Rule of Law and Politics of Anti-Corruption Reform in a Post-Authoritarian State

Yusuf, Hakeem

DOI:
10.5235/096157611794895264

(2011) 22 KLJ 57–83

Rule of Law and Politics of Anti-Corruption Campaigns in a Post-Authoritarian State: The Case of Nigeria

HO Yusuf*

1. INTRODUCTION

There is a global 'corruption eruption'.[1] While developed countries appear to a great extent to have brought corruption under control, it remains a matter of concern globally. In Africa, a succession of dictators provides classic case studies of political corruption and abuses of power.[2] Not surprisingly, there is considerable criticism of political corruption on the continent, given the obvious links among corruption, poverty, poor economic performance and underdevelopment.[3] As Kofi Annan reminds us, the effects of corruption are 'disproportionately' felt in poor countries, as it leads to the diversion of funds that are meant for development and undermines governments' ability to provide even the most basic social services. This is apart from the propensity of corruption to accentuate inequality and injustice.[4]

The Nigerian experience of political corruption supports Annan's view. Corruption accounts largely for the growing poverty and under-development that is threatening the

* Lecturer in Law, School of Law, Queen's University Belfast, UK. I am grateful to Colin Scott (University College Dublin), Kamil Omoteso (De Montfort University) and Rory O'Connell (Queen's University Belfast) for their comments on earlier drafts of this article. All views expressed and remaining errors are the responsibility of the author.

1 Robert Williams, 'Introduction' in Robert Williams (ed), *Explaining Corruption* (Edward Elgar, 2000) ix–xi.

2 Some commentators are of the view that, compared with elsewhere, corruption in the continent is 'modest'. See Morris Szeftel, 'Misunderstanding African Politics: Corruption & Governance Agenda' (1998) 76 *Review of African Political Economy* 221, 222–3.

3 Sarah Bracking (ed), *Corruption and Development: The Anti-Corruption Campaigns* (Palgrave Studies in Development, 2007).

4 United Nations Office on Drugs and Crime, 'Foreword', United Nations Convention Against Corruption (2004) iii.

country's socio-economic and political well-being.[5] The discussion in this article will be best appreciated if the reader bears in mind the view within the international system that 'combating corruption and related social vices' is not only a 'fundamental prerequisite' for sustaining ongoing democratisation efforts in the country; it is also central to the institutionalisation of the rule of law, as well as the maintenance of public order and security.[6] Commentators at the domestic level share similar sentiments.[7] The consensus on the need to address the problem of corruption has led to the introduction of an anti-corruption campaign in which the judiciary has become a key player.

The reliance of the anti-corruption campaign on new mechanisms and institutions—such as the Due Process Office, the Independent Corrupt Practices and Other Related Offences Commission (ICPC)[8] and the Economic and Financial Crimes Commission (EFCC)[9]—has made the judiciary, an institution with a questionable reputation,[10] a key participant in the campaign. This article evaluates the judicial role in the anti-corruption campaign instituted in the country, with specific focus on political corruption. What is the nature of judicial involvement in the campaign? In light of its accountability-deficit, can the judiciary confer legitimacy on the campaign? What have been the implications of its involvement for the rule of law? These are some of the important questions that this article addresses in the context of the first decade of Nigeria's post-authoritarian transition.

The rest of the article proceeds in the following way. Part 2 provides some contextual and theoretical background to the discussion, including a brief clarification of which aspects of the rule of law are relevant to the discussion that follows. This is followed by a consideration of the definition and conceptualisation of corruption, with specific reference to political corruption. The institutionalisation of corruption in Nigeria is then examined, along with the renewed anti-corruption campaign following the political transition. Part 3 evaluates the involvement of the judiciary in the anti-corruption campaign and its consequences for the rule of law. This discussion covers public

5 See eg Mamman Lawan, 'Liberal Legalism and the Challenge of Development in Nigeria' (2009) 2 *Law, Social Justice and Global Development Journal* 1, 6–9, www2.warwick.ac.uk/fac/soc/law/elj/lgd/2009_2/lawan/Lawan.pdf (accessed 19 November 2010); United Nations Office on Drugs and Crime, *Assessment of the Integrity and Capacity of the Justice System in Three Nigerian States: Technical Assessment Report* (2006) 1.

6 United Nations Office on Drugs and Crime, *ibid*, 3.

7 A good exposition is provided in the contributions in David Enweremadu and Emeka Okafor (eds), *Anti-Corruption Reforms in Nigeria since 1999: Issues, Challenges and the Way Forward* (IFRA, 2009) and Ilufoye Sarafa Ogundiya, 'Corruption: The Bane of Democratic Stability in Nigeria' (2010) 2 *Current Research Journal of Social Sciences* 233.

8 Established under the Independent Corrupt Practices and Other Related Offences Act 2000, now repealed and replaced by a 2003 Act of the same name.

9 Established under the Economic and Financial Crimes Commission (Establishment) Act 2002, now repealed and replaced by a 2004 Act of the same name.

10 Hakeem O Yusuf, *Transitional Justice, Judicial Accountability and the Rule of Law* (Routledge, 2010) 79–80.

perceptions of the role of the judiciary in the campaign. To conclude, in Part 4 I suggest that the institutional involvement of the judiciary in the anti-corruption campaign has not been satisfactory overall. In some important ways, the judicial role in the campaign has threatened, rather than promoted, the rule of law.

2. BACKGROUND

The Rule of Law

Apart from the concept of 'justice', perhaps no other concept in contemporary legal discourse provokes debate in the way 'the rule of law' does. There is an ever-growing body of literature devoted to the concept. This article does not focus on the subtleties of the debate around this rather 'elusive' concept,[11] but two elements of Diceyan constitutionalism—the principle of equality before the law and determination of citizens' rights by the courts—are relevant to the discourse in this article. The rule of law constitutes an important, even indispensable, foundation for any process directed at ensuring transparency in the exercise of power, principally where this has been displaced by the incidence of authoritarian rule (or even conflict). The normalisation of equality before the law as a fundamental principle for organising the state is central to ensuring the accountability of those who govern. Advocates of both thin (formal) and thick (substantive) conceptions of the rule of law agree that these elements are core aspects of it.[12]

A combination of the rule of law elements of equality before the law and the determination of citizens' rights by the courts can construct a paradigm of accountability for the exercise of power. The rule of law is constituted into a critical mechanism for ensuring transparency in the interaction of government with citizens (state-society relations) and individuals *inter se*. This paradigm concretises the relevance of the judiciary in its 'guardian institution'[13] role in the (re)construction of the rule of law. This is very important in the context of a post-authoritarian state such as the one in focus.

11 See eg Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004); Peter Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) 62 *Public Law* 467.

12 For an analysis of formal/thin as well as substantive/thick varieties of the rule of law, see, respectively, Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2009) 210; Thomas Carothers, 'The Rule of Law Revival' in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment International, 2006) 4.

13 Adriaan Bedner, 'An Elementary Approach to the Rule of Law' (2010) 2(1) *Hague Journal on the Rule of Law* 48, 67.

Political Corruption: Definition and Concept

Defining corruption is not an easy task.[14] The difficulty in coming up with a definition is partly attributable to corruption's multidimensional nature. What is considered a bribe or inducement in one society or culture may be regarded as a gift in another.[15] A related problem that then arises is how to determine applicable standards on what constitutes corruption. The issue is complicated by the different standards—social and legal—that operate across different institutions and societies. The complexities of defining and conceptualising corruption are further amplified by the interplay of different perspectives from which it can be analysed: law, public interest and public opinion.[16]

However, it is possible to identify symmetries of understanding of corruption across jurisdictions, specifically in the public sphere. At the international level, the United Nations Convention Against Corruption (UNCAC) demonstrates this in two important ways. First, there is a predominance of references to what I will call 'political' corruption in UNCAC. While it recognises private sphere corruption, UNCAC clearly focuses extensively on political corruption. UNCAC's 'statement of purpose' declares that it is designed to 'promote integrity, accountability and proper management of public affairs and public property'.[17] Second, the preamble to UNCAC draws attention to other international, regional and multilateral instruments targeted at checking corruption. These instruments emphasise global consensus on the scourge of corruption and the challenges it poses to effective governance.[18] It is similarly possible to identify the criminalisation of corruption in a range of domestic legislation within virtually every legal system. These symmetries of understanding on what constitutes corruption support the view that a consistent feature in various definitions of corruption is the notion that corruption is some form of deviation from acceptable norms that prevail (or at the least, are believed to prevail) in a particular context.[19]

14 John Gardiner, 'Defining Corruption' in Arnold J Heidenheimer and Michael Johnston (eds), *Political Corruption: Concepts and Contexts* (Transaction, 3rd edn 2002) 25.

15 Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reforms* (Cambridge University Press, 1999) 91–110.

16 For a legal framing, see Franklin E Zimring and David T Johnson, 'On the Comparative Study of Corruption' (2005) 45(5) *British Journal of Criminology* 793.

17 UNCAC (n 4) Art 1(c).

18 These instruments include the Inter-American Convention against Corruption, adopted by the Organization of American States on 29 March 1996; the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, adopted by the Council of the European Union on 26 May 1997; the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organisation for Economic Co-operation and Development on 21 November 1997; the Criminal Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 27 January 1999; the Civil Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 4 November 1999; and the African Union Convention on Preventing and Combating Corruption, adopted by the Heads of State and Government of the African Union on 12 July 2003.

19 Carl J Freidrich, 'Corruption Concepts in Historical Perspective' in Heidenheimer and Johnston (n 14) 15–16; Rose-Ackerman (n 15) 91.

Morris Szeftel defines political corruption as the 'misuse' of 'public office or public responsibility' to secure 'private gain'.[20] This definition accords with the more comprehensive features of political corruption identified by Mark Philp. According to Philp, it is possible to recognise corruption in the violation of public trust in the individual. It is identifiable in conduct that harms the public interest, or deliberate engagement in acts that constitute exploitation of a position for personal or private gain. It may alternatively be the act of conferring a benefit on an individual in a manner that wrongly denies another equally deserving individual access to the same benefit. Thus, abuse of public office is a prominent, if not defining, feature of political corruption. It refers principally to unethical conduct on the part of a public official.[21]

This article adopts both conceptions of political corruption. Political corruption is defined as the misuse of public office for private gain by an individual entrusted with public duties. The significance of political corruption is underlined by the aforementioned focus of UNCAC, the first legally binding international instrument in the area of corruption, on political corruption.[22] The discussion in the section that follows, on the roots of the problem of corruption in Nigeria, suggests that political corruption is central to the institutionalisation of corruption in the social fabric of society.[23]

Legacy of Corruption: From Colonial to Military Authoritarian Rule

The seeds of corruption in Nigeria are as old as Nigerian statehood itself.[24] McMullan has argued that colonial governance made corruption inevitable in the country. The institutional framework for corruption which has now pervaded the country is a product of colonialism. The country has witnessed the perpetuation of a 'literate government' ruling an 'illiterate society'. This refers to a government constituted of literate public servants, initially colonial, later indigenous (post-independence), governing a predominantly illiterate society through British imperial structures. There exists a space of incomprehension between the officials, agencies and instruments of government on the one hand, and society on the other. It is within this spatial incomprehensibility that corruption thrives. It is a dynamic of undue opportunity which allows the public official

20 Szeftel (n 2) 221.

21 Mark Philp, 'Conceptualising Political Corruption' in Heidenheimer and Johnston (n 14) 42–58.

22 There are various forms of corruption; this article focuses essentially on political corruption. For the view that political corruption has become a global problem and why it should constitute a source of serious concern see Paul Heywood, 'Political Corruption: Problems and Perspectives' (1997) 47 *Political Studies* 417.

23 Ilufoye Sarafa Ogundiya, 'Political Corruption in Nigeria: Theoretical Perspectives and Some Explanations' (2009) 11(4) *Anthropologist* 281, 287–9.

24 For discussion of how corruption has been an issue from the late colonial period see Robert L Tignor, 'Political Corruption in Nigeria Before Independence' (1993) 31(2) *Journal of Modern African Studies* 175; Paul D Ocheje, 'Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000' (2001) 45(2) *Journal of African Law* 173, 174–5.

to exploit the unlettered citizen at every turn. The hapless citizen seeks to protect himself from the power-wielding public official and becomes a(n) (un)willing giver of some form of inducement.[25]

The social context is complicated by the existence and operation of a system of laws considered alien to the people. The legal regime has proven problematic and fostered corruption for at least two important reasons. First, there is the very nature of some laws, which may be best suited to Britain. The socio-political background to such legislation is grounded in British society and experience and is plainly inappropriate for Nigeria, or any other West African country for that matter. Secondly, many enactments are simply 'law and order' legislation designed to subordinate society to imperialism. Many such laws have remained on the statute books. They suited the dictatorial designs of successive authoritarian rulers who replaced colonialism (almost naturally) within a few years of independence in many African countries. Over time, the privileged public service in African countries appropriated this legal regime to create a 'climate of corruption',[26] which has permeated society with disturbing impunity.

Anti-Corruption: Legal and Institutional Framework in the Pre- and Post-Authoritarian Periods

The legal and institutional framework for combating political corruption has over the years moved from generic provisions in criminal codes, to specific and targeted legislation in the periods before, during and after the various military regimes in the country. Such generic provisions include sections 98 (and 98A–98D), 99 and 104 of the Criminal Code, as well as sections 115–122 of the Penal Code. However, the provisions are inadequate as they deal only with bribery and arbitrary conduct of public officers; these are only two of the various forms of corruption and abuse of office that take place. The criminal codes conspicuously omit misappropriation and outright theft of public funds for instance, which, along with bribery, are at the heart of political corruption in Nigeria.

This inadequacy appears to have informed specific and targeted legislation on political corruption, which includes the Public Officers (Investigation of Assets) Decree,[27] the Corrupt Practices Decree[28] and the Recovery of Public Property (Special Military Tribunals) Decree,[29] promulgated by successive military regimes. Anti-corruption agencies also created by the military but which were hardly utilised include the Public

25 M McMullan, 'A Theory of Corruption Based on a Consideration of Corruption in the Public Services and Governments of British Colonies and Ex-Colonies in West Africa' in Robert Williams (ed), *Explaining Corruption* (Edward Elgar, 2000) 1, 8–10.

26 Gabriella Montinola and Robert Jackman, 'Sources of Corruption: A Cross-Country Study' (2002) 32 *British Journal of Political Science* 147, 156.

27 (No 5 of 1966).

28 (No 38 of 1975).

29 (No 3 of 1984) as amended by Decree No 8 of 1984 and Decree No 21 of 1986.

Complaints Bureau (PCB), the Corrupt Practices Investigation Bureau (CPIB), the Code of Conduct Bureau and Tribunal[30] and the Public Complaints Commission[31]. In the post-authoritarian period, the most prominent statutes to have established agencies to combat corruption are the Independent Corrupt Practices and Other Related Offences Act (ICPC Act),[32] the Economic and Financial Crimes Commission Act (EFCC Act),[33] and the Money Laundering Act[34]. Beyond this, there are a number of further mechanisms and institutions aimed at addressing corruption in the country. Some analysts have expressed the view that the multiplicity of legislative provisions and institutions creates jurisdictional conflicts, and hence has the potential to 'exacerbate rather than reduce' the incidence of corruption in the country.[35]

The ICPC Act, which is directed only at public officers, has been described as the 'most comprehensively drafted and tightly worded' anti-corruption legislation in the country's history.[36] Section 2 of the Act defines 'corruption' as including 'bribery, fraud and other related offences'. This rather 'vague definition',[37] while mirroring the definitional problems of corruption discussed earlier, is arguably a positive rather than a negative element of the legislation. It provides an opportunity to capture other forms of corruption and abuses of power in the public sector, such as exceeding contract approval ceilings through the mechanism of contract-splitting, payment for bogus or unexecuted contracts, corrupt enrichment, and public procurement fraud.

In any event, several sections of the ICPC Act criminalise certain other specific corrupt practices. These include contract inflation, award of contract without budget provision, and diversion of funds from one budget head to another.[38] It is also important to note that while the ICPC Act lists only a few corruption and related offences, it also empowers the Commission to investigate and prosecute corruption and related offences in extant legislation, most notably the Criminal and Penal Codes operative in the southern and northern parts of the country respectively.

Section 6 of the Act grants the ICPC wide-ranging and unprecedented investigatory, administrative and educational functions relating to corruption and the running of government ministries, agencies, corporations, and related bodies. It is under a duty not only to receive and investigate reports of corruption and in appropriate cases prosecute offenders, but also to 'examine the practices, systems and procedures of public bodies and where, in the opinion of the Commission, such practices, systems or procedures aid

30 Cap M18, Vol 9 Laws of the Federation of Nigeria 2004.
31 Established by Decree No 31 of 1975, amended by Decree No 21 of 1979.
32 Cap C 31, Vol 4 Laws of the Federation of Nigeria, 2004.
33 Cap EI, Vol 5 Laws of the Federation of Nigeria 2004.
34 Cap M18, Vol 9 Laws of the Federation of Nigeria 2004.
35 Ezenwa Ngwakwe, 'An Analysis of Jurisdictional Conflicts among Anti-Corruption Laws and Institutions in Nigeria' in Enweremadu and Okafor (n 7) 43.
36 Ocheje (n 24) 177.
37 *Ibid*, 178.
38 See eg ICPC Act, s 22(3)–(6).

or facilitate fraud or corruption, to direct and supervise a review of them'. The ICPC is also required to educate and enlighten the public on corruption and related offences, with a view to enlisting and fostering public support for the anti-corruption initiative. Further, the investigatory powers of the independent commission are quite broad. In the performance of their duties, ICPC officers have all the immunities conferred by law on a police officer[39] and the power to seize all movable and immovable properties reasonably suspected to be the subject matter of, or evidence relating to, an offence.[40]

Transition and a New 'War' Against Corruption

Notwithstanding the legal and institutional regime, corruption has been identified as a major cog in the wheel of socio-economic development and public service delivery in the country.[41] By the time Nigeria moved away from authoritarian rule in 1999, combating the scourge of corruption was one of the foremost concerns of Nigerian society. Not only had the country earned a reputation for corruption internationally, combating it had also become a major 'policy imperative' for any government intent on moving the country in the direction of socio-economic recovery and development.[42] Corruption has 'eroded' the economic, social, political and moral foundations of the polity, rendering it virtually 'helpless and hopeless'.[43] Punishing political corruption has become a daunting task.[44] Ironically, successive regimes, military and civil, in turn, have sought legitimacy through various, much-vaunted, anti-corruption policies.

Following the political transition to civil governance at the end of May 1999, there has been a demonstrable, renewed interest on the part of both the state and society to combat the scourge of corruption.[45] Measures taken by the government, specifically the Obasanjo administration[46] as stated earlier, include the establishment of two complementary anti-corruption agencies, the ICPC and the EFCC. The Bill relating to the creation of the ICPC was the first federal executive bill sent by the President to the national Parliament. Despite undisguised and serious opposition to the Bill within the legislature,[47] it attracted massive

39 *Ibid*, s 5.

40 *Ibid*, s 37.

41 Sarah Bracking, 'Political Development and Corruption: Why "Right Here Right Now!"?' in Bracking (n 3) 8.

42 Yusuf (n 10) 110–11.

43 Independent Corrupt Practices and Other Related Offences Commission, www.icpc.gov.ng/history.php (accessed 20 May 2010).

44 Ogundiya (n 23) 285–6.

45 Nlerum Okogbule, 'An Appraisal of the Legal and Institutional Framework for Combating Corruption in Nigeria' (2006) 13(1) *Journal of Financial Crime* 92, 95–103; Paul Okojie and Abubakar Momoh, 'Corruption and Reform in Nigeria' in Bracking (n 3) 103.

46 The Obasanjo administration was in power from 1999 to 2007.

47 This was due to perceived draconian provisions in the Bill which included severe jail terms for official corruption prevalent in the country. A softer-tempered version of the Bill was eventually passed into law.

public support, which played a major role in securing its passage into law.[48]

The blacklisting of the Financial Action Task Force (FATF) for being remiss in legislating on funding terrorism[49] provided another excuse for the government to establish a near-parallel institution to tackle economic crimes, the financing of terrorism, corruption and money-laundering. The EFCC (and, to a lesser extent, the ICPC) set about the anti-corruption campaign in a manner that drew the judiciary into the fray of the anti-corruption campaign. But it is important to note that it is the ICPC that 'drew the first blood'[50] in the anti-corruption campaign.

3. POLITICS OF THE ANTI-CORRUPTION CAMPAIGN, THE JUDICIARY, AND RULE OF LAW

The involvement of the elite in corruption has, predictably, raised the stakes in the renewed anti-corruption campaign. The high stakes include the prospect of utilising the anti-corruption campaign as an effective mechanism for disenfranchisement, control of the political space and neutralising political opponents. The nature of the high stakes is reflected in a recent statement given by the current Executive Chairman of the EFCC, Mrs Farida Waziri. She declared at a public forum that the EFCC would ensure that 'Politically Exposed Persons'—politicians and public office holders—who have pending corruption cases would not be afforded the opportunity to contest the 2011 general election.[51] This is reminiscent of what happened in the run-up to the last general election in 2007. The EFCC, due to statements like this, and its actions relating to them, has been accused of being used by incumbent governments to neutralise the opposition.[52] Consequently, the operations of the two anti-corruption agencies have been accompanied by controversy, intrigue and 'high politics'.

The volatility of anti-corruption policy when it interacts with politics is of course not limited to Nigeria. This may be attributable to the recognition in all legal systems that

48 Yusuf (n 10) 110–11.

49 The country was listed as one of the 'Non Cooperative Countries and Territories' (NCCTs) in 2001. The Nigerian authorities were not even aware of this until the fourth year of the post-authoritarian period. The country was de-listed in 2006 following the activities of the EFCC in implementing money laundering and anti-terrorist legislation. See Nuhu Ribadu, 'Capital Loss and Corruption: The Example of Nigeria' (Testimony before the House Financial Services Committee, 19 May 2009) 8–9, www.house.gov/apps/list/hearing/financialsvcs_dem/ribadu_testimony.pdf (accessed 24 November 2010).

50 See *ICPC* (n 65 below) and accompanying text.

51 See Ben Agande and Chris Ochayi, 'EFCC Insists on Stopping Corrupt Politicians' *Vanguard* online, Lagos, 31 August 2010, http://community.vanguardngr.com/forum/topics/efcc-insists-on-stopping?commentId=4565467%3AComment%3A58543 (accessed 8 February 2011).

52 See eg Letitia Lawson, 'The Politics of Anti-Corruption Reform in Africa' (2009) 47(1) *Journal of Modern African Studies* 73, 85–87, 93; Akhakpe Ighodalo, 'Political Corruption and the Challenges of the Anti-Corruption Crusade in Nigeria' in Enweremadu and Okafor (n 7) 20, 26–28.

criminal liability is distinctly disabling. It is the most serious type of formal reprobation any society can inflict.[53] An example of this is the public interest and media attention focused on the parliamentary expenses scandal in the United Kingdom in the run-up to the 2010 general election.[54] Another related example is the dramatic consequences of the corruption allegations against Jacob Zuma, then South Africa Vice-President for the Thabo Mbeki presidency. Two respected commentators have noted with regard to this latter case that the judgment of Nicholson J in *Zuma v National Director of Public Prosecutions*[55] played a major and precipitate role in the dramatic resignation of then President Thabo Mbeki.[56]

The involvement of the judiciary as a mediator in the context of such high-stake politics has considerable implications for the rule of law. This is particularly so if we accept the contention that:

> By far the most harmful and destructive effects of corruption are on the rule of law, in particular when the efficiency and effectiveness of the criminal justice system, which should be seen as the epitome of integrity, are undermined.[57]

This contention, as will be demonstrated in the following analysis, is reflected in the Nigerian experience. It will be useful to preface this analysis with a discussion of the institutional credentials of the judiciary itself at the dawn of the transition to civil rule in 1999. Arguably, the institutional standing of the judiciary at the time continues to impact on judicial performance in general and its disposition toward the anti-corruption campaign in particular.

Social Reform through Unreformed Courts?

During the years of military authoritarian rule, the judiciary came to be recognised as being afflicted, like all other institutions in the country, with the malaise of corruption.[58] One of the legacies of the military era was the fact that judges who had been found to be corrupt were able to remain in office.[59] However, in implicit recognition of that undesirable state of affairs, the exiting military regime established the National Judicial

53 Andrew Ashworth, *Principles of Criminal Justice* (Clarendon, 2nd edn 1995) 1.

54 See eg *The Telegraph*'s 'Complete MPs' Expenses Guide' at http://parliament.telegraph.co.uk/mpsexpenses/home (accessed 6 February 2011).

55 [2009] 1 All SA 54.

56 Jonathan Klaaren and Theunis Roux, 'The Nicholson Judgment: An Exercise in Law and Politics' (2010) 54(1) *Journal of African Law* 143.

57 United Nations Office on Drugs and Crime (n 4).

58 See Oluyemi Osinbajo, 'Lessons Learned about Fighting Judicial Corruption' in Transparency International, *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge University Press, 2007) 146.

59 A few were later removed from office following another round of inquiries initiated by the Obasanjo administration. See *ibid*.

Commission (NJC). This body was conceived as an institutional arrangement to facilitate judicial reform and accountability in the short and long term.[60] Composed mainly of judges, with its leadership held by justices of the Supreme Court, the NJC has faced an uphill task in securing judicial rectitude. Perhaps nothing better depicts the rot in the judicial establishment than the dismissal of several judges by the executive on the recommendations of the NJC.[61] However, even the Supreme Court (as well as members of the NJC itself) has sometimes been engulfed in allegations of corruption.[62] The general perception continues to be that corruption remains a major issue in the Nigerian court system, as with the other branches of government. This constitutes the background to the judiciary's institutional involvement in the anti-corruption campaign.

Before discussing some of the cases on political corruption and the role of the courts in social reform on that front, it is pertinent to highlight the nature of judicial review in the Nigerian legal system. The judiciary generally has wide powers of judicial review, which include the power to declare executive action illegal and legislation void. Constitutional, rather than parliamentary, supremacy is a cardinal feature of constitutionalism in the country's federal, presidential political system. The power of judicial review is exercised by all courts of 'superior record' in the country, namely the high court and appellate courts, the Court of Appeal and the Supreme Court. This is the settled judicial position on the provisions of section 6 of the Constitution, which deals with judicial powers. Section 6(6) confers powers on the judiciary to apply 'all the sanctions of a court of law' to settle 'all matters between persons, or between Government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person'.

Of further relevance is section 232 of the Constitution. This section confers original jurisdiction (to the exclusion of any other court) on the Supreme Court in relation to any dispute between the federation and a state or between states *inter se* involving any question (whether of law or fact) on which the existence or extent of a legal right depends. Both provisions foreground our discussion below on inter-governmental policy contestations and the prosecution of individual cases relating to political corruption. The position of the law on the nature of judicial review, particularly as it relates to the legislature and, by extension, the executive, is succinctly captured by Justice Niki Tobi of the Supreme Court:

60 One of several 'Federal Executive Bodies' established by s 153 Constitution of the Federal Republic of Nigeria 1999.

61 Okechukwu Oko, 'Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria' (2006) 31 *Brooklyn Journal of International Law* 9, 26.

62 Oluwatoyin Badejogbin, 'The National Judicial Council: Weaving a Patchwork of Praiseworthy Accomplishments and Ruinous Shortfalls' (2005) 3 *Justice Observatory Journal*, www.accesstojustice-ng.org/journals.php (accessed 16 October 2009).

> [T]he National Assembly has the power, in the course of legislating, or making law, to nullify or abrogate decisions of any court of law, including the Supreme Court … That is one side of the coin. The other side of the coin is that the courts, in the exercise of their judicial powers under section 6 of the Constitution, have the jurisdiction to nullify legislation which is not enacted in accordance with the Constitution.[63]

Judicial powers had purportedly been curtailed during the period of military authoritarian rule. However, the return of civil rule and democratisation has led to extensive recourse by both individuals and the state to the judiciary in the post-authoritarian period.[64]

ICPC and Revenue Monitoring: (Un)Certainty in the Law?

The creation of the ICPC—a federation-wide institution—to address the corruption problem provided a crucial opportunity for the judiciary to set out its institutional disposition toward the anti-corruption policy in the post-authoritarian period. In conformity with section 232 of the 1999 Constitution, mentioned above, the Ondo State Government challenged the validity of the ICPC Act in the Supreme Court of Nigeria (the Supreme Court) and called for its nullification in the context of a federation. In *ICPC*,[65] it was argued by states opposed to the creation of a monolith anti-corruption agency that no express or even implied provision in the Constitution conferred powers on the National Assembly (federal legislature) to create such a body.

The plaintiffs argued that power to create corruption offences did not feature in the Exclusive or Concurrent Legislative Lists in the Constitution. The respective lists set out matters exclusively in the legislative competence of the federal legislature and those shared by both federal and state legislatures. Further, there is an unwritten 'residual list', by which by is meant all matters not mentioned in either of the two lists. All such matters are deemed to be the exclusive legislative preserve of the state legislature. Accordingly, the states argued that the creation of corruption offences is one such matter. The federal government and a number of states that supported its position argued that federal constitutional powers to make laws for the 'peace, order and good Government of the Federation' sufficed to authorise the creation of the ICPC through federal statute.

A constitutional panel of the Supreme Court unanimously dismissed the challenge to the validity of the ICPC Act. The Court held that the federal legislature had the power to create the ICPC. According to the Court, a joint and liberal construction of the provisions

63 *Attorney-General of Abia State and 2 Ors v Attorney-General of the Federation and 33 Ors* (2006) 7 NILR 71, [1], [22].

64 Nigeria has witnessed an extensive judicialisation of politics in the post-authoritarian period. See eg Hakeem O Yusuf, 'Democratic Transition, Judicial Accountability and Judicialisation of Politics in Africa: The Nigerian Experience' (2008) 50(5) *International Journal of Law and Management* 236.

65 *Attorney-General of Ondo v Attorney-General of the Federation and 35 Ors* (2002) 6 SC pt I, 1.

of sections 4, 15(5), 88(2)(a) and (b), paragraph 2 of Part III of the Second Schedule and Item 60(a) of the Exclusive Legislative List of the Constitution granted the National Assembly such a power. Section 4 confers powers on the Assembly to make laws for the 'peace, order and good Government of the Federation or any part thereof'. Section 15(5) provides that 'The State shall abolish all corrupt practices and abuse of power'. Item 60(a) states that the federal legislature has the power to establish and regulate authorities 'for the Federation or any part thereof' in order to 'promote and enforce the observance of the Fundamental Objectives and Directive Principles of State Policy' contained in the Constitution. Section 88(2)(a)–(b) confers power on the federal legislature to 'expose corruption, inefficiency or waste in the administration of laws within its legislative competence'.

The crux of the Supreme Court's decision was that the creation of the ICPC through federal legislation constituted a proper course of action with regard to fulfilling its constitutional obligation under section 15(5) to abolish all corrupt practices, which is one of the 'Fundamental Objectives and Directive Principles of State Policy'. Reference to 'State' in that section meant both the federal and state governments. It was further held that 'corrupt practices and abuse of power can, if not checked, threaten the peace, order and good Government of the Federation or any part thereof'.[66] Legislation seeking to curb it 'will be for the peace, order and good government of this Nation'.[67] In this way, despite the questionable accountability credentials of the judiciary, the highest judicial forum in the country declared its preparedness to lend strong institutional support for the adoption of legislative and policy measures aimed at checking corruption in the post-authoritarian period.

It is important to note that the Supreme Court conceded that the ICPC Act is in tension with the federal character of the country, a foundational political principle of the polity.[68] In spite of this, the Court held that the nature and extent of corruption justified a federal agency's addressing the menace. In a marked departure from a well-established formalist interpretive tradition, the Court recognised the transitional exigencies of the times. It adopted a utilitarian conception of the function of law which is reflected in the observation by then Chief Justice of Nigeria, Justice Muhammad Uwais, that 'the aim of making law is to achieve the common good'.[69] This policy preference was understandable, given the huge toll that corruption had exacted (and still exacts) on the commonweal.[70]

Nonetheless, the legitimacy of the highest judicial sanction for a laudable policy objective to the detriment of a cardinal constitutional principle is easily rendered suspect.

66 *Ibid,* 59.

67 *Ibid,* 72.

68 *Ibid*, 29–30.

69 *Ibid*, 29.

70 For a comprehensive account of the case and its constitutional implications, particularly in the context of political transition, see Yusuf (n 10) 110–18.

Exploitation of the sanction by a powerful executive intolerant of political opposition (for which the Obasanjo administration was notorious) has the potential to be unsettling to say the least. Add to this state of affairs the fact that the sidelined principle was adopted to manage the complex socio-political affairs of a heterogeneous post-colonial state, and the ensuing complications in the business of governance can be imagined. This reality dawned on the Supreme Court following subsequent (mis)use of its powerful policy decision in *ICPC* by the Obasanjo administration, which sought, through the pursuit of different policies and through legislation, to govern the country in a unitary fashion, much to the consternation of state governments. It is noteworthy that the Supreme Court later shifted ground on its initial complete support for the anti-corruption campaign and its clear compromise of the federation principle.

The significant shift in judicial policy in this regard, though not without significant dissent, is reflected in the Supreme Court decision in *Revenue Monitoring*.[71] The case centred on securing the balance between judicious disbursement and proper utilisation of federally allocated revenue by state and local authorities on the one hand, and the need to protect the federal principles enshrined in the 1999 Constitution on the other. The federal government established a mechanism for monitoring the distribution and disbursement of revenues accruing to local authorities through the Monitoring of Revenue Allocation to Local Governments Act 2005 (MRA). The federal government sought to justify its action on the basis of its anti-corruption campaign along similar lines to *ICPC,* namely section 4 of the Constitution (discussed above). The move was resisted by three states as being unconstitutional. The constitutional challenge by the states was based on section 7 of the Constitution, which 'guarantees' the existence of the system of local governments in the country and further provides that each state government 'shall … ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such councils'.

Of interest here is the defence advanced by the federal authorities that the law was an integral part of the federal government's avowed anti-corruption policy. In both the authoritarian and post-authoritarian periods, diversion and mismanagement of local government-allocated revenue has been a major causative factor behind the failure of governance, weak infrastructural facilities and poor social services at that level of government which is closest to the people. Hence, there was undoubtedly an urgent need to address the situation: a declared *raison d'être* of the challenged MRA. However, the plaintiff states insisted that the federalism principle be protected, as provided for in the Constitution which, it was argued, allowed for the federal government to make laws and set up mechanisms for allocation but not disbursement of revenue from the federation account to local authorities. It was contended that this latter function was a matter for state governments only.

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

The Supreme Court declared judicial notice of serious 'leakages in the system' and the need for all state institutions, including the judiciary, to support efforts to check such leakages, but upheld the case for the states. The Court was not convinced about the propriety of undermining the federal status of the country and rejected the federal government's defence. It held that there was a critical difference between the power of allocation on the one hand, and disbursement on the other, of federal revenue as provided for by the Constitution. While distinguishing its earlier decision in *ICPC*, the Court reaffirmed its commitment to the anti-corruption policy. It held that in *ICPC* the focal point was the Corrupt Practices and Other Related Offences Act 2000: 'The whole issue [in the earlier case] was … corruption as opposed to this matter which is not directly on corruption but in respect of allocations to Local Government Councils.' While there was some element of checking corruption in the MRA, this lacked the 'prominence' it had enjoyed in the ICPC Act.[72]

Justice Tobi was emphatic that the Court would not condone the enactment of legislation, even legislation designed to 'check corruption', in contravention of the Constitution.[73] For the Court, the 'clear good intentions' of the Act notwithstanding, the federal status of the country must be respected, something which the MRA had failed to do.[74] Where this happens, it is the duty of the judiciary to uphold the supremacy of the Constitution. In the words of the Court 'where a statute is enacted in breach of the Constitution, the court must come in to stop the breach'. The Court further stated that the judiciary would 'stoutly rise' to condemn such legislation even where it is designed to 'promote the highest good and economic well being of the society'.[75] However, conscious of the potential of the decision to send the wrong signals, it warned those in charge of funds not to view the judgement as 'a victory' and 'freedom of the air' to misappropriate such funds since 'the two anti-corruption bodies', the ICPC and the EFCC, 'are watching … very closely and will, without notice, pounce on' and prosecute erring officials.[76]

The Court emphasised that the federal principles enshrined in the Constitution envisage that the state governments will operate with considerable autonomy in their designated sphere of governance. There must be a clear line of authority which requires that the states should not be regarded as appendages of the federal government. Rather, the states must be treated as autonomous entities capable of exercising their 'own will' in the conduct of their affairs, 'free from direction' of the federal government. According to the Court, a 'community reading' of the provisions of sections 7 and 162 of the Constitution leads to the conclusion that while the federal legislature has the power to

72 *Ibid*, [24].
73 *Ibid*, [25]–[26].
74 *Ibid*, [19].
75 *Ibid*, [29].
76 *Ibid*, [31].

make laws for the allocation of federal revenue to the states and local governments. The allocations must be made directly by the federal authorities to the states. In turn, the State Houses of Assembly (state legislatures) have the sole constitutional power to make laws for the disbursement of such allocated revenue to the state and local governments.

At this point, it is germane to comment further on how the majority decision in this case constitutes a marked departure from the earlier decision in *ICPC*. Arguably, the emphasis in *Revenue Monitoring* on the propriety of upholding the principle of federalism in fiscal matters has led to considerable uncertainty regarding the extent of federal powers to make anti-corruption law and policy for the whole country. It is pertinent to recall that in *ICPC* the Court stated, *inter alia*, that:

> [T]he provisions of the Act impinge on the cardinal principles of federalism, namely the requirement of equality and autonomy of the state Government and non-interference with the functions of state Government … but … both the federal and state Governments share the power to legislate in order to abolish corruption and abuse of office. If this is a breach of the principles of federalism, then, I am afraid, it is the Constitution that makes provisions that have facilitated breach of the principles.[77]

The significance of this aspect of the leading judgment in the Court's decision in *ICPC* is underscored by the fact that Justice Dahiru Musdapher, one of two Justices who dissented from the five others in *Revenue Monitoring*, relied on it in his dissenting opinion. In taking a contrary view to the premium placed by the majority on federalism as a counter-weight to the anti-corruption policy of the federal government as expressed in the MRA, his Lordship opined that 'constitutional provisions override the principle of federalism'. Justice Musdapher opined that the judiciary, and especially the Supreme Court, has the 'sacred duty' to contribute to the actualisation of the 'noble ideas' stated in the Constitution. These abstract concepts include 'freedom, liberty, transparency' as well as 'a society free from corruption, abuse of power'.[78] Justice Musdapher maintained that the MRA was identical to the ICPC Act given that both were federally enacted legislation to check the incidence of corruption. In light of this, there was no justification to depart from the position of the Supreme Court in *ICPC*.[79] Suffice to say that even in acknowledging what is arguably a fine line in the position of the Court in *ICPC,* and in *Revenue Monitoring* (and the apparently revised institutional support for the anti-corruption policy), the expectation has been that the judiciary will identify with and support social reform. After a decade of judicial involvement in that campaign, that expectation, as the Ibori saga demonstrates, may have been misplaced.

77 *ICPC* (n 65) 30, *per* then Chief Justice of Nigeria, Mohammed Uwais.
78 *Revenue Monitoring* (n 71) [45]–[46].
79 *Ibid,* [46]–[50].

The Ibori Saga: Shielding an Ex-Convict?

In discussing the various cases involving James Onanefe Ibori, an ex-governor of one of the Niger-Delta states, it is appropriate to mention that by virtue of section 308 of the Constitution, various high-ranking political office-holders—namely the President, Vice-President and State Governors and their deputies—enjoy immunity from prosecution during their tenure. This remains a formidable barrier to timorous prosecution, though not investigation, of these high-ranking public officers on corruption charges.[80]

James Onanefe Ibori ruled as Governor of Delta State from May 1999 to May 2007. In the course of his eight-year tenure, Ibori was reputed to have amassed fabulous wealth[81] by siphoning off the state's considerable earnings derived essentially from its oil-producing status.[82] On completion of his term of office, Ibori successfully staved off all attempts to prosecute him through—among other things—the disingenuous device of taking on the role of major financier of the campaign of late President Umar Musa Yar' Adua, who came into power in 2007.[83] Despite the perceived tacit protection offered by the new administration, Ibori's notoriety was such that the EFCC prepared a substantial investigative dossier in preparation for the end of his tenure in May 2007, and he was subsequently arrested for trial.[84]

Four years earlier, Ibori had won the party-primaries of his political party to contest a second term in office for the 2003 general election. However, in *Agbi v Ogbeh (No 1)*[85] the plaintiffs approached the Federal High Court (Abuja) and sought a declaration that Ibori ought to be disqualified from contesting the gubernatorial elections because he had a criminal record. The crux of the plaintiffs' claim was that a James Onanefe Ibori had been arraigned and convicted for negligent conduct and criminal breach of trust in 1995. The accused was charged on 28 September 1995 before the Upper Area Court Bwari in charge No CR/81/95—*Commissioner of Police v James Onanefe Ibori*. The charge was

80 The high level of corruption that has attended post-authoritarian governance in the country has led to a call for the removal of s 308, 'the immunity clause', from the Constitution. This has, however, been rejected by parliament in an ongoing constitutional review.

81 For instance, in 2007, while he was governor, a UK court froze assets allegedly belonging to him worth $35m (£21m). His annual salary was less than $25,000. The EFCC has accused him of misappropriating $290m (£196m). See Joseph Mokuolu and John Oloyede, 'Capital Flight and External Reserve in Nigeria: A Global Challenge to Developing Countries' in Wali I Mondal (ed), *American Society of Business and Behavioural Sciences Proceedings of the 12th International Conference* (2009) 115, 117, www.asbbs.org/meeting_files/2009/ASBBS_Program_12th_Int_Confc_London.pdf#page=116 (accessed 20 December 2010).

82 By virtue of ss 162 and 163 of the Constitution, oil-producing states receive a special allocation from the consolidated account of the federation to mitigate federal control of natural resources in the country. This is in addition to the allocation made to all states utilising a matrix of factors.

83 Lawson (n 52) 88.

84 The EFCC had stated in press releases that at least 30 of the country's 36 state governors were due for prosecution at the end of their tenures. See Lawson (n 52) 85–92. Three ex-governors have been convicted, and at least 11 are currently being prosecuted.

85 *Engineer Goodnews Agbi and Anor v Chief Audu Ogbeh and 4 Ors* (2003) 15 NWLR pt 844, 493.

brought through a summary trial procedure and was instituted under the provisions of section 157 of the Criminal Procedure Code of the former Northern Region of Nigeria, applicable to the Federal Capital Territory, Abuja. Ibori pleaded guilty, and was convicted and sentenced to a year in prison with an option of a fine, which he paid. It was alleged that James Onanefe Ibori the candidate and James Onanefe Ibori the convict were one and the same person. In line with constitutional provisions and electoral laws, an ex-convict was barred from contesting and holding certain public offices, including the office of state governor.

At the trial of this claim, the court, with the consent of all parties, admitted the record of criminal proceedings as 'Exhibit A'. The trial judge, Mukhtar J, directed counsel on both sides to formulate the issues they considered germane to the determination of the case. The single issue raised with the consent of all the parties was this: 'Whether on the face of Exhibit A, the record of proceedings of the Upper Area Court Bwari in CR/81/95—*COP vs James Onanefe Ibori*, the accused was convicted.' After taking submissions from the parties, the trial judge ruled that the accused in the case was not convicted and dismissed the claims of the plaintiffs. This rather curious judgment paved the way for Ibori to contest and win the gubernatorial elections. The plaintiffs appealed the decision. The Court of Appeal criticised the procedure adopted by the trial judge and ordered a retrial to determine the identity of the convict. Both Ibori and the plaintiffs were dissatisfied with the judgment, so they appealed and cross-appealed respectively to the Supreme Court. In the subsequent action, *Ibori v Agbi*,[86] the Supreme Court dismissed both the appeal and cross-appeal. It upheld the judgment of the Court of Appeal for an identification trial.

At the identification trial, *Agbi v Ogbeh (No 2)*,[87] the plaintiffs' case revolved around the testimony of the presiding judge in the criminal case. As plaintiff-witness, he testified that the convict and the Governor were one and the same person. Two judges sat on the criminal case but the other one, for undisclosed reasons, was not called to testify in the identification trial, though his statement was tendered and received in evidence. Mukhtar J of the High Court found the lone witness testimony unreliable. Ibori, the Governor, had not been satisfactorily identified as the convict. The court held that the witness testimony was 'riddled with contradictions and speculations all creating doubts'. The plaintiffs, dissatisfied with the judgment, appealed to the Court of Appeal, which dismissed the appeal. The plaintiffs further appealed to the constitutional panel of the Supreme Court, which also dismissed the appeal. The Supreme Court held that there had been a concurrent finding of fact by the two lower courts and no special circumstances had been disclosed to warrant displacement of the finding.

86 (2004) 6 NWLR pt 868, 78.

87 *Engineer Goodnews Agbi and Anor v Chief Audu Ogbeh and 3 Ors* (2006) 5 NILR 193.

According to all three courts, the onus of proving the identity of the convict rested squarely with the plaintiffs and this they had failed to discharge. In line with the provisions of section 138 of the Evidence Act, the standard of proof required in the matter, though a civil suit, was 'beyond reasonable doubt' since the commission of an offence was in issue. Section 138(i) of the Evidence Act provides that 'if the commission of a crime by party to any proceeding, is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt'. The Supreme Court, like the trial and appeal courts, held that the appellants had not proved the allegation even on the balance of probabilities.[88] The Supreme Court stated that the appellants had taken too much for granted in the evidence they led in the case and had to fail in their claim. Justice Ikechi Francis Ogbuagu declared that the matter had to be dismissed in the event that although the plaintiffs 'brilliantly' pleaded relevant 'weighty averments' in their statement of claim, they, 'remarkably', had failed to proffer evidence in support of those averments. The claims had to fail because courts are not meant to 'speculate on possibilities which are not supported by any evidence'.[89]

The concurrence of the judges who presided over the trial and appeals in *Agbi v Ogbeh (No 2)* is as remarkable as it is controversial. It is remarkable that all the courts conceded that in accordance with the applicable common law principles, the evidential value or strength of the case for the prosecution or, as in this case, plaintiff, is not made out according to the number of witnesses that testify, but rather according to the quality of the testimony offered (the 'quality principle'). As confirmed in the leading judgment and by five of the six concurring opinions of the Justices of the Supreme Court, this remains the unaltered position of the law of evidence. It is thus striking that the tenor of the leading judgment, as well as the opinions of individual Justices in the unanimous decision, clearly suggest the unwarranted displacement of the principle.

Six of the seven-member panel made extensive comments regarding which witnesses the plaintiffs *ought* to have called to support their claims. Interestingly, none of the six Justices, all of whom made reference to the 'contradictions' found in the sole witness testimony, attempted even to outline or examine what the supposed contradictions were. Yet, they made strident remarks about the witness based on the same record. The sole witness testimony was, for instance, dismissed as 'sickening'.[90] This aspect of the case imported a certain ambivalence into the decision of the Supreme Court. It is also troubling that the judges failed to accord probative value to a police investigation report on the matter. The same goes for an 'administrative' report on the case ordered by the Chief Judge of the Abuja High Court (acting on the directive of then Chief Justice of Nigeria). Both documents were admitted in evidence in the matter and clearly supported

88 *Ibid*, [6]–[7].

89 *Ibid*, [18]–[20].

90 *Ibid*, [18] *per* Justice Ikechi Francis Ogbuagu. It is relevant to note that Justice Ogbuagu did briefly refer to one of the contradictions.

the case of the plaintiffs in identifying Ibori the candidate and Ibori the ex-convict as one and the same man.

Another disconcerting aspect of the matter was the introduction of a red herring in the Supreme Court judgment, which has significant implications for the rule of law in this context. As mentioned earlier, the Court had declared in *Ibori v Agbi* that there was no doubt that one James Onanefe Ibori had been convicted in *COP v James Onanefe Ibori*. This was the basis for the 'identification' trial it ordered and which predictably came all the way back to it as *Agbi v Ogbeh (No 2)*. For the Court to make disparaging comments about the substance of the criminal trial itself amounts to a capitulation on this fundamental aspect of the case. Justice Musdapher identified 'irregularities' which could 'not be ignored' in the criminal trial. It effectively calls into question the settled foundations of the case before it, and the Court's previous decision in *Ibori v Agbi*. How can the Court, without standing logic (and law) on its head, raise doubts regarding a matter it had declared 'settled' in the initial appeal? This aspect of the Supreme Court judgment raises a question concerning the integrity of the Court. The doubt expressed by the Supreme Court tends to undermine the finality of its decisions and raises the prospect of endless litigation. This is clearly undesirable in the context of a liberal democracy. It is more troubling in the context of a post-authoritarian society where nearly three decades of military dictatorship have affected the national psyche and social attitudes to law and legal institutions, as well as engendering recourse to self-help for the resolution of conflict.[91]

One of the cardinal roles of a Supreme Court is to set out the law in a clear manner that prevents—or at the least discourages—unwarranted litigation.[92] While the earlier decision in *Ibori v Agbi* was generally hailed as courageous, serious doubts were nonetheless expressed regarding a credible judicial resolution of the identification issue. Indeed, some damage was done directly to the reputation of the Supreme Court when counsel for the plaintiffs alleged that Governor Ibori had given a handsome amount as a bribe to the Justices who considered the matter. The Court invited Interpol to investigate the matter, but nothing was found against the Justices.[93] This case still haunts the Court, as it emerged soon after that Ibori had previously been twice convicted of similar offences by courts in the United Kingdom.

Meanwhile, allegations of political corruption have continued to haunt Ibori. Subsequent to the completion of his gubernatorial term in office, efforts to prosecute him

91 Sola Akinnrinade, 'Constitutionalism and the Resolution of Conflicts in Nigeria' (2003) 368 *The Round Table* 41.

92 Rt Hon Lady Justice Arden DBE, 'Freedom of Expression and the Role of a Supreme Court: Some Issues from Around the World' (2010) 21(3) *King's Law Journal* 529.

93 Following a complaint by the Nigeria Bar Association, the complainant (a lawyer) and his counsel were later debarred by the Disciplinary Committee of the Bar Council. See Tobi Soniyi and Tony Amokeodo, 'Two Lawyers Barred from Practice' *The Punch on the Web*, Lagos, 22 April 2008.

have generated much intrigue. He was arraigned before a Federal High Court in *FRN v Ibori*[94] on a 170-count charge of money laundering along with five others: his sister, an associate, and three companies thought to be some of his fronts. This trial ended in a quashing of the charges and his discharge by the court based on a 'no-case submission' made by the accused. The court held that the prosecution had failed to make out a *prima facie* case in respect of all or any of the counts of money laundering preferred against the accused persons.[95] The trial judge, Awokulehin J, stated that while the prosecution had correctly identified the essential ingredients of the offences with which the accused persons were charged, the proof of evidence supplied by the prosecution failed to disclose a *prima face* case against any of the accused or applicants. The court held that the prosecution had failed to produce the necessary evidence to establish the essential ingredients of the offences charged. Critical corroborative evidence or relevant witnesses were not included in the proofs of evidence before the court. According to the court, 'the witnesses who were interrogated and asked questions were not asked the critical questions that relate to the essential ingredients of the offences charged'.[96] Further, the court noted that relevant investigation reports, which are 'basic requirements in proof of evidence for criminal trials',[97] had also been left out. The prosecution had withdrawn the charges against Chiedu Ibori-Ibie because she was simultaneously standing trial at Southwark Crown Court facing fraud and money laundering charges. The British authorities had refused to release her for the trial in Nigeria.

In the summer of 2010, Chiedu Ibori-Ibie and Udoamaka Onuigbo (another Ibori associate accused in the Nigerian case) were subsequently convicted by the London court on charges of fraud and money laundering running into several millions of pounds. The two were sentenced to five years' imprisonment each for fraud and money laundering in the UK (and elsewhere), 'overwhelmingly for the benefit of James Ibori'.[98] The defendants had earlier failed in their bid to stop this trial based on the quashing of the charges in *FRN v Ibori*. They alleged that continuing the trial would amount to usurping Nigeria's sovereign jurisdiction. Ibori himself remains wanted for money laundering charges in the UK. The role of the courts in the Ibori saga, and the anti-corruption campaign generally, has come under scrutiny and has been the subject of considerable comment.

94 *Federal Republic of Nigeria v James Onanefe Ibori and 3 Ors* (Charge No FHC/ASB/IC/09, unreported, on file with author).

95 The *prima facie* test has remained the evidential threshold for filing criminal charges in Nigeria, in contrast to the United Kingdom where the threshold has been substituted with the 'realistic prospect of conviction' test.

96 *FRN v Ibori* (n 94) 11–19.

97 *Ibid*, 19.

98 'Sentencing Remarks of Judge Christopher Hardy', *Regina v Christie Ibori-Ibie and Udoamaka Onuigbo*, Charge Nos T20087009 and T20087792 (on file with author). Subsequent to this, Ibori's wife and his (British) solicitor were also convicted on similar charges.

The Courts, the Public, and Rule of Law

The EFCC has expressed both praise and deep concern at the role of the judiciary in the anti-corruption campaign.[99] While the EFCC proudly notes that over a hundred cases have been successfully completed in the post-authoritarian period, it has expressed serious concern at perceived judicial mishandling of some cases of corruption. This is with regard to high-profile cases mainly involving former or serving public office holders. The courts have been criticised on at least three fronts with regard to the conduct of anti-corruption trials.

The first concern resides in the area of questionable court orders. Court injunctions (usually *ex parte*), subversive of established constitutional and legal principles and procedures, have been granted to influential political office holders who were either under investigation for, or charged with, corruption. The *ex parte* injunction granted by a Federal High Court in *Odili*[100] is characteristic of such subversive injunctions. The trial judge, Buba J, granted a perpetual *ex parte* injunction to Peter Odili, then Governor of Rivers State in 2007. The injunction barred the EFCC from ever arresting or charging him for corruption, effectively preventing the EFCC from performing its statutory duties. It is important to note that the order was granted at a time when Odili was still protected by the immunity clause in the Constitution. The injunction came in the aftermath of media reports that the EFCC was making arrangements to prosecute Odili on serious charges of abuse of office and corruption at the end of his tenure. Odili has continued to brandish the order as a legal stratagem to evade prosecution to this day.

This disturbing order does not stand alone, despite clear statements by the appellate courts that such orders are plainly illegal and in contravention of the Code of Conduct for Judicial Officers.[101] The injunction caused much disquiet and the furore it generated prompted a reaction from the highest levels of the judiciary. In recent times, successive Chief Justices of the Federation have warned all judges that unwarranted grants of *ex parte* orders constitute judicial misconduct. Some judges have been dismissed for the unwarranted grant of *ex parte* orders in the past,[102] but the judge in *Odili* remains on the bench and he is not unique in that regard. Recently, the same judge similarly granted an *ex parte* interim injunction restraining the EFCC from investigating and prosecuting Ibori

99 Joe Nwankwo, 'Corrupt Judges Must Go, Says Kutigi' *Daily Independent*, Lagos, 17 June 2008.

100 *Attorney-General for Rivers State v Economic and Financial Crimes Commission and 3 Ors* (unreported suit No FHC/PHC/CSI78/2007, Federal High Court of Nigeria, Port-Harcourt Judicial Division).

101 Rule 2(2), Code of Conduct for Judicial Officers of the Federal Republic of Nigeria. It states: 'A Judicial Officer must avoid the abuse of the power of issuing interim injunctions, *ex parte.*' See www.deontologie-judiciaire.umontreal.ca/fr/magistrature/documents/CODE_NIGeRIA.pdf (accessed 24 January 2011).

102 Hon Justice BO Babalakin, 'Performance Evaluation of Judicial Officers and the Role of the National Judicial Council: The Journey So Far' (paper presented at the All Nigeria Justices Conference, 5–9 November 2007) 3, www.nji.gov.ng/index2.php?option=com_docman&task=doc_view&gid=98&Itemid=182 (accessed 19 September 2010).

on fresh charges of corruption and money laundering, and also ordered that concerned parties be put on notice. There was relief when the court later vacated the order at a full hearing of the matter. A petition for disciplinary action against the judge was dismissed by the NJC, leading the petitioner to ask the pertinent question of judicial accountability: 'Who judges the judges?'[103]

The judiciary has also been criticised for delaying the prosecution of many high-profile corruption cases.[104] The lax attitude of some judges in taking control of proceedings in court has led to trials in many such cases being stalled. With the benefit of bail, most of the well-heeled individuals charged with political corruption capitalise on their reprieve to file all manner of motions to delay or frustrate their prosecution. This has been a sore point for the anti-corruption agencies. The insouciance of some trial judges has compelled the EFCC to lodge official complaints to the highest judicial authorities. The agency has also been at the forefront of the call for the establishment of special courts for the trial of anti-corruption cases as a measure to overcome the delays in the conventional courts. It is fair to observe that delay in criminal trials is partly due to a law-reform gap in the country. The fact that inherited colonial-era laws continue to constitute the bulk of substantive criminal laws and procedure creates a problem in the criminal justice system. The effect of the law-reform gap cannot be discounted, particularly in an adversarial system where the parties have a more active role in the conduct of their cases than in an inquisitorial system.[105] While the 'essentially partisan' role of defence counsel is ethically recognised in the common law tradition,[106] in the Nigerian context it has frequently been exploited by unscrupulous defence counsel in blatant attempts to frustrate the trial process.[107]

Common law jurisdictions have been known to adopt various measures to facilitate judicious delivery of justice to the victim, accused and society. A principal part of this is the continuous review and reform of existing procedural and adjectival laws. Andrew Ashworth and Mike Redmayne have pointed out that in England and Wales, the roles of both prosecuting and defence counsel under the common law have been altered through legislation such as the Criminal Procedure and Investigations Act 1996 and the Criminal Justice Act 2003.[108] It is also an open question (with regard to which some will argue for

103 Osita Mba, 'As the NJC Upholds Odili's Perpetual Injunction—Who Judge the Judges?' *Vanguard* online, Abuja, 8 April 2010, www.vanguardngr.com/2010/04/as-the-njc-upholds-odili's-perpetual-injunction-who-judge-the-judges (accessed 8 February 2011).

104 Chris Ojukwu and JO Shopeju, 'Elite Corruption and the Culture of Primitive Accumulation in 21st Century Nigeria' (2010) 1(2) *International Journal of Peace and Development Studies* 15, 21.

105 Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford University Press, 4th edn 2010) 27–28.

106 *Ibid*, 65.

107 Emmanuel Obuah, 'Combating Corruption in a "Failed" State: The Nigerian Economic and Financial Crimes Commission (EFCC)' (2010) 21(1) *Journal of Sustainable Development in Africa* 27, 46.

108 Ashworth and Redmayne (n 105) 65.

an affirmative answer) whether the powers of the criminal trial judge have been altered by these Acts in the direction of an inquisitorial system familiar to a judge in the continental system.[109] In contrast, there has been very limited activity on much needed comprehensive law reform activity in Nigeria; part of the unwholesome and yet-to-be-rectified legacy of years of authoritarianism.

However, a major part of the problem, and in any event the perception in the public domain, is that many judges condone delays in the prosecution of important corruption cases due to outright corruption.[110] Compromised adjudication deriving from corruption remains an institutional blight with which the judiciary has continued to struggle. The common view is that corruption is the most important reason for judicial inefficiency,[111] even though there are other factors at play, such as inadequate manpower and poor or outdated infrastructure.[112] A recent survey of three states in three geo-political zones of the country found that

> court users had to face on average six to ten adjournments before resolving a case … Access to justice has proven to be closely related to corruption … [P]eople who had to return to court several times for the same case were the ones that were asked to pay bribes more frequently.[113]

The near absence of a moral high ground for the judiciary clearly makes it difficult for any structural or legislative challenges to be appropriately regarded as contributing (at least in some reasonable way) to the pervasive delay in the trial of high-profile corruption cases.[114] While a few judges have earned praise for their handling of political corruption cases,[115] the dominant trend, as one notable legal practitioner recently lamented, is that the judgments delivered in many cases of corruption raise serious doubts in the minds of the public about the institutional integrity of the judiciary.[116] It is in this light that the recent declaration of the president of the Nigerian Bar Association to collaborate with

109 *Ibid*, 418. For the view that adversarialism in the English criminal trial system has become increasingly curtailed in order to seek a balance between obtaining the truth and protecting the rights of the defendant, see John Jackson, 'The Adversarial Trial and Trial by Judge Alone' in Mike McConville and Jeffrey Wilson (eds), *Handbook of the Criminal Justice Process* (Oxford University Press, 2002) 335–51.

110 Augustine Nwabuzor, 'Corruption and Development: New Initiatives in Economic Openness and Strengthened Rule of Law' (2005) 59(1–2) *Journal of Business Ethics* 121, 128.

111 Obuah (n 107) 39; Fabrizio Sarrica and Oliver Stolper, 'Assisting Judicial Reform: Lessons from UNODC's Experience' in *Global Corruption Report 2007* (n 58) 160–2.

112 Obuah (n 107) 46.

113 Sarrica and Stolper (n 111) 162.

114 Okechukwu Oko, 'Lawyers in Fragile Democracies and the Challenges of Democratic Consolidation: The Nigerian Experience' (2009) 77 *Fordham Law Review* 1265, 1308–11.

115 See eg Editorial, 'The Conviction of Bode George and Five Others' *The Guardian*, 2 November 2009.

116 John Olusola Baiyeshea, 'Corruption: The Mother of All Crimes is Antithetical to Any Notion of Justice, Equity and Fairness in Judicial Administration' (paper presented at the Symposium of Mustapha Akanbi Foundation, Sheraton Hotel, Abuja, 21 July 2010) 3, http://mafng.org/symposium2/index.htm (accessed 15 October 2010).

the NJC to ensure the prosecution (and not just dismissal, as is currently the case) of corrupt judges has received much public support as a long overdue measure.[117]

Another issue that has impacted negatively on the involvement of the judiciary in the anti-corruption campaign is unethical conduct or indiscretion on the part of senior members of the bench. A good example relates again to the Ibori saga. It has been noted that the 'crème de la crème' of the Nigerian judiciary attended a 'valedictory party' organised in honour of Ibori to mark the end of his eight-year tenure as Governor of Rivers State. The roll call included (then) Chief Justice Kutigi, as well as his two predecessors in office.[118] This was at a time when it had become clear that Ibori was to be prosecuted for alleged corruption. Obviously, the Justices did not consider the message their presence at such occasions sent to the watching public. Such conduct no doubt affects public perceptions of the subsequent judicial handling of the Ibori cases, despite the judicial position that nothing but justice was done in the cases.

Presumably, conscious of the prevailing negative public perceptions of the judicial handling of the criminal allegations against Ibori, Awokulehin J, while discharging him, in his concluding remarks stated:

> Before I conclude this Ruling it must be noted that a Court of Law arrives at its findings and decisions based on the evidence placed before it by the contending parties … [T]he pronouncement in AGBOR ELE VS STATE (2006) all FWLR (pt 309) page 852 … becomes instructive … and I quote: 'it must of necessity be emphasized that law should only be applied to facts of a case. It is not for the Court to manufacture such facts or move from law backwards to facts on the pretence of justice.' The above quotations speak for themselves and the applicability of same to the instant case.[119]

While this is no doubt a correct statement of the judicial role, the judiciary has arguably done little to promote confidence given the examples of questionable conduct mentioned here.

Furthermore, sentencing practice has generated much discontent regarding the judiciary's handling of anti-corruption trials. The foregoing analyses makes clear that most of the criticisms of the judiciary in these trials centre on ongoing cases, but concluded ones have also generated controversy. While the judiciary has been applauded for convicting a number of formerly highly-placed public officers, the terms of imprisonment meted out in many such cases have been viewed as a mere slap on the wrist considering the magnitude of the corrupt practices involved. This is the case, for instance, with the reported 'plea-bargain' sentence of a former Inspector General of Police, Tafa Balogun, who was sentenced to six months' imprisonment after admitting to theft of over

117 Adamu Adamu, 'Nigeria: Judiciary and the National Ethic' *Daily Trust* online, 10 September 2010, http://allafrica.com/stories/201009100490.html (accessed 8 February 2011).

118 Mba (n 103).

119 *FRN v Ibori* (n 94) 21.

a million dollars of public funds.[120] Similar sentiments followed the one-year sentence handed down to former Governor Diepreye Alamieyeseigha, who had also corruptly enriched himself using state funds.

The terms of imprisonment in these and many other cases have come in for strong criticism in light of the fact that 'ordinary criminals' are routinely sentenced to several years in prison for stealing property worth much less than a hundred dollars.[121] That plea-bargaining has accompanied most high-profile corruption convictions may at least imply the consent of the prosecution to the light sentences meted out to defendants. However, the fact of such arrangements remains a matter of conjecture, since there is no overt participation of the prosecution in sentencing practice in Nigeria. Judicial practice in this regard is subject to abuse due to the complete absence of sentencing guidelines in the criminal justice system.

4. CONCLUSION

Corruption has been identified as one of the major threats to the rule of law in post-authoritarian contexts. The judiciary is considered by promoters of the rule of law to be a core institution for its protection. It is a noteworthy irony that the involvement of the judiciary in a crucial anti-corruption campaign has not had as positive an impact as it should have. In the Nigerian context, a salient issue that is easily missed by advocates of the over-judicialisation of the anti-corruption initiative in the post-authoritarian transition is the neglect of institutional accountability of the judiciary for its role in governance during almost three decades of authoritarian rule. The judiciary emerged from the authoritarian period as a weak institution that nonetheless had critical issues of social reform thrust before it.

The contextual focus in this article is on Nigeria. However, pursuing social reform through the agency of an unreformed institution—in this case the judiciary—gives rise to trouble in many post-authoritarian contexts. In light of the common mistrust of courts in post-authoritarian transitions arising from societal misgivings regarding their complicity in past illiberal governance, entrusting any major issue of social reform to the judiciary is predictably problematic. The problematic nature of such an approach to social reform even takes on a paradoxical tone where the issue is a failing that has affected the judiciary in the recent past. The Ibori saga demonstrates how power is deployed by political office holders to shield their interests and those of their supporters or associates from the administration of justice. If the judiciary had unwittingly provided the leverage for Ibori's second term as Governor of Delta State, the decision in *FRN v Ibori* has

120 Ogundiya (n 23) 287.
121 *Ibid.*

afforded him the opportunity to maintain the impression that he is above the law. It does appear that the institutional position of the judiciary has impacted in a less than salutary manner on the rule of law during the judicialisation of the anti-corruption campaign. Perhaps more than any other cases in recent times, the series of cases involving James Onanefe Ibori challenge the view that the judiciary has risen to the important task of safeguarding the rule of law in post-authoritarian Nigeria. This is ironic given the unimpeachable observation of Justice Musdapher in *Revenue Monitoring* that 'the judiciary is an essential integral arm in the governance of the nation … The judiciary when properly invoked has a fundamental role to play in … promoting good governance.'[122] Good governance, as the Supreme Court observed in the *ICPC* and *Revenue Monitoring* cases, includes checking the incidence of corruption, particularly by public officers. Only an independent yet accountable judiciary can contribute effectively to the arduous task of social reform and institutionalisation of the rule of law (closely tied to the notion of good governance), which is much desired in post-authoritarian societies.

122 *Revenue Monitoring* (n 71) [45].