

## Calling the Judiciary to Account for the Past

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# Calling the Judiciary to Account for the Past: Transitional Justice and Judicial Accountability in Nigeria

HAKEEM O. YUSUF

*Institutional and individual accountability is an important feature of societies in transition from conflict or authoritarian rule. The imperative of accountability has both normative and transformational underpinnings in the context of restoration of the rule of law and democracy. This article argues a case for extending the purview of truth-telling processes to the judiciary in postauthoritarian contexts. The driving force behind the inquiry is the proposition that the judiciary as the third arm of government at all times participates in governance. To contextualize the argument, I focus on judicial governance and accountability within the paradigm of Nigeria's transition to democracy after decades of authoritarian military rule.*

## I. INTRODUCTION

Accountability of the judiciary in transitional societies merits critical analysis. This article argues a case for extending the purview of *truth-telling* processes to the judiciary in postauthoritarian contexts. The driving force behind the inquiry is the proposition that the judiciary as the third arm of government at all times participates in governance. The paucity of critical perspectives on the role of the judiciary during a society's troubled period could lead to the view that it lacks a distinct role in governance. To contextualize the argument, I focus on judicial governance and accountability within the paradigms of Nigeria's transition to democracy after decades of authoritarian rule. Historically, Nigeria, a former British colony, started out its postindependence existence as a Westminster-type political arrangement but subsequently translated into an American-styled federation. The course of governance in the country (the judicial aspect being of specific interest in this article) has been and continues to be influenced by its historical antecedents and current political affinities. Comparative insights from both the British and American legal and political experiences are thus germane to a discussion of the country's judicial institution and are explored in this article.

I set out by considering two critical issues framed as queries to be addressed in this inquiry, which seeks to generate scholarly interest in an otherwise neglected perspective in transitional justice theory and state practice. First, should it not be the case that the judiciary is held to account for its role in societal experience of gross violations of human rights and impunity? Secondly, what is the relevance of such inquiry? It is anticipated that the inquiry will unearth the significance of the role played by the judiciary in

authoritarian societies and the circumstances underlying judicial preferences. I then proceed to evaluate the role of the judiciary in transitional contexts in view of its institutional participation in governance. Specific focus is on the attitude of the judiciary to the truth-seeking process as a complementary tool in the search for justice after a period of gross human rights violations.

The article identifies a tension in the interface between the truth-seeking process and efforts to call the judiciary to account. The tension originates from the view that such accountability seriously undermines the integrity of the judiciary as a key institution of the state (particularly in transitional societies) while the path of nonaccountability challenges the viability of the truth-telling mechanism in achieving transitional justice. I argue that the adoption of an approach that accords proper appreciation of the transitional context and fundamental principles of international law (specifically human rights and humanitarian law) significantly eases the tension. I further contend that inherent in the approach is the potential for institutional transformation and relegitimization of the vital judicial function that had become delegitimized by years of acquiescence to authoritarianism.

## II. STATE POWERS AND THE JUDICIARY

According to one prominent way of thinking, government as delegated powers are vested by a collective (the *people*) in the modern state. Thus, government is the custodian of the common interest. The *people* however retains “popular sovereignty” and demand accountability from rulers (March and Olsen 1995: 151). State powers in legal and political conceptions are divided between the three institutions: the executive, the legislature, and the judiciary (Vile 1967).

Any institution or group that has the capacity to influence how others experience the “vulnerabilities” of existence both as individuals and groups wields a form of power in society (Poggi 2001: 203). This ability to change an existing state of affairs is the cardinal feature of power. It entails the capacity to have others act or refrain from acting in a particular manner. In the power game, there are different groups in active contest for dominance, each utilizing specific inherent advantages to achieve supremacy. However, the different power bases in the struggle to undermine the influence of others become constrained in that quest by certain self-limiting factors (ibid.: 204).

The self-limiting factor of the judiciary, namely that it does not initiate the process for the exercise of its power notwithstanding, contemporary social experience indicates it is endowed with the resources with which it can and does influence society. Two recent

examples lend credence to this view. One is the historic decision of the U.S. Supreme Court in *Bush v Gore* (2000), which proved decisive in the election to the coveted position of U.S. president in rather controversial circumstances. The other is the same Court's decision in *Hamdan v Rumsfeld, Secretary of State for Defense* (2006) in which the Court decried the Bush administration's detention of "terror suspects" in Guantanamo Bay and declared the plan to prosecute them before military commissions under the Presidential Military Orders 2001 illegal. Many commentators have hailed *Hamdan* as a victory for the rule of law (American Bar Association 2006; Washington Post 2006).

The foregoing examples reveal that judicial decisions in specific cases affect not only the parties before a court. In practice, judicial determinations impact on others in the wider society who, in most instances, will never subject themselves to the direct jurisdiction of a court. They affect civil rights, individual freedoms, and property rights (at the microlevel) and thus influence or, in some cases, dictate outright, the course of political, social, cultural, and economic development (at the macrolevel). In that way, the judiciary performs shares in the burdens of governance. Thus the nature of the judicial role constitutes it into a major machinery of the state. In that vantage position, Griffith notes, the judiciary takes part in political decision making (1997: 292–93). Thus, the subversion of the judicial institution by incidence of social dislocations of authoritarianism justifies public scrutiny in postauthoritarian contexts not so much as an indictment on the institution but, more importantly, to draw out relevant lessons for desired transformation. For the most part however, transitional justice research 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" (Hart and Wechsler 1976: 16).

In recent times, the powers of the judiciary have become incrementally visible, owing particularly to the "rights revolution of the twentieth century." The situation has led to concerns about "the emergence of government by judiciary" (Loughlin 2003: 212–13). The growth of judicial powers in relation to the other arms of government has become more noticeable in the post–World War II period (Barak 2003: 21). The growing importance of the judiciary should be expected, granted that it is one of the institutions of the state—wielding some of the powers of the state in the task of ensuring good governance, freedom, equality, and social justice (Held 2004: 391). Such considerable powers impact on all aspects of societal development and interaction. It ought not to be left unaccountable.

The executive and the legislature (even if with differing emphasis) have been viewed as prime movers of the process of development and assessed along those lines. But the role of the judicial institution as an integral part of, and key contributor to governance and development, has been largely unacknowledged and ignored (Ogowewo 2005: 39). This may be due in part to the contestable notion that it is the least dangerous arm of government (Berns 1997).

The lack of initiative to exercise its institutional power unless moved by an aggrieved party may be another contributory factor (Nwabueze 1997:49). Yet, dependent on sociopolitical factors, the powers wielded by the courts<sup>1</sup> may expand in dimensions that substantially reduce powers exercised by the other two branches of government (Winter Jr. 1997: 29).

In a democracy, a correlate of the exercise of powers by any institution is the requirement of accountability. As Theberge argues with reference to the Supreme Court of the United States, the immense powers wielded by the judiciary necessitates its being subjected to similar objective and informed scrutiny applicable to the executive and the legislative branches. This is more particularly so in jurisdictions where judicial tenure is for life (Theberge 1997: 176).

The exercise of power in democratic societies involves a measure of developing accounts. Such accounts serve to define the past and choices made in the course of it. An important utilitarian function of democratic accounting is the promise it holds for establishing trust between the people and the government (March and Olsen 1995: 46). Governance through authoritarianism, with the incidence of egregious violations of human rights and breaches of the rule of law, results in social displacement and distortions between the government and the governed. It is accordingly arguable that comprehensive accountability in the transition to democracy and the rule of law is a key requisite for addressing the resultant disequilibrium in society.

In discussing judicial accountability, the system of appeals to superior courts no doubt constitutes a check and, some reckon, adequate form of accountability for the judiciary (Prefontaine and Lee 1998). Appeals as a form of judicial accountability may be sufficient in societies where the rule of law is entrenched with a well-developed democratic culture. This may be the case particularly in view of the existence of other forms of public accountability like congressional hearings, professional censor, and critical media focus. All of the foregoing no doubt play crucial roles in ensuring public engagement with the judiciary in particular and government in general in stable democracies.

Some factors may however militate against appeals as a form of judicial accountability. The complex web of legal processes, social and economic costs of litigation, absence or inadequacy of legal aid, and the limitations of educational development in developing countries in general (by and large the sites of transitional justice processes) and Nigeria in particular (Oko 2000: 611), suggest the need for a system of checks directly and easily accessible to the public at *transitional moments*. Further, it is plausible to argue that the fundamental premise of the appeal paradigm of accountability is the presumption of democracy and good governance, the absence of which is precisely in issue in postauthoritarian societies. Thus, it is apposite in such contexts to obtain accountability by other mechanisms.

### III. JUDICIAL ACCOUNTABILITY AND THE RULE OF LAW

The ability of citizens to enforce their rights against the state (as well as other individuals) is critical to the modern conception of the rule of law (Loughlin 2003: 209). The case for accountability of the judiciary is reinforced by this need since the judicial function is central to the realization of the right. There must be no doubts as to the integrity and commitment of the judicial institution to ensuring the rule of law (as against the rule of men) in furtherance of the public purpose and popular sovereignty.

Under the concept of popular sovereignty, the three institutions of governance hold power as agents of the people (Watkins Jr. 2007: 2). The U.S. Supreme Court in the classic articulation of this view of sovereignty in *Williams Marbury v James Madison, Secretary of State of the United States* (1803) asserted that the people possess an incontestable right to specify for their prospective government whatever “principles” they believe “shall most conduce to their own happiness.” The will of the people is not only supreme but dictates the powers of the different arms of government and delineates the limits of those respective powers.

The foregoing understanding of the rule of law adopted in this article, as against other contending views (Peerenboom 2005: 901–13) assumes a more relevant position in societies in transition from a troubled past where there is a common aspiration for societal rebirth. There is usually an urgent need for across the board reconfiguration of state institutions and public participation in a process of social reconstruction to forestall a return to authoritarianism or even conflict. This is central to repositioning the rule of law as a beneficial rather than exploitative principle for the organization 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 for instance in Nazi Germany, apartheid South Africa, and authoritarian military regimes in Africa and Latin America. It would appear that a conception of the rule of law, which emphasizes or relies on “people-power” or, in more formal terms, popular sovereignty, holds strong promise for enduring fundamental changes aspired to 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 eighteenth century (Kramer 2004) in particular provides strong precedent for societies seeking to assert popular power in transitioning states.

Proceeding on this understanding of the rule of law, a publicly accessible process of scrutiny (arguably offered by the *truth-seeking* mechanism) can be expected to restore some measure of judicial credibility and public confidence in the judiciary. To insist otherwise, namely that any institution was beyond public scrutiny conducted in a plainly public manner afforded by a truth-telling process in a transitioning society, may fly in the face of the admitted significance of transformation in such societies. It amounts to conceding to the judiciary certain omnipotence it has been all too ready to deny the other two arms 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 (Watkins 2007: 101).

#### IV. THE JUDICIARY IN AUTHORITARIAN CONTEXTS

The regular if not immediate casualties of military rule in democratic states are the executive and the legislature (Ogowewo 2005: 42, Aihe 1971: 214–15). The continued existence of both institutions is incompatible with military intrusion into governance. To a large extent, the military leaves the judiciary nominally intact but usually severely compromised.

Why do military usurpers of the democratic-will sack the executive and legislature but leave the judicial institution intact? Two factors can be advanced for this. The first is the legitimating function (rather than the ironic, oft-repeated *respect* for the rule of law) that the judiciary accords military usurpation of power. This secures political legitimacy for the usurpers (Ogowewo 2005: 43; Mahmud 1994: 103–04).

Legitimacy is central to governance. From dual perspectives, normative and descriptive, legitimacy is crucial to the ability of the ruling elite to make valid political decisions and

orders as well as to the societal acceptance of such orders and decisions (Zurn 2004). Thus, even the military class in its foray into governance is obliged to secure a veneer of *Legitimacy* for effective exercise of political power.

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

Military regimes, perhaps more than any other form of government, invariably desire a judiciary it can subjugate. Despite that, military autocrats aspire that the judiciary as well as judges are perceived as being independent (Loughlin 2003: 62–63). Thus, it may be rather simplistic to justify judicial acquiescence to military authoritarianism (as some constitutional law scholars have sought to do) on the basis of the latter's complete control of the powers of coercion and perceived self-sufficiency (Mahmud 1994: 104).

The claim of self-sufficiency, in view of the recurring action of usurpers in preserving the judiciary in virtually all instances of military incursion into power in postcolonial commonwealth states (Mahmud 1994), suggests it is at best exaggerated. In view of the ambivalent disposition of military regimes to the judiciary, it is relevant to critically examine the exercise of judicial power in authoritarian contexts in periods of transition.

## V. THE CASE FOR JUDICIAL ACCOUNTABILITY IN TRANSITIONS

It can be argued that institutional accountability for past (mis)conduct with a view to strengthening weak or transforming derelict state structures is one of the fundamental ways to foster the viability of democracy and the rule of law. Such accountability facilitates acknowledgement of institutional shortcomings that is key to achieving transformation of strategic state institutions and constitutes a definitive progression to democratic governance and movement away from repression (Ni Aolain and Campbell 2005; 184, 207).

In general terms, an accountability relationship exists where a group or other entity demands an agent to report on the agent's activities (Keohane 2003: 157). It has also been considered to be the right to hold an agent "to answer for performance that involves



some delegation of power” (Romzek and Dubnick: 236). Political accountability proceeds on the precept that individual or institutional actors who act on behalf of the community and are funded from public resources be accountable to the ordinary citizens. The democratic accountability process requires a record of individual and institutional roles in governance as well as responsibility for the results achieved and the means deployed in the process (March and Olsen 1995: 150).

Authoritarianism, with its attendant incidences of egregious violations of human rights and breaches of the rule of law, results in social displacement and distortions between the government and the governed. It is accordingly arguable that comprehensive accountability in the transition to democracy and the rule of law is a key requisite for addressing the resultant disequilibrium in society. The judiciary, as one of a tripod of state institutions, cannot be thus excused from accountability if it is conceded that the judicial function is exercised in a general sense as a form of delegated power from the people.

A number of *mundane* objections may be canvassed for the futility of a case for judicial accountability. One is that a sizeable number of the population, particularly in Africa, are excluded by a legal system that is at once culturally alien and commonly conducted in a foreign language. Related to this is the fact that the intricacies of the merits of the jurisprudence to which the judiciary subscribed in particular cases is typically beyond the grasp of the generality of the people (even those who have an appreciable level of education). Thus, the outcome of such accountability process may only be accessible to a privileged class of, largely, legally trained technocrats.

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

Another possible objection is the perspective that the judiciary was itself victim of the sociopolitical system that disempowered the institution in the face of a sovereign parliament. I will deal with this below in the context of what I consider to be institutional objections.

A further objection is the need to maintain and protect the collegiality of the judiciary in the period of transition. At the heart of the collegiality argument is the need to maintain a

rancour-free atmosphere for judicial officers who had served in the old order (and are, at the least, tainted with complicity for human rights violations) and those newly appointed by the postconflict government following transition to ensure institutional cohesion and stability. In countering this objection, it is possible to argue that the narrow objective of individual collegiality ought not to be allowed to frustrate the wider claims of the society at large to institutional rectitude and transformation that accountability is expected to foster. Having disposed of what I refer to above as *mundane* objections, it is relevant to examine in some detail the institutional objections to the case for accountability of the judiciary in transitional contexts.

#### A. JUDICIAL INDEPENDENCE<sup>2</sup>

The need for judicial independence constitutes a potent argument for critics of a call for public accountability of the judicial role. However, the call is based on what can be regarded as an overarching and implied legitimate political expectation of the people within the legal and political paradigm of popular sovereignty as developed by Locke (Loughlin 2003: 162–75).<sup>3</sup>

The people are empowered to demand an account from their agent as constituted by the government of which the judiciary forms a part. In any event, as Karlan notes, “Judicial independence is . . . not an end in itself” (1999: 537); rather as one of the most renowned English jurists admitted, it confers great responsibility on judges (Denning 1978: 63). It is conceded that the principle of judicial independence is crucial to the judicial function. The principle is enshrined in most modern constitutions, and in countries with unwritten constitutions, like Britain, the principle has by convention been entrenched sometimes over centuries of practice (ibid.: 55–102). The critical question however is whether such privileged position and strong foundations ought to shield the institution from public scrutiny?

The principle in all of its importance for the adjudicatory role and dispensation of justice ought not to be allowed to override the need for accountability for powers conferred on any institution of state. Justification for the foregoing position includes the fact that judicial independence is not a perquisite of judicial office. In its conception, the principle is, like judicial power itself, designed for the benefit of citizens (Gleeson 2005: 1), and it is commonly recognized 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 is fostered by the belief in the impartiality of the judiciary. It is not meant to cast a sanctimonious cloak around individual judges.

The fundamental doctrinal basis of the principle of judicial independence is the desire to obviate potential constraints to the exercise of the judicial function. Institutional independence is necessary to secure the role of the judiciary as the institution charged with protection of the individual from oppression. The principle, guaranteed not only by national but also a considerable number of significant international human rights instruments (Friedland 1996: 622–29),<sup>4</sup> entails both “negative” and “positive” aspects. Both turn on the need to institutionalize measures designed to liberate judges from external constraints and promote their ability to follow their conscience in the proper adjudication of disputes (Karlan 1999: 537–48).

The view that judicial independence inures to the benefit of citizens validates the case for public accountability of the judiciary. The right to demand societal scrutiny or public account of the exercise of judicial power in whatever form flows from the conferment of that power by society on the judicial institution. Thus, it can be asserted that the claim to *Independence* is hollow and ought to be disregarded as justification for rebuffing public accountability.

The implication of the right as belonging to citizens is that it is in the nature of a public right. There is judicial support for the view that public rights, unlike private rights provided in the constitution, cannot be waived. The Nigerian case, *R Ariori & Ors. v Muraimo B O Elemo & Ors.*(1983) provides judicial support for this proposition. In that case, parties purported to consent to waiver of their right to speedy hearing of the title to land, which was in issue in the matter. The Nigerian Supreme Court held, *inter alia*, that speedy trial, a component of the constitutionally guaranteed right to fair hearing was in the nature of a public right. It rejected claims of waiver by the consent of litigating parties on the premise that it fell outside the ambit of their private rights or prerogatives.

In the same way, the right to public scrutiny or demand for accountability of the judiciary is in the nature of one that cannot be interfered with or waived. It is a right vested in society at all times and arguably ought to come into sharper focus in transitional contexts. The right to accountability being a public one, any institutional attempt at, or claim to waiver of the right, is not only counterintuitive but ought to be rejected for being patently illegal and in violation of the rule of law.

The security of tenure, which is a near-universal feature of judicial office (and thus the exercise of judicial power), ensures the continuance in office of judges who have been part of an old order with which there is much dissatisfaction. It reinforces the imperative for judicial accountability to ensure judicial transition along the lines of societal aspirations.

The Nigerian judiciary, in which judicial officers normally hold office until a constitutionally stipulated retirement, is again a reference point. The adoption of the pretransition constitutional arrangements coupled with the absence of an interim constitution (which could have stipulated otherwise) ensured that judges appointed in the period of authoritarian rule continued in office by default. The judiciary has been criticized for a jurisprudential outlook that continues to accord an instinctive recognition and validation of authoritarian rule and the legacy of decrees made by the military despite the transition to civil rule in spite of the untold suffering and distortion authoritarian rule has foisted on the country (Ogowewo 2000: 166).

Such judicial disposition supported the creation of binding judicial precedents that conferred legitimacy on the authoritarian *law and order* model of rule of law enforced by successive military regimes in the country. The continued approbation of such precedents by the courts however threatens a much desired deepening of the democratic precepts and internationally accepted notions of the rule of law in the country's transition. It assumes a disturbing dimension when there is palpable failure of executive and legislative governance, and the state in transition is already inching toward the precipice of crisis with growing expectations of judicial salvation. Recently, the International Crisis Group brought the relevance of this expected role in to focus when it noted that recourse to the judiciary constitutes the first major step to resolve the brewing crisis created by the April 2007 elections in Nigeria (International Crisis Group 2007). An untransformed judiciary will most likely fall short of the crucial mediating role expected of it in a democratic crisis of the nature now confronting the country or any other in a period of transition.

Law as a tool of "social engineering" (Lloyd 1991: 210) constitutes a medium for the achievement of other social goals. On this view of the role of law, the judiciary is required to dissociate itself from the formalist interpretation of judicial independence as an impregnable fortress that sets the institution on a pedestal beyond the reach of society. The normative account of judicial independence that seeks to oust the judiciary from accountability for its role in authoritarianism should be rejected. Such an approach to the function or purpose of the principle runs contrary to transparency in governance, an essential democratic value.

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

## B. JUDICIAL IMMUNITY

Judicial immunity from suit probably represents the boldest measure for securing the independence of judicial officers. Although judges are not the only officers of state imbued with immunity from suit for official acts, the ramifications for judges are the most extensive, taking into consideration their near permanent and all embracing dimensions. Judicial immunity from suit, Waters argues, is inconsistent and in tension with the rule of law (1987: 462). Whereas members of the executive and legislature are almost always liable to prosecution (at least on expiry of their electoral mandate) for corrupt practices in office, judges are usually permanently immune from prosecution in the conduct of their office and exercise of their judicial powers.

This derives from the need to extinguish any threat of litigation on the judge for performing the normal functions of the office. In essence, the nature of the judicial function confers a duty on judges that requires an independence of “mind” that addresses itself to ensuring justice according to *law*. It rises above the whims of individuals as well as institutions and particularly one that trumps the common weal. However, that the judiciary has been complicit in the violations of human rights by the state following the *plain fact* interpretation of law (to which I return later) under an illiberal regime supports a case for accountability for what could well amount to judicial abdication of its role.

Scrutiny of the judiciary through a *truth-seeking* process is all-distinct from subjecting individual judges to the indignity of civil suits for their judgments. The positive values of judicial immunity (and more broadly, independence) notwithstanding, an absolutist interpretation of it could seriously undermine other equally important societal values (Karlan 1999: 536).

It has been recognized that public accountability assists in ensuring judges discharge their duties in a disaffected manner (Friedland 1996: 606). This is in itself necessary for building, restoring, or ensuring public confidence in the judiciary and a requisite for resort to law rather than self-help. Ensuring such trust is reposed in the judiciary can only be negotiated away with grave consequences for a fragile polity as obtains in a transitioning society.

Lack of public trust and confidence in the judicial system 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 (Gleeson 2005: 1–2). In particular, the dynamics of transitional justice lends itself to the argument that the claim to judicial independence must be balanced against actual judicial outcomes (Karlan 1999: 558).

In the event there is substantial 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. It should hardly be a task undertaken to establish such a state of affairs in transitional societies that had labored under authoritarian rule, war, institutionalized discrimination like apartheid, or other forms of substantial social displacement. The jurisprudence of transitional justice revolves around the restoration of rights, justice, and the rule of law. Teitel has rightly noted that one of the key features of transitional societies is a fundamental inquiry into the legitimacy of societal institutions including the judiciary (1997: 2030). Such an inquiry is not the least bit compelling where any of the institutions are viewed as victims of the troubled period.

### C. THE JUDICIARY AS VICTIM

The judiciary as an institution, much like other arms of a democratic society, may be a victim of authoritarian rule in the same way political institutions (executive and legislative) were displaced by military rule in Africa and Latin America. It may even suffer in perhaps more individualized ways, like the fate of judicial officers in Rwanda in the course of the genocide in that country. As a result, it is possible to take the position that the judicial institution ought to be excused from accountability in transition as a victim.

But that argument quickly loses force when it is considered that a truthseeking process is in fact primarily designed in part (if not essentially) to ease the burden of victims—individuals and groups (it has hardly been suggested that institutional victims are precluded)—of rights violations by providing a forum for a narration and acknowledgment of their sufferings.

Further, where the choice of the truth-seeking process is made to establish a credible record of violations of human rights and subversion of the rule of law with a possible view to social acknowledgment, reconciliation, reparation, and fostering rule of law, no institution of state, least that avowed to upholding the rule of law, should be insulated from scrutiny. This is imperative if only to ascertain the judiciary, like other institutions that have functioned under abnormal conditions, is retuned to the aspirations of society in the transition from authoritarianism to democracy (Teitel 1997: 39).

An inquiry into the propriety of the judicial role or the judiciary been required to *tell its truths* in a transition process is germane to obtaining a complete record of a period of gross violations of human rights and impunity in a nation's history. It could possibly

achieve more. Such endeavour has the potential to advance the justification (some insist in the face of insurmountable constraints) for the course of judicial governance in the period. This perspective is relevant in view of the concession by a notable protagonist of the relevance of truth commissions in transition that “moral or meta-ethical debates feed directly into jurisprudential questions about whether and to what extent law—even in domestic systems—provides meaningful guidance for the judges who implement it” (Asmal 2000: 2).

What is the role of judges in authoritarian or even conflicted societies? Are they “unconstrained moral actors or bureaucratic functionaries effectively bereft of discretion, because the law tells them what to do and leaves them no choice to do otherwise?” (ibid.: 5). Should it be one that is insulated from the dictates of changes in society? Or should the judicial role be in a state of flux, subject to the vagaries of its environment (Barak 2003: 25)?

These are by no means easy questions, and there have been ongoing debates on them and related issues on the judicial function all emphasizing the crucial role of the judiciary in society. A process of scrutiny is well positioned to address these concerns. The South Africa transition process attempted such scrutiny.

## VI. JUDGING THE JUDGES?

Happily, the precedent set by the South Africa truth and reconciliation commission (TRC) in this regard is the subject of an incisive analysis by Dyzenhaus. In his aptly titled book, *Judging the Judges* (Dyzenhaus 2003), he addressed the response of the judiciary to the truth-seeking process that was at the center of the country’s efforts to recover justice for victims and achieve reconciliation in its transition to popular democracy.

The attempt was all but roundly rebuffed by the South African judiciary. Unlike the various professional bodies representing lawyers (barristers, advocates and solicitors) no serving judge, despite repeated requests, turned up at the scheduled three-day public “Legal Hearing.” The judiciary contended in the written memorandum, submitted—ostensibly on its behalf— by Justice Michael Corbett (then Chief Justice of the apartheid era), that the proposition was plainly unworkable and in outright violation of the much-coveted principle of judicial independence. The argument was further advanced by the judiciary that a past-focused enquiry threatened progress and could disrupt the march into the future. Thus, the judges stayed away, and their failure to attend the summons of the TRC was described as the “most conspicuous feature” of the three-day hearings (ibid.: 67).

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

The TRC Legal Hearings were regarded by the commission itself as the most crucial of a series of special hearings in view of the place of the law in apartheid. Lawyers and the judges were brought under scrutiny for their role in applying apartheid law. Lawyers and, more so, judges, it was alleged, failed to exercise their discretion when they could have in their interpretation and daily application of discriminatory laws. For Dyzenhaus, the judges had no excuse for upholding unconscionable apartheid laws (ibid.: 28).

Dyzenhaus challenged the view, canvassed in the written memorandum of the judiciary, that judges were “disempowered” in the face of parliamentary sovereignty. Judges who subscribed to this view under the principle of *the plain fact* rule of interpretation were guilty of “judicial dereliction of duty.”

He insists that the duty of judges is to maintain the rule of law that requires justice to be done at all times. It is the duty of judges to uphold “moral ideals” (ibid.: 161) even in the event that they may have their decisions overturned by appeals or trumped by countermanding legislation that was in reality a practice of the legislature during the apartheid era. Judicial resistance to apartheid laws through a purposive approach that gave primacy to common law principles of equality, equity, and fairness could at least place the government in a very uncomfortable position though it was most unlikely to alter government policy. Such conscientious objections had the potential to place the government in a position where it would, through legislation, have to admit it was operating outside rather than within the ambit of the rule of law.

Dyzenhaus argues further that where the historical record strongly suggests judges have failed in upholding their oaths of office to maintain fidelity to law (and his conception of law is one indivisible from morals), they ought to be called to account for their failure. He posits that in such situations, recourse cannot be had to judicial independence as a shield.

Independence of judges, he maintains, will not be compromised by the public hearings on how such independence was in fact compromised (ibid.: 59). I now proceed to



examine the role of the Nigerian judiciary and the need for accountability in the transition from authoritarian rule.

## VII. TRANSITION AND JUDICIAL ACCOUNTABILITY: THE NIGERIAN CONTEXT

To allow for a proper understanding of the discussion on judicial accountability in Nigeria, it is appropriate to briefly set out the political and judicial contexts that constitute the background of issues surrounding the current transition and accountability in the country. Nigeria achieved independence from British colonial rule on 1 October 1960. The country achieved republican status three years later.

The first experiment of democratic governance in the country was cut short on 15 January 1966 by a military rebellion. The military intervened with the self-imposed mission of salvaging the country from a political class perceived to be grossly irresponsible. The multireligious and multiethnic country was plunged into a protracted three-year civil war and nearly thirty years of military dictatorship under seven military regimes between January 1966 and May 1999.

The military imposed authoritarian rule by suspending certain sections of the constitution particularly those dealing with human rights and civil liberties, subordinating it to military-enacted legislations. Citizens were subjected to state-sponsored violence including murder and arson, restrictions on civil liberties, and other forms of human rights violations under the military.

Due to the prevailing level of gross human rights violations, the country acquired pariah status in the international arena with attendant negative economic, social, and political consequences. The country at various times came under international censure for her appalling human rights record. The UN Commission on Human Rights found the country in fundamental breach of its covenanted international human rights obligations (UN Economic and Social Council 1997). Virtually all successive military administrations made pretensions to instituting democratic transition from authoritarian rule. However, the military eventually handed over power to an elected government on 29 May 1999 with the promulgation of a hurriedly produced and imposed constitution.

The newly elected administration of President Olusegun Obasanjo took a cue from the various truth processes in Latin America and South Africa and announced the establishment of the Human Rights Violations Investigation Commission less than three weeks after its inauguration. The Commission came to be popularly known as the “Oputa Panel,” so named after the chairman (Yusuf 2007: 269–73).

Significantly, the Oputa Panel noted three factors that militated against upholding human rights in the country. One was the long period of military rule that fostered disregard for the rule of law. The second was the impunity demonstrated by law enforcement agents who became notorious for illegal arrests, torture, and extrajudicial killings. Last was the lack of respect for due process. Not only did successive military regimes subordinate the constitution to whimsical military decrees, they also engaged in retroactive legislation and prohibited judicial appeal. Ouster clauses were used to prevent judicial review of executive action and “legislative judgment” to direct legislation at certain individuals (Human Rights Violations Investigation Committee Report 2004: 59–66; Ogowewo 2000: 151–52). The first and last factors implicated judicial governance in the country as will be discussed below.

Successive constitutions of the country provided for a secure judicial term of office limited only by attainment of specified statutory age. The judicial branch of government thus remained the relatively most stable during the authoritarian period and after, a fact that I argue, among others (below), justifies scrutiny of the judicial role in the transition period.

#### VIII. TRANSITION, TRUTH, AND THE ACCOUNTABILITY GAP

A critical evaluation of judicial impact on governance ensures that the judiciary is assigned its “fair share of the credit: for the state of affairs in any nation. That “fair share” can also be on the debit side (Ogowewo 2005: 39). The judiciary like any other institution ought not to loathe taking the credit for its positive contributions to the course of governance and the exercise of state powers. In the same way, common sense dictates that it should submit itself to criticisms for its failures. This is relevant at all times. However, it assumes the nature of a compelling obligation in transitional contexts particularly where there is substantial basis to adduce complicity (Veitch 1999) to the judiciary for a situation of sustained gross violations of human rights and impunity.

In spite of the precedent set by the South Africa TRC, the Nigerian truth-seeking process neglected to focus attention on the judiciary. Through that neglect (with the seeming acquiescence of civil society), human rights groups, the legal profession, and the Nigerian public missed the opportunity to develop the theme of establishing the *truth* about judicial governance in the most populous black nation in the world. It is significant to note in this regard that the truth-telling process itself ultimately became a major casualty of that oversight (Yusuf 2007).

The failure of the Oputa Panel in this regard is rather intriguing considering that the Panel held special hearings for the Police and the Prisons Service— institutions that constitute an integral part of the criminal justice administration system. The Nigeria Police Force and the Nigeria Prisons Service had the legal profession, lawyers, magistrates, and judges to contend with in the execution of their duties. With regard to the notorious phenomenon of prison congestion (to cite but one example), the Nigerian Prisons Service was quick to point out that it is a hapless victim of the remand orders of magistrates and judges. Notwithstanding, the Oputa Panel, ostensibly to investigate petitions alleging gross violations of human rights of detained individuals in the various prisons, summoned the Prisons Service to give an account of its role in the violations of human rights during the decades of military rule in Nigeria. Yet the judiciary and the broader family of the legal profession were not called to account for their role in the period of authoritarian rule.

Was it the consensus that the judiciary was also a victim of military authoritarianism? Could it be a deliberate attempt to shield the constituency of the majority of the Panel's members including the chairman, from possible unsavory public scrutiny? Undue emphasis on the nature of the composition of the Oputa Panel to come to terms with the neglect to obtain an account of the judiciary may be uncharitable. A theory of misplaced institutional loyalty on the part of the Panel members appears even more unlikely in view of the unquestioned integrity of the members. There is also the fact that, at inception, the Oputa Panel held consultative forums with diverse interests in the Nigerian society including human rights and nongovernmental organizations to articulate an agenda for the Panel.

From a comparative perspective, there is also the fact that the chain of events leading to the South Africa TRC Legal Hearing was set in motion by the submission made to the TRC by a human rights lawyer alleging injustice on the part of the judiciary in the apartheid era (Dyzenhaus 2003). No petition or submission of similar purport directly challenging the judiciary is on record to have been made to the Oputa Panel. But should the omission on the part of the Oputa Panel be excused considering that the Ghana National Reconciliation Commission held a Legal Hearing similar to the South Africa TRC without a petition of the nature that spurred the latter's inquiry?

It is noteworthy that Ghana shares not only a history of British colonial rule with Nigeria but also authoritarian rule for the better part of its postindependence period (Oduro 2005: 334–39). Further, its judicial arrangements during the period were not only similar to

Nigeria's, both judiciaries similarly contended with the challenges of adjudicating in the context of military authoritarian rule.

It would appear the Commission maintained a deafening silence on judicial governance as a deliberate policy. It may have felt satisfied that the report of an earlier inquiry on the state of the Nigerian judiciary constituted sufficient scrutiny of the institution. The Panel in fact recommended full implementation of the report, which to date remains unheeded. The inquiry instituted by the late dictator, General Sanni Abacha, was headed by another respected retired Supreme Court Justice, Kayode Eso, with the report named after him. It did expose some unsavory details about the judicial institution in the country. Suffice it to say however that the inquiry was about the *state* rather than the *role* of the judiciary during years of military authoritarian rule in the country and was by no means an attempt at public scrutiny of the judiciary in the transitional context. In any case, the latter remit was temporally beyond the purview of the Eso Panel, which was constituted by and conducted under military rule. Thus, such *satisfaction* on the part of the Oputa Panel could be regarded as misplaced and out of tune with transitional justice considerations. There are several factors that justify a public accounting of the judicial role in governance during the period of authoritarian rule in the country. They can be broadly categorized: the legal-jurisprudential aspect and a sociopolitical nature.

## IX. LEGAL-JURISPRUDENTIAL DIMENSION

### A. LEGITIMIZING MILITARY RULE

The highest court in Nigeria, the Supreme Court (the Court) maintained an ambivalent attitude toward the legitimacy of military rule right from the onset of military intervention in the country's politics. The judiciary had legitimized military adventurism at the earliest opportunity to pronounce on the rebellion that brought it to power in 1966. This it did in *Isaac Boro v Republic* (1967) the first case that tested the waters of judicial attitude toward military rule. It came before the Court in December 1966, barely six months after the second military coup in the country.<sup>55</sup>

In the subsequent case of *Council of the University of Ibadan v Adamolekun* (1967) the Court decided, *inter alia*, that the mutiny that resulted in the military usurpation of executive and legislative powers was a military takeover of the apparatus of government in the country. Curiously, it went further to hold that the takeover was of a nature that kept the Constitution of the Federation intact but subject to the military decrees that suspended and modified it. It thus legitimized the unconstitutional purported "transfer" of

power by the Council of Ministers to the military who had murdered some key political office holders in the executive branch of government including the Prime Minister, Abubakar Tafawa Balewa.

The foundations of judicial obeisance to authoritarian military rule in the country, which was to become an imprimatur of most judicial decisions bearing on the constitutionality and legitimacy of military rule in the country for the better part of three decades, was however irretrievably laid by the Nigerian Supreme Court in *E O Lakanmi and Kikelomo Ola v The Attorney-General (Western State), The Secretary to the Tribunal (Investigation of Assets Tribunal) and the Counsel to the Tribunal* (1971), the *Lakanmi* case. The substantive issue in the *Lakanmi* case was the constitutionality of Decree No. 45 of 1968—Forfeiture of Assets Validation Decree—promulgated by the Federal Military Government (FMG). Among others, it directed the forfeiture of the assets of the plaintiffs/appellants for alleged corruption in public office.

The plaintiffs contended that the decree was null and void for being in violation of their property rights guaranteed by the 1963 Republican Constitution, which was the substantive constitution of the country at the time. The Attorney-General argued on behalf of the defendants/respondents that the events of 16 January 1966, which brought the FMG into power, amounted to a revolution of the Kelsenian model that destroyed the legal system. The FMG had then become the supreme legislative authority in the country whose legislative powers could not be assailed. The Attorney-General placed much store in the provisions of Decree No. 1 of 1966 (*ibid.*)—Constitution Suspension and Modification Decree—which provided, *inter alia*, that “the Federal Military Government shall have powers to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever.” He further relied on the section 1(1) of that Decree, which modified the 1963 Republican Constitution by subordinating its provisions to the supremacy of military decrees. The Court agreed with the submission of counsel for the plaintiffs/ appellants that it was vested with powers of judicial review of executive action and rejected the purported ouster of its jurisdiction by the decree, declaring it a piece of legislative judgment. But the Court, per Ademola, Chief Justice of Nigeria, nonetheless accorded recognition to the FMG not only as one deriving from “necessity” and thus a “constitutional government” within the contemplation of the 1963 Republican Constitution but also affirmed the FMG was “the Supreme Legislative body” in the country. This recognition was in spite of the fact that it rejected the argument of the FMG that it had come into power through a revolution.

Although the Court mustered some courage to insist on judicial review of the executive and legislative actions of the federal military government in the *Lakanmi* case, it capitulated in *Adejumo v Johnson* (1972). It implicitly overruled even the limited recognition it had accorded military usurpation of power in the former decision. In its place, the Court substituted an unqualified acknowledgement of the events of 16 January 1966 as a revolution.

The Court's verdict in the *Adejumo* case was sequel to the promulgation by the FMG of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1970,<sup>6</sup> 6 barely two weeks after the decision in the *Lakanmi* case. Thus, it adopted and went on to retain the *plain fact* jurisprudence in the interpretation of military decrees in much the same way as the courts in apartheid South Africa did with apartheid laws (Dyzenhaus 2003: 16–17, 83–86). The decision in the *Adejumo* case thus gave effect to the provisions of not only Decree No. 28 but that of section 1(1) of Decree No. 1 of 1966, which it had hitherto partly rebuffed in the *Lakanmi* case.

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

Mahmud rightly rejects this conflation of a revolution with a *coup d'état*. According to him, a revolution leads to a complete disintegration of existing societal structures and leads to the establishment of a new legal order that is “autonomous” of the previous order. A *coup d'état*, on the other hand, has the limited aim of capturing political power within the framework of the existing legal structures but in an illegal manner. It proceeds to seek legitimacy and recognition within or from the (pre)existing order (Mahmud 1994: 102–03).

Mahmud's position on the nature of revolutions as against *coup d'état* ought to be preferred on cursory evaluation of the political experience of authoritarianism. It has been demonstrated over time by military usurpers in Africa, Asia, and parts of the Middle East notably in the common practice of leaving the judicial institution intact and seeking judicial approbation of its legitimacy, on the one hand, and lip-service claims to

upholding the rule of law and constitutional arrangements (with certain *caveats*) by even some of the most notorious dictators, on the other.

The question of the appropriate judicial approach to military authoritarianism is a much contested one. The merits or propriety of one or the other approach constitute contentious issues that have generated (and continue to generate) scholarly interest. The fine points of the complex debates involved are outside the scope of this work. It is instructive in this regards that even Dyzenhaus cautioned in further reflections on the role of judges in the apartheid legal order that “one must be careful not to err on the side of over of underestimation” of what judges can do within an unjust or authoritarian legal order (Dyzenhaus 2001: 80–82). In the case of authoritarian military regimes, there is little doubt the response of the military—as indeed demonstrated by the enactment of the “Supremacy Decree” following the half-hearted *courageous* decision of the Nigerian Supreme Court in the *Lakanmi* case—is to override such decisions. However, that state of affairs does not detract from the case for accountability of the judiciary.

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

The question of judicial accountability in transition seeks the production of a record of judicial governance to highlight the nature, course, and impact of the judicial function in the period of social displacement occasioned by authoritarian rule or violent conflict. Is it not the case that the judiciary served to perpetuate a subversion of the constitution that established it and to which it was sworn to protect? In the Nigerian context, the question can be raised as to why, for instance, did the Supreme Court not give consideration to the question of the origin of its judicial powers in the foregoing cases?

According to Mahmud, any court that evinces a serious inclination toward “strict constitutionalism” in the aftermath of a *coup d'état* is *ab initio* obliged to consider the sources of its own powers to determine whether they are derived from the “old” or “new” constitutional arrangement (1994:125). Following on Mahmud’s position, it can be argued that consideration of the basis of judicial power after the military putsch may have proven decisive to the course of jurisprudence in the period of authoritarian military

rule in Nigeria. This is particularly important when it is considered that the Republican Constitution of 1963 in operation before military incursion into governance in the country (unlike the South African apartheid constitutions) had an unequivocal constitutional supremacy clause as the first substantive provision.

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

No doubt writing from the vantage position of the pinnacle of a judiciary that was established and continues to operate within the most controversial and longest ongoing conflict in the post-World War II era, Barak asserts that regime changes impact on the judiciary. Such changes affect all the institutions of state and condition their perception of their role (Barak 2003: 24–25). Proceeding on that view, the absence of democracy impacts the role of the judiciary and its claims to independence. The truth-telling process in the context of the political transition in Nigeria provided a prospective forum for the clarification of the legal or other considerations that conditioned the jurisprudence of the courts in jettisoning the supremacy clause in the constitution at the relevant period. But the opportunity for public accountability of the course of judicial governance was frittered away.

#### B. IMPERATIVES OF POPULAR SOVEREIGNTY

Section 14(2) (a) of the Nigerian Constitutions of 1979 and 1999 (the latter constitutes the *transition* some critics insist, *interim* constitution of Nigeria) lends constitutional support to the case for accountability of the judiciary in Nigeria to the people. Both constitutions, fairly representative of constitutionalism in the Nigerian polity in the postindependence period, specifically provide for popular sovereignty. The section states that “sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority.”

The illegality constituted by the subversion and impairment of the popular will of the people as embodied in the constitution, through the use of “superior force,” by the military according to Ogowewo, alters their expressed wishes on how they prefer to be governed (2000: 152). Successive military administrations foisted untold hardship and



suffering on the mass of the people (Human Rights Violations Investigation Committee Report 2004). What role did or could have the judiciary played in that suffering? This ought to have constituted an important thematic focus of the truth-telling process in Nigeria in view of its broad terms of reference. The terms included a remit to identify all individuals, authorities, institutions, or organizations that may be held accountable for gross violations of human rights and determine the motives for the violations or abuses. Further, the unequivocal provisions of the constitution provide support for the proposition that all institutions of the Nigerian state owe a duty of public accountability to the people, the source of all governmental powers. This is implicit in the specific vesting of sovereignty in the people of Nigeria by the 1979 constitution, which Ogowewo argues is the legitimate and validly subsisting constitution of the country (2001: 140–41) and the *transition* constitution of 1999 now operative in the country. The judiciary can thus not be excused for lending itself to the hardship wrought on the national psyche by military rule in Nigeria.

It may be the case that there is a need to protect the judiciary from being made pliant to unbridled subjection to public opinion and that it maintains some respectable distance from the flux of (sometimes indeterminate) popular opinion. It is however in the institutional interest of the judiciary that such autonomy be conditioned by the realities of the society from which it derives authority if it hopes to maintain relevance. The demands of the period of transition, when the need for social restructuring is more imperative than at any other, is perhaps the most momentous for the display of such recognition.

In the Nigerian situation, the case for judicial accountability is made stronger by the fact that judicial officers are usually not only unelected (Ogowewo 2005: 40), unlike some American jurisdictions, but also immune from the democratic check on public officeholders characteristic of the executive and legislature. The public is thus precluded from directly participating in and imposing sanctions on perceived improper or perverse use of power by the judiciary in the way it generally does with politicians in the executive and legislative arms of government through elections, recall, judicial review, etc. Even military adventurers in power have been known not to be completely immune from one or the other form of public sanction or accountability as the trials of Haile Mengistu and Hissen Habre of Ethiopia and Chad, respectively, have shown.

## X. SOCIOPOLITICAL DIMENSION

### A. CORRUPT AND COMPROMISED

There is consensus within and outside legal circles in Nigeria that the judiciary has been palpably corrupt. It had become a notorious fact that in the period of authoritarian military rule in the country, justice was available for sale to the highest bidder. The situation in the courts had become so bad that trials had turned into “charades” manipulated by well-heeled litigants.

The situation was complicated further by “unethical lawyers” and “faithless judges” (Olowofoyeku 1989: 67–68; Oko 2006: 14–17). The deplorable situation had even been lamented by Justice Oputa who was to head the Human Rights Violations Investigation Commission (HRVIC) almost two decades earlier (Oputa 1981: 9).

The perception that corruption exists in the judiciary has not changed, though a recent analysis suggests it has been reduced (Osinbajo 2007). The perception has been carried over into the transition period (Oko 2006: 19– 20, 26, 31). The judiciary itself is aware of this unwholesome state of affairs. Two leading judicial officers recently warned of dire consequences awaiting judges who engage in corruption in the discharge of their duties (Daily Independent 2007).

Further, by several accounts, the judiciary had become severely compromised (Olowofoyeku 1989: 59). The nature of military rule in the country led to severe hemorrhaging of the human rights of citizens. Justice Olajide Olatawura has observed that military rule weakened the rule of law through the introduction of ouster clauses as well as suspension of human rights provisions in the constitution (2000). Significantly, he made this observation at the most important annual convocation of Nigerian judges in his capacity as the Administrator of the National Judicial Institute responsible for the continuing professional education of judges in the country. Of further significance is the fact that his judicial career was largely spent under military authoritarian rule. The observation justifies the case for some form of accountability by the judiciary even if to highlight whether there was dereliction on the part of the institution entrusted with the duty of enforcing those rights.

The position that the judiciary ought to *tell its truths* for its role in the pretransition period further receives support from the view expressed by the Oputa Panel that the courts had become “toothless bull dogs” in the years of military rule faced with decrees ousting their jurisdiction in many cases (Human Rights Violations Investigation Committee Report 2004). The compromised status of the Nigerian judiciary is further compounded by a legacy of questionable appointments characterized by nepotism and prebendalism (Oko 2006: 48–54).

## B. PUBLIC APATHY FOR DUE PROCESS OF LAW

Public mistrust of the judiciary constitutes a danger to societal cohesion and respect for the rule of law. Citizens may resort to self-help rather than have recourse to the law and the judicial institution to resolve disputes. The effect of resultant distortions may be fraught with serious negative consequences for hitherto troubled societies where a considerable number of citizens may be faced with the challenges of coming to terms with the hurt they have suffered in the past that still remain with them. Thus, calls for reform of the judiciary have been particularly strident from stakeholders even in the transition period. Voicing the concern of civil society groups, Joseph Otteh, Executive Director of Access to Justice, a leading nongovernmental organization focused on the judicial sector, stated that the judiciary required a “full turn around maintenance” in view of the perversion of the rule of law occasioned by structural deficiencies of that branch of government (Ahiane 2003).

Cynicism about the relevance of judicial governance had developed in Nigeria. This was due in part to the dysfunctional judiciary that was steeped in corruption (Oko 2006: 24–31). In turn, the public attacked the judicial institution. Judicial decisions became highly suspect, sometimes without justification but owing to the persistent institutional reputation for corruption. How did the judiciary come to such infamy as a largely failed institution in the Nigerian polity?

An account of the circumstances under which the judicial role was performed is required not only for its historical value, though this may be value enough. Rather, it ought to be produced for its socioanthropological potential of providing a viable prognosis for the way forward in the quest for justice and reinstitution of the rule of law in the emerging democratic society. Transitional justice theory recognizes the right of individuals and society to the reform of compromised and deficient institutions. The right to transformation of afflicted institutions can only be properly realized where the opportunity is provided for developing and scrutinizing accounts of the conduct of state institutions in the troubled period.

## C. UNACKNOWLEDGED VICTIMS?

It is something of a paradox that the Oputa Panel neglected to hold a hearing on the legal profession and the judiciary for an account of its governance during the period of military authoritarian rule in Nigeria. This is the case because the judiciary itself could be considered a victim of military rule. The paradox is heightened by the poignant description of the institution at that time as a “beleaguered fortress” (Olowofoyeku 1989:

71). That description notwithstanding, could it be that the judiciary felt itself under such a heavy burden of complicity for (mis)governance that surpassed (and thus precluded) any sense of victim-hood during the decades of military authoritarian rule? A host of questions regarding the course of judicial governance in the authoritarian period in the country remain unaccounted for.

The experience of the judiciary during the years of authoritarian rule in Nigeria was quite different from that of South Africa in a number of ways. Unlike the South African judiciary, the judges in Nigeria could themselves be considered, though in a limited sense, victims of human rights violations. As Dyzenhaus pointed out, postappointment, South African judges were secure in their tenure during the apartheid era, and they enjoyed relatively comfortable conditions of service. In Nigeria, the security of tenure was breached and judges were unceremoniously dismissed or retired in a good number of cases during the years of military rule (Olowofoyeku 1989: 59–62). Judicial pay was poor (*ibid.*: 64) particularly when compared with the salaries paid to military officers in executive positions. The tenure of judges was on many occasions violated in contravention of the Basic Principles of the Independence of the Judiciary (1985) and the Montreal Declaration on the Independence of Judges (1983).

They lacked proper housing, worked under strained conditions, took notes in long hand, administered justice in ill-equipped courtrooms and chambers, worked with ill-trained and unmotivated support staff, etc. (Oko 2006: 42–48). Cases of violations of judicial tenure must however be qualified in one respect; the military regimes were not noted for interfering with the tenure of judges on the basis of adverse decisions against governmental actions. Rather, judicial purges were invariably premised on allegations of corruption even if, like in many other aspects of military conduct of power, such purges were carried out in breach of due process.

Thus it is still proper to contend in the Nigerian context (like Dyzenhaus did in the case of South Africa) that the people were entitled to know why judges, who were despite their vantage positions to affect the course of governance, neglected the opportunity but “made the wrong moral choice” (Dyzenhaus 2003: 89–90). This is the case because, like in South Africa, Nigerian judges could have maintained fidelity to law (and it is again crucial to note that few did) since they were not required to follow the orders of the power usurpers. For all of the reported cases of state-sponsored murder during various military regimes, not even in the case of the most notorious generals—Babangida and Abacha—were judicial officers targeted. Nigerian judges are thus obliged to account for why they sought “a warm place by the fire” (Pound 1922: 26) rather than uphold *the law*

for which they were specially prepared by their training and entrusted by their oath of office.

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

So why didn't the judges come forward as victims? Did they feel it was below their office to do so? Could it be a result of some resentment and contempt for the truth-seeking process similar to the response of the judiciary in South Africa to the TRC? The judges in Nigeria have now dropped their lethargy to combat perceived unjust treatment in the hands of the executive that was at play under military authoritarian rule.

Unlike in the past, when dismissal and retirement of judges went virtually unchallenged, in the wake of the transition to democratic governance, a number of judges have challenged their perceived wrongful dismissal or retirement from the bench in the courts of law. At least in one instance, a dismissed judge has been ordered reinstated following successful legal challenge of his sack for corruption almost three years later (Ughegbe 2007). In all events, that dismissed judicial officers seemed to have been resigned to "fate" under military rule in the past perhaps speaks volumes of their self-perception and the institution of the judiciary at that period of Nigerian sociopolitical and legal history.

In view of the foregoing analyses, the failure of the Oputa Panel to call the Nigerian judiciary to account for its role in governance in the period of authoritarian military rule in the country can by no means be regarded as a *faux pas*. Even if arguably there is a good case to be made for the judiciary as victim of authoritarian rule, the truth-telling process in Ghana clearly demonstrates that such a finding does not preclude the conclusion that the judiciary was complicit for executive (and sometimes legislative) actions that deprived citizens of their fundamental rights (Ghana, National Reconciliation Commission 2004: 131). Thus, there is the need to publicly scrutinize the course of judicial governance in postauthoritarian societies as a cardinal measure of institutional transformation. Following on the recognition that the judiciary in postauthoritarian contexts will be faced with enormous challenges of dispute resolution (Widner 2001), its

institutional transformation following a period of siege is critical to the survival of democracy and the rule of law.

## XI. CONCLUSION

The iconography of Justitia, the familiar symbol of law and justice, is one of the few that has continued to survive Renaissance art. Both the citizen and the state remain in obeisance to the image of the female, a regally robed and impersonal goddess. The reason for this, as succinctly stated by Loughlin, is the necessity of the state to maintain order. The judiciary plays a key role in the maintenance of that order (Loughlin 2003: 61–62).

While Loughlin's position is arguably more apposite in a democratic society, it nonetheless has resonance in authoritarian societies as the Nigerian experience has shown. The military at no point in the course of its hold on political power in the country laid claim to judicial capability in the way it was quick at emphasizing its *leadership* abilities derived from military training to justify its hold on power where the political class had *failed*.

I contend that this state of affairs constitutes a potent weapon for the defense of the rule of law and human rights by the judiciary and, for our purposes, stronger justification for insisting that the judicial institution maintain an unwavering fidelity to law in all circumstances. Some scholars insist there are grave limitations to or even no latitude at all available for affecting the state of affairs against a military regime bent on having its way (Ojo 1971). While this may be tenable in certain circumstances, I have argued (like Dyzenhaus) that the “tales of disempowerment” such a position portends may not be adequately represented in the totality of judicial experience in illiberal regimes. In any case, there is much to be said for the need for judicial accountability in the transition period for the tacit admission of complicity in governance inherent in that position.

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

The case for such a process is arguably stronger if it is considered that the Nigerian judiciary was a creation of a democratic constitution.<sup>7</sup> The antecedents of the Nigerian judiciary imposes on it a heavier moral burden of public accountability for legitimizing what, in retrospect, was to be a string of authoritarian regimes that committed a range of atrocities on the people and deprived them of the right to determine how they were governed for about three decades, plundering the country's resources in the process and leaving not a few in misery.

The purview of accountability in transitions ought to be extended to the judiciary in recognition of its role in governance as the third arm in the tripod of state institutions. Public accountability ensures comprehensive accounts of governance in transitional societies, which is essential to charting a transformative agenda for all the institutions of state. Institutional transformation is at the heart of the aspiration to reinstitute the rule of law in postauthoritarian as well as postconflict contexts.

Traditional notions of judicial independence gird objections to public accountability of the judiciary, setting it apart in the accountability paradigms applied to the other arms of government. I have argued that objections to judicial accountability are rooted in conceptions of the judicial function in liberal democracies (distinguished by the absence of social upheavals) to the neglect the dynamics of law and justice in transitional contexts. In view of the concession that the interpretive role of the judiciary is not immune to the vagaries of time and place, but rather contingent on it (Barak 2003: 25), fixation on a single ostensibly univocal judicial paradigm for all climes and periods is misplaced at best.

The Nigerian experience of military authoritarianism has not been one of physical decimation of the judiciary. Rather, the judiciary acquiesced to the rule of force in many cases. According to Mahmud, there are four possible options for the judiciary faced with the challenge of a *coup d'état*. The options are (1) validating the usurpation; (2) declaring the usurpation unconstitutional and hence invalid; (3) resignation, thereby refusing to adjudicate the legality of the demise of the very constitution under which the court was established; or (4) declaring the issue a nonjusticiable political question (Mahmud 1994: 100).

The courts in Nigeria chose the option of validating and legitimating the rebellious act. The judiciary was quiescent (with few notable exceptions) to the suspension, abridgement, or outright abrogation of human rights and constitutionalism by successive military regimes. Years of military dictatorship thus bequeathed the country with a conservative and compromised judiciary. The versatility of the judiciary in making an

expeditious reformation could have notable impact on the course of democracy, human rights, and the rule of law in transitional societies.

It is widely accepted that independence of the judiciary is required for ensuring the rule of law prevails and guarantee of individual and group rights (Tolbert and Solomon 2006: 45–46). But the very proposition presupposes an *independent* judiciary not one that acquiesces to the subversion of the rule of law; a charge at the door of judiciaries that give effect to military authoritarian rule like the Nigerian experience.

The lack of independence demonstrated by the judiciary in the pretransition period has arguably continued to feature in its recognition of questionable decrees (now styled acts) including those introduced on the very eve of the handover that were unconnected to the handover but instead dealt with the regulation of the capital market. In other words, the military were purporting to legislate for the civilian government a few hours before the civilian government took over. The courts in true fashion never questioned this (Ogowewo 2000). Such judicial posturing constitutes eloquent testimony to the need for public accountability as a tool for effecting institutional transformation of the judiciary in the transition era.

The failure of the truth-telling process to challenge the judiciary to *tell its truths* in governance during the period of authoritarian rule in Nigeria constitutes a major flaw in the otherwise laudable conduct of the Oputa Panel. There is much to be said for the apprehension that the Nigerian judiciary still considerably staffed and controlled by judicial officers appointed by successive military regimes remains untransformed in the transition from authoritarian rule.

Critics have asserted that in the aftermath of the transition to civil rule in the country, “The Nigerian judiciary is still in disarray” (Oko 2006: 46). This is due at least in part to the yawning accountability gap on judicial governance in the period of the country’s experience of authoritarian rule. That gap is a threat to democracy and the rule of law in the country. It is a critical neglect that currently constitutes a veritable challenge to the transition in the country. The process of transition requires an independent and formidable judiciary to deepen democracy and rule of law after decades of authoritarian rule. The neglect may continue to haunt the Nigerian society in the foreseeable future. Worse still, it could engender a reversal of the landmarks achieved in the country’s transition.

#### NOTES

Throughout this article I use the terms “court” and “judiciary” interchangeably.

<sup>2</sup> The themes of judicial independence and judicial accountability have attracted (and continues to attract) considerable scholarly interest of both legal writers and jurists alike. This is evidenced by the works documented in Atchison, Lawrence, and Russell (1999).

<sup>3</sup> Loughlin (2003: 162–75): “Locke makes an important innovation in asserting that political power rests in individuals and that this power is delegated through their consent to an institution (whether monarch or parliament or both) which, in some form or the other, can be taken to be representative of the people” (ibid.: 165).

<sup>4</sup> See Friedland (1966: 622–29) for a discussion of some of these conventions, declarations, and statements of principles. They include the Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, the Montreal Declaration on the Independence of the Judiciary, the European Convention on Human Rights, the American Declaration of the Rights of Man, and the African Charter on Human and Peoples Rights.

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<sup>5</sup> The first military coup took place on 15 January 1966, and dissensions within the military led to the second *coup d'état* in July 1967. For an in-depth socio-political analysis of military rule in Nigeria, see Osaghae (1998).

<sup>6</sup> This presaged the pattern that subsequent military usurpers adopted in the country. Every other *coup d'état* in the country was declared along with the passage of not only a Constitution Suspension and Modification Decree but also a (Military) Supremacy and Enforcement of Powers Decree.

<sup>7</sup> Of course this is the case only insofar as we refer to Nigeria as an independent nation and disregard the colonial heritage. The analysis in this article wholly depends on that presumption.

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