlled by the legislature nor the force at the service of the executive, public confidence is at the heart of obedience to judicial decisions.[74] It is not at all challenging to establish such a state of affairs in transitional societies that had laboured under authoritarian rule, war, institutionalised discrimination like apartheid or other forms of substantial social displacement. Thus the significance of incorporating judicial accountability into transitional justice processes.

The judiciary in post-authoritarian societies is usually privileged in at least two ways which accentuate the need for accountability for the past. First, it actively participates in governance and may by the reason of such participation be complicit for misrule and violation of human rights. Thus, unlike the political institutions which invariably suffer from suspension or abrogation by authoritarian rulers, it benefits from an institutional memory in the post-authoritarian period. This gives it an edge over the political organs of the state in governance at the crucial period of consolidating political change in transitional societies. Indeed, it usually takes the strategic position of mediator in state-society, intra- and inter-governmental disputations and rights claims. Secondly, and connected to the first is the need by authoritarian regimes for the judicial function despite their dubious claims to messianic executive and legislative capabilities as was commonly the case in military regimes in Nigeria. This strategic positioning of the judiciary makes the case for judicial accounts for its role in past governance more compelling.

The dynamics of transitional justice lends itself to Karlan's argument that the claim to judicial independence must be balanced against actual judicial outcomes.[75] The positive values of judicial immunity (and more broadly, independence) notwithstanding, an absolutist interpretation of it could seriously undermine other equally important societal values.[76] Society as a body corporate stands above its institutions. It is entitled to an account as principal, for exercise of powers devolved to any of its agents, parts or institutions as surrogates in furtherance of the common weal. The judiciary as one of such surrogates is thereby not excluded. The operation

[74] GLEESON note 47 supra at1-2.
[75] KARLAN note 49 supra at 558.
[76] Ibid. at 539.

of normative or other principles as a shield for judicial accounts for the past in post-authoritarian contexts, no matter how important, simply lack legitimacy.