The judiciary and political change in Africa: Developing transitional jurisprudence in Nigeria

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At a time of increased evaluations of law, human rights, and the rise of judicial power all over the globe, the work of most African judiciaries and the principles of the jurisprudence they espouse in promoting social justice remain an unlikely focus of comparative legal scholarship. This ought not to be so in view of the considerable activities of the courts on the continent in the dawn of the third wave of democratization. This article explores the work of the Nigerian Supreme Court in the political transition to democracy since 1999. Utilizing insights from the work of Ruti Teitel, it attempts to outline some of the major constitutional and extraconstitutional principles adopted by the Court in mediating intergovernmental contestations in the turbulent transition away from almost three decades of authoritarian military rule. It emerges that the task of fostering social transformation through the "weakest" branch seriously tasks the institutional integrity of the judiciary.

Introduction

The dynamics of Nigeria's tottering unnegotiated political transition have led to the emergence of a discernible turn in the jurisprudence of an otherwise complacent and conservative judiciary. These decisions have shaped and, in turn, been shaped by the course of political transition in the country. The judiciary in recent times has been at the epicenter of intergovernmental contestations and individual human rights claims, and the judicial function has played an active and direct role in governance. Although its decisions have had direct relevance for policymaking and governance in the course of Nigeria's troubled transition to civil democratic rule since 1999, there has been little

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focus on the nature of the judicial role in the process of political transition, social transformation, and democratization in the country.

Analysis of the work of courts in Africa, and their jurisprudence (with the exception of postapartheid South Africa), has hardly been a staple of comparative legal scholarship.[1] Within the international legal academy, there seems to be a presumption that there is little to be learned from the judicial function in that part of the globe. But the reality of an increasingly globalized world belies such a narrow outlook. In particular, the jurisprudential principles adopted by courts in transitional societies deserve closer attention, not least because the judiciary has become increasingly involved in governance and policy making in such societies.[2] By the same token, evaluations based only on the performance of the political branch offer an incomplete account of contemporary African governance.

This article analyzes the jurisprudential approach to various claims arising from the sociopolitical tensions that have bedeviled Nigeria's political transition upon the conclusion of almost three decades of authoritarian military rule and seeks to distill certain principles from that approach. The Nigerian Supreme Court has adopted certain

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[1] *But see* H Kwasi Prempeh, *Africa's Constitutionalism Revival: False Start or New Dawn*, 5 INT'L J. CONST. L. (I•CON) 469 (2007); H Kwasi Prempeh, *Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa* (SSRN Working Papers Series, 2007), *available at* http://ssrn.com/abstract=1015369 (last accessed Aug. 28, 2009); H Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TULANE L. REV. 1239 (2006); Tunde I. Ogowewo, *Self-Inflicted Constraints on Judicial Government in Nigeria*, 49 J. AFR. L. 39 (2005); H Kwasi Prempeh, *A New Jurisprudence for Africa*, *in* GLOBAL DIVERGENCE OF DEMOCRACIES 260 (Larry Diamond & Marc Plattner eds., John Hopkins Univ. Press 2001).

[2] There is a growing body of literature on this theme, variously referred to as the judicialization or constitutionalization of politics. *See, e.g.*, Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts* 11 ANN. REV. POL. SCI. 93 (2008);, TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES (Cambridge Univ. Press 2003) Tom Ginsburg, *Constitutional Courts in New Democracies: Understanding Variations in East Asia* 2 GLOBAL JURIST 1 (Advances Article 4, 2000), *available at*: http/www.bepress.com/gj/vol2/iss1/art4 ; THE JUDICIALISATION OF POLITICS IN LATIN AMERICA 21, 24 (Rachel Sieder, Line Schjolden & Alan Angell eds., Palgrave Macmillan 2005), Susan Balme, *The Judicialisation of Politics and the Politicisation of the Judiciary in China 1978–2005*, 5 GLOBAL JURIST 1 (2006), *available at*: http://www.bepress.com/gj/frontiers/vol5/iss1/art1 TAMIR MOUSTAFA THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS AND ECONOMIC DEVELOPMENT IN EGYPT (Cambridge Univ. Press 2007), Richard H Pildes, *The Supreme Court 2003-Foreword: The Constitutionalization of Democratic Politics* 118 HARVARD L. REV. 28 (2004);Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine* 80 NO. CAROLINA L. REV. 1203 (2002), HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION (Cambridge Univ. Press 2000).

constitutional and extraconstitutional principles in mediating what can be described as "new constitutionalism" in the country—referring to the determination of an unprecedented number of governance-related issues by the judiciary rather than by the political branch.[3] This is partly due to the adoption of constitutional reforms that guarantee a range of rights and provide for extensive powers of judicial review.

With the transition to democratic rule and notional rehabilitation of civil institutions in the country, the most salient features of the country's transitional jurisprudence fall under such rubrics as "peace, order, and good government," "fundamental objectives and directive principles of state policy," "constitutional supremacy," and "cooperative federalism." The critical analysis of these principles as elucidated by the Supreme Court in the mediation of conflicts and pursuit of societal transformation and social justice deserves scholarly attention in light of constant references in the sociopolitical literature to the country as a "weak,"[4] "failed," or "failing" polity.[5] The role of the judiciary in the political transition has been an important factor in holding the country together as a political entity.

The judicial response to socioeconomic and political disputes at individual and intergovernmental levels has generated a transitional jurisprudence in a society confronted with multifaceted challenges of postauthoritarian governance reforms and democratic-institution building. The judiciary, particularly the appellate courts, has been inundated with "political" cases and has become a strategic actor in policy-decision making at a level unprecedented in the country's history.[6] While judicial inclinations have not been able to quell the controversies generated by a good number of the cases,

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[3] *See* Hirschl, *supra* note 2; Moustafa, *supra* note 2.

[4] Susan E Rice and Patrick Stewart, *Index of State Weakness in the Developing World* (Brookings Institution 2008), *available at* http://www.brookings.edu/reports/2008/02_weak_states_index.aspx (Aug. 28, 2009).

[5] J Shola Omotola, *Through a Glass Darkly—Assessing the 'New' War against Corruption in Nigeria*, 36 AFR. INSIGHT 214 (2006).

[6] Hakeem O. Yusuf, *Robes on Tight Ropes: The Judicialisation of Politics in Nigeria*, GLOBAL JURIST, vol. 8, issue 2, art. 3, 8–9 (2008), *available at* http://www.bepress.com/gj/vol8/iss2/art3/.

they have nonetheless shaped the direction of power contestations at intra-individual and intergovernmental levels in the country.

Attention to the work of the courts is important considering the context—one suffused with attempts by ruling political elite with suspect democratic credentials to legitimize the exercise of power through the judicial process. The judiciary has been faced with the difficult task of maintaining the normative balance between pure politics and law in its interpretive institutional role. In this regard, the focus is in part on the implications of the ascendance of one over the other, particularly in a transitional context.

This article is arranged in three parts: The first offers a description of the sociopolitical situation in the country inasmuch as it constitutes the contextual background to the discussion. The second offers a theoretical framework for analysis of transitional jurisprudence in Nigeria by examining the work of Ruti Teitel on the role of law in political transformations and the dynamics of constitutional adjudication in transitional societies. The third focuses on the developing transitional jurisprudence in Nigeria. Here, it emerges that the task of fostering transformation in a transitional context through the supposedly "weakest" branch seriously burdens the institutional integrity of the judiciary, in circumstances where its intervention is required for achieving desired social reconstruction. The article concludes that the judiciary, with the benefit of new or "rehabilitated" constitutional powers, has progressively assumed an important position in governance in the country through the dynamics of transitional constitutionalism.

1. The political transition in Nigeria

Nigeria has had a checkered history, in which military authoritarianism virtually destroyed the fabric of state and society. By 1999 it had witnessed almost three decades of military rule, interspersed with two brief spells of democratic governance.[7] The

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

country's economic and social fortunes took a nosedive as the military acted like an army of occupation ruling captured territory. All institutions of civil governance suffered as the military ruled with authoritarian decrees that undermined the Constitution.

The military in some instances suspended parts of the Constitution and, in others, passed decrees that it declared (and were judicially upheld) as superior to it.[8] Gross human rights violations abounded to an extent that the country acquired pariah status within the international community. Following the sudden death of General Sanni Abacha in mid-1998, his successor, General Abdusalam Abubakar, embarked on an accelerated civil transition program, culminating in elections, the handover of power to political office holders, and the exit of the military on May 29, 1999. Throughout the military era, the judiciary hovered between complicity and complacency in the misrule of the country while maintaining its position as the only state organ that did not experience institutional truncation or disruption.

The country has now had its longest experience of civil governance in its postindependence history. Rising crime rates, poverty, unemployment, the deplorable state of social infrastructure, and the failure of transitional justice measures for past victims of gross violations of human rights have all challenged an otherwise welcome political transition.[9] However, over the past decade, the most serious challenges to Nigeria's continued viability as a state have been posed by intergovernmental disputes on spheres of power in a lopsided federation.[10] This has been accompanied by unhealthy wrangling for power among the political elite, pervasive corruption, and the absence of effective dialogue among various stakeholders to foster a consensual basis for the continued existence of the polity.

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[8] Hakeem O. Yusuf, *Calling the Judiciary to Account for the Past: Transitional Justice and Judicial Accountability in Nigeria*, 30 L. & POL'Y 194, 207–219 (2008).

[9] For an account of the transitional justice issues in Nigeria, see Hakeem O. Yusuf, *Travails of Truth: Achieving Justice for Victims of Impunity in Nigeria*, 1 INT'L J. TRANSITIONAL JUST. 268–286 (2007).

[10] Hakeem O. Yusuf, *Democratic Transition, Judicial Accountability and Judicialisation of Politics in Africa: The Nigerian Experience*, 50 INT'L J. L. & MGMT. (formerly MANAGERIAL LAW) 236–261 (2008).

2. Political change and the judiciary—A theoretical framework

In her influential work on transitional justice, Ruti Teitel explores the transformative function of law at times of social change.[11] She argues that the role of law undergoes "normative shifts" that distinguish it from the conception and understanding of law in "ordinary" times. [12] In other words, there is a shift in the understanding of the workings of law and its place in a society undergoing significant sociopolitical changes—what Teitel calls "transitional jurisprudence."[13]

According to Teitel, transitional jurisprudence is a distinct and legitimate conceptualization of law in societies experiencing momentous political change. Such societies encounter the "rule of law" dilemma, which usually arises in "politically controversial" cases.[14] During such periods, rather than providing "foundational" bearings for democracy, constitutionalism takes on a "constructivist" role.[15] Constitutionalism at times of political change becomes constructivist because the "paradigmatic form of law that emerges in these times operate in an extra ordinary fashion." The emergent legal paradigm both "stabilizes and destabilizes" existing conceptions of law in the transitional society.[16] This dynamic is the product of transitional justice, with its key feature of supplementing the existing paradigms of justice and conceptions of rule of law. In this way, transitional justice provides a "balancing of ideal justice with political reality" in the task of "constructing liberalizing

[11] RUTI G. TEITEL, TRANSITIONAL JUSTICE (Oxford Univ. Press 2000).

[12] Ruti G. Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2015 (1997).

[13] *Id.* at 2015–2016.

[14] TEITEL, *supra* note 11, at 11.

[15] *Id.* at 191.

[16] *Id.* at 220.

change." [17] In particular, Teitel identifies adjudication as one of the most important mechanisms through which law constructs in transition periods.[18]

Courts are ordinarily considered to be better suited for "case-by-case" decision making than for crafting policy. However, in transitional societies, Teitel argues, courts may have a strategic advantage over the political branch that derives from their more stable institutional existence. Furthermore, transitional disputes may lend themselves to "nuanced case-by-case resolution," for which the judiciary is more competent than the political branch.[19] Thus situated, the judiciary takes on the "ambivalent directionality of law."[20] Teitel's analysis provides a theoretical framework for this study of the Supreme Court of Nigeria in the context of the political transition in the country.

In a polity undergoing political change from authoritarian rule, the absence of a sustained institutional experience and practice of constitutional democracy may result in the society being saddled with a fragile political branch. [21] Inevitable contestations that arise in the context of newfound democratic principles are typically at the center of such disputes. These play out on multiple fronts, including previously repressed rights claims for identity, autonomy, self-determination, and control of economic resources, as well as demands for greater accountability for the exercise of political power in line with (usually touted) new openness in governance. Courts in such a setting are often faced with resolving essentially political issues and deciding difficult, time-bound cases with direct bearing on the process of state reconstruction at the heart of the political transition.

There has been substantial interplay of the foregoing claims in Nigeria's troubled political transition from military authoritarian rule. The resulting dynamics have led to a remarkable privileging of the judiciary in the resolution of disputes regarding the exercise of political power in the country. In analyzing the Nigerian experience, this

[17] *Id.* at 213.
[18] *Id.* at 220.
[19] *Id.*
[20] Teitel, *supra* note 12, at 2033.
[21] *Id.* at 2033.

article adopts as its point of departure Teitel's characterization of the rule of law and transitional constitutionalism. Her argument that "transitional constitutionalism" is both "constitutive" and "transformative"[22] has considerable resonance with the Nigerian experience. So is the position that "transitional law is settled and unsettled."[23]

Further, there is an empirical consideration that further supports the adoption of Teitel's model of transitional jurisprudence and the role of the judiciary. Judges in Nigeria hold office until a constitutionally stipulated retirement age. With judicial office thus protected and guaranteed, the judiciary was not subject to accountability measures as part of the transitional justice process, leaving its role in the country's experience of authoritarian misrule unexamined. The adoption of the pretransition constitutional arrangements, coupled with the absence of an interim constitution (which could have stipulated otherwise) in the process of political change, meant that judges appointed during the period of authoritarian rule continued in office by default. Notwithstanding this institutional accountability gap, the judiciary has come to play an important role in the political transition to civil governance in the country.[24]

3. Developing a transitional jurisprudence in Nigeria

Thus, in Nigeria, an untransformed judiciary is charged with mediating what Heinz Klug refers to as "legalization of political conflict."[25] It has been called upon continually to play an active and critical role in the political reconstruction and democratic transition of a heterogeneous polity.[26] In the discharge of that task, the judiciary from an early stage had been criticized for continuing to identify with a questionable jurisprudential outlook. Some have argued that it has accorded a knee-jerk, "spurious and simplistic" recognition

[22] Teitel, *supra* note 12, at 2051–2054.
[23] *Id.* at 2015.
[24] *See* Yusuf, *supra* note 9; Yusuf, *supra* note 10.
[25] KLUG, *supra* note 2, at 12.
[26] Yusuf, *supra* note 8, at 207–219.

to, and validation of, authoritarian rule and the legacy of decrees made by the military, even after the transition to civil rule.[27]

In this regard, it is important to note that Nigeria lacks the new judicial institution, (a constitutional court) that features prominently in Teitel's model of transitional jurisprudence. This was not created as part of the political transition in the country, although the military regime led by General Sanni Abacha had proposed doing so. To date, there does not appear to have been any interest in moving in that direction. However, even with the absence of a new judicial body, the rehabilitation of the constitutional powers of judicial review in the Nigerian courts has been remarkable. It is now apt to examine the Court's transitional adjudication in some detail.

3.1 Constitutional supremacy

Constitutional theory commonly holds that a supreme constitution is a *sine qua non* for ensuring the autonomy of existence and powers of the central and subnational units in a federal polity.[28] The necessity for constitutional supremacy has been a feature of Nigerian constitutions[29] and has been restated in the very first section of the 1999 Constitution of the Federal Republic of Nigeria (the Constitution). Section 1 (1) provides that the Constitution is supreme and its provisions shall have binding force on authorities and persons throughout the Federal Republic of Nigeria. Call this the 'Supremacy Clause.' Section 1(2) states that the country must be governed only in accordance with the Constitution. In apparent unequivocal reinforcement of the Supremacy Clause, section 1(3) further provides that in the event any other law is inconsistent with the

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[27] Tunde I Ogowewo, *Why the Judicial Annulment of the Constitution of 1999 is Imperative to the Survival of Nigeria's Democracy*, 44 J. AFRIC. L. 135, 166 (2000). Ogowewo's position appears to be vindicated by current efforts to produce a new constitution. *See, e.g.*, C Isiguzo, *Ekweremadu: Nigeria Gets New Constitution Next Year—Senate to Begin Zonal Consultation Soon*, THIS DAY ONLINE (Abuja Sunday, September 2, 2007).

[28] BENJAMIN O. NWABUEZE, FEDERALISM IN NIGERIA UNDER THE PRESIDENTIAL CONSTITUTION 21–22 (Lagos State Ministry of Justice Law Review Series 2003).

[29] *See, e.g.*, § 1, CONST. NIGERIA (1960); § 1, CONST. FED. REPUB. NIGERIA (1963); § 1, CONST. FED. REPUB. NIGERIA (1979); § 1, CONST. FED. REPUB. NIGERIA (1989).

provisions of the Constitution, "this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void."

The Supremacy Clause in successive Nigerian constitutions was, however, continually abrogated or suspended by military legislation for the better part of three decades. Displeased by the attempt to tinker with its self-ascribed legislative supremacy 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* (*Lakanmi* case),[30] successive military regimes ensured passage of a military legislative supremacy decree as the first piece of legislation enacted after each *coup d'etat* in the country.

Emblematic of this legislative aberration is the Constitution Suspension and Modification Decree No.1 of 1966 (the Supremacy Decree), which provided: "… 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." Modifying the 1963 Constitution then in operation, section 1 (1) of the Supremacy Decree further provided:

> This Constitution shall have force throughout Nigeria …provided that *this Constitution shall not prevail over a decree*, and nothing in this Constitution shall render any provision of a decree void to any extent whatsoever.[31]

Through a replication of such provisions in successive decrees, military regimes repeatedly asserted the supremacy of their legislation over provisions of the Nigerian Constitution.

After an initial halfhearted attempt at rescuing the principle of constitutional supremacy from the assault of military authoritarianism, the Supreme Court succumbed

[30] (1971) University of Ife Law Reports 201.
[31] Emphasis added

to blowing muted judicial (and constitutional) "trumpets"[32] for the better part of three decades. Thus, with the acquiescence of the judiciary, emergency legislation and exceptionalism became instituted as standard mode of governance in the country. However, with the advent of political change, the Supreme Court has become more assertive of the imperative of constitutional supremacy, particularly in the resolution of intergovernmental disputes and political contestations, a prominent aspect of political transition in Nigeria between 1999 and 2007. A number of cases illustrate this point.

In *Attorney General of Abia State & 2 Ors v Attorney General of the Federation and 33 Ors* (*Revenue Monitoring* case),[33] the issue before the Court was the constitutionality of the Local Government Revenue Monitoring Act passed by the National Assembly. The plaintiff states argued that the Act, which provided for direct disbursement of local government allocations from the federal account and monitoring of the process by federal authorities, amounted to undue interference with their powers over the matter of local government political and fiscal administration as recognized under section 7, among others, of the Constitution.[34]

The main purpose of the Revenue Monitoring Act was purportedly to ensure allocations from the Federation Account and allocation were properly distributed to the local governments. This was an important policy objective considering that the deplorable state of infrastructure in the country is largely traceable to misappropriation of public funds. There was a need for initiatives to check corruption in the country. Local authorities have had a notoriously poor record of performance in governance over the years and the proper delivery of federal allocations which forms the bulk of their resources was an important factor in the state of affairs.

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[32] See *Wang Ching Yao and 4 Others v Chief of Staff Supreme Headquarters* (unreported decision of the Court of Appeal); a report is provided in GANI FAWEHINMI, NIGERIAN LAW OF HABEAS CORPUS 436 (Lagos Nigeria Law Publications 1986).

[33] (2006) 7 NILR 71, 1 [hereinafter *Revenue Monitoring* case].

[34] *Id.* at 4–5.

The Court upheld the case of the plaintiffs. It emphasized that legislative action, no matter how laudable, must be kept within constitutionally prescribed limits, because legislative powers and functions are "not at large."[35] Justice Tobi in the lead judgment emphasized the significance of the Supremacy Clause, which mandates all three arms of government to conform to the provisions of the Constitution. Referring to various dicta in *Attorney-General of Ondo State v Attorney-General of the Federation and 35 Others (ICPC* case*)*,[36] the Court reiterated its support for the anticorruption policy of the political branch. It however maintained that the initiative must be conducted within constitutionally sanctioned limits.[37]

For a Court that had earlier boldly declared unanimous support for an anticorruption policy in the country to limit national legislative competence over state-revenue monitoring, it was consciously treading a tight rope. As will be argued below, initial unequivocal judicial support for the anticorruption policy was given at the expense of the federal principle also in issue in this case. The reluctance of the justices to carry forward the *ICPC* precedent here would appear to be a product of subsequent national experience. The government at the center (whose party also had an overwhelming majority and a vise-like grip on the National Assembly), led by a former military head of state, repeatedly violated the federal principle in its executive and legislative actions. A rash of cases, well over a dozen, subsequently came before the Court, brought by aggrieved states—particularly those led by opposition parties.[38] The unitarizing bent of the central government was to be a defining feature of the first eight years of

[35] *Id.* at 24.

[36] (2002) 6 S.C. (Pt. I) 1 [hereinafter *ICPC* case]. See discussion below on Good Governance Clause.

[37] *Revenue Monitoring* case, *supra* note 33, at 19.

[38] *See, e.g.,* Attorney General of Abia & 2 Ors v Attorney General of the Federation & 33 Ors (2006) 7 NILR 71; Attorney General of the Federation v Attorney General of Abia & 35 Ors (No.2) (2002) NWLR 542 S.C.; Attorney General of Ogun State v Attorney General of the Federation (2002) 12 S.C. (Pt. II), 1.

postauthoritarian military rule, which resulted in a regrettable dissipation of resources in litigation.[39]

The Court, challenging what was an implicit abuse of its liberal construction of the powers of the center in the *ICPC*, shifted to a more restrictive view of the federal principle. Thus, the approach of the Court in the *Revenue Monitoring* case, which appears on principle to be in sharp contrast to the earlier decision in *ICPC*, follows what Teitel describes as the "ambivalent directionality of law"[40] in transitional constitutionalism. The Court had to respond to the dilemma presented by the need to secure a balance between a laudable policy objective with constitutional support and a fundamental black-letter constitutional principle. The realities of the contextual experience dictated a proactive judicial response as political power struggles threatened the stability of, and interfered with, day-to-day governance in all parts of the country.

This section of the paper has discussed how the Supremacy Clause required all the institutions of state to "dance to the music and chorus that the Constitution beats and sings."[41] However, it is significant that in deciphering the constitutional "chorus," the Court[42] has generally pursued a minimalist approach, reflected in its preference for the "blue pencil rule."

3.2 The blue pencil rule

Notwithstanding the broadly couched powers of judicial review contained in sections 6 and 315 (3) of the Constitution, in practice, the Court has consistently adopted an attitude of considerable judicial deference to the legislature. In case after case, when called on to strike down a piece of challenged legislation in its entirety, the Court has exercised

[39] Yusuf *supra* note 6 at 8-9.

[40] Teitel, *supra* note 12, at 2033.

[41] *Revenue Monitoring* , *supra* note 33, at 24.

[42] Hon. Muyiwa Inakoju & 17 Ors v Hon. Abraham Adeolu Adeleke & 3Ors (2007) 4 NWLR 1115, 1 NILR 121, 1, 43, *available at* http://www.nigeria-law.org/LawReporting2007.htm (last accessed Aug. 28, 2009). References are to the latter report based on accessibility considerations.

restraint. For all its seeming readiness to take on political issues and its commitment to uphold the Supremacy Clause, the Court has been reluctant to declare any piece of legislation illegal. Indeed, it has yet to invalidate any enactment in its entirety on grounds of unconstitutionality. In *Attorney General of Lagos State v Attorney General of the Federation & 35 Ors* (*Urban Planning* case),[43] Justice Tobi declared that, even in cases where a section of a statute is inconsistent with the Constitution, the Court was duty bound to only "remove the chaff from the grain."[44]

The minimalist interpretive approach of the Court is rooted in its history. The attitude from which it has rarely departed is that it is beyond the purview of the judiciary to embark on wholesale striking down of legislation. The Nigerian legal and judicial system, though a hybrid of customary, Islamic, and common law, is in its operation and outlook essentially dominated by its colonial heritage of the British legal system. At inception, judges of the superior (and many lower) courts were trained in the British common law system, with its minimalist constitutional conception of the role of judges. Added to this is the colonial context in which the role of judges was even more linear and limited in governance. That has largely remained the case. In the preindependence period, it was virtually unthinkable that courts would upturn colonial legislation. This attitude had a strong influence on the postindependence judiciary, as seen in the case of *Balewa v Doherty and Others*,[45] which has remained the leading authority on this area of the law and was indeed cited by Justice Tobi in support of his position stated above.

Further, as mentioned earlier, a new constitutional court was not created as part of the transition to democracy. Consequently, judges of the old legal order, appointed in the period of authoritarian military rule, continue to occupy the top order of the judicial system. It has thus been hard for the judicial leopard to change its spots. During thirty years of authoritarian military rule, the judiciary, like all of Nigeria's civil governance

[43] (2003) 6 S.C. (Pt. I), 24 [hereinafter *Urban Planning* case].
[44] *Id.* at 142.
[45] (1963) 1 WLR 949.

institutions, suffered serious institutional decay, and the administration of justice had fallen into disrepute.[46] Virtually all the members of the Court had been appointed to the bench by a military regime. Given the rot that had pervaded the Nigerian judiciary, and the perception that it had operated to legitimize authoritarian rule,[47] a new judicial body could have provided a fresh, less encumbered jurisprudential approach. The failure to take this path inevitably reinforced to some degree, the historical jurisprudential leanings of the Court in its mediation of disputes critical to governance in the country's political transition.

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The Court has constantly resorted to the "blue pencil rule" to redeem legislative excess, a common feature of many laws passed by the National Assembly in the period under review. Essentially a principle of contract law, the rule allows for a court to enforce a contract after first striking out a provision to make the contractual terms more reasonable. According to Chief Justice Muhammadu Lawal Uwais, the source of the rule in Nigerian jurisprudence is the second ambit of the Supremacy Clause which provides that any law that conflicts with the Constitution shall be void to the extent of its inconsistency.[48] Over the years, the Nigerian Supreme Court has actively extended the blue pencil rule to allow it to strike out or void offending aspects of legislation, usually with a view to saving the nonoffending provisions.

Mediating the legacy of distorted federalism in Nigeria's unnegotiated political transition is a critical challenge for ensuring the viability of the country's democratization process. This is especially the case given the background of elite manipulation of a diverse ethnic composition in the bid to secure power and control a stake in the poorly regulated but rich natural resources industry. Military authoritarianism,

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[46] Yemi Osinbajo, Attorney-General and Commissioner for Justice, Lagos State, Getting Justice Sector Reform on the Political Agenda: The Lagos State Experience, Paper Delivered at the Conference on Justice Reform in Sub-Saharan Africa: Strategic Framework and Practical Lessons (Nairobi, Nov. 21-22, 2006).

[47] Yusuf, *supra* note 8, at 219.

[48] *Urban Planning* case, *supra* note 43, at 189 (emphasis added). Chief Justice Muhammadu Lawal Uwais retired on 12 June 2006, on attaining the constitutionally prescribed retirement age of 70.

perceived to be largely fostered and dominated by a segment of the multiethnic state, has been a source of civil strife (including a bloody civil war), loss of lives and properties, instability, and social tension over the years. A number of cases illustrate how the Court has utilized the blue pencil concept to mediate the legacy of a distorted federal polity among other structural and institutional distortions in the postauthoritarian period.

In the *ICPC* case, the Court found that sections 26 (3) and 35 of the Corrupt Practices and Other Related Offences Act 2000 were in violation of the fundamental right to liberty guaranteed under section 35 of the Constitution, and struck them down. Chief Justice Uwais anchored this approach on the Court's tradition of saving *intra vires* parts of legislation.[49] The other six justices all held similar views in their concurring decision on this aspect of the matter.

Application of the blue pencil rule is a common thread running through structural judicial review of much contentious legislation between the federal government and various states in the country.[50] It has been observed that in its postauthoritarian political transition, the Nigerian state has found structural judicial review, "a more reliable mechanism for achieving a balance of power and deepening democracy."[51] The judicial reference in this case to the balance of power is significant, understood in its historical and contemporary context. From the historical point of view, the judicial penchant for the blue pencil rule is essentially a carryover from the days of judicial caution and deference to legislative authority both in the colonial and postindependent authoritarian experience. It served the judiciary well as an instrument of self-preservation.

In the current context, the balance of power issue is one that impacts on the consolidation of democratic governance in the postauthoritarian period. The checkered

[49] *ICPC* case, *supra* note 36, at 31–33.

[50] Structural judicial review according to Adrienne Stone is the process, in federal polities with written constitutions, whereby judges interpret and enforce constitutional provisions that relate to the basic structure of government. *See* Adrienne Stone, *Judicial Review without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review*, 28 OXFORD J.LEG. STUD. 1, 2 (2008).

[51] Yusuf, *supra* note 10, at 8.

institutional experience of the political branches has distinguished the judiciary as the forum of choice for the resolution of numerous vertical and horizontal jurisdictional disputes. The situation has been complicated by the continued existence on the statute books of a considerable number of unitarizing laws. A direct consequence has been the pivotal need for mediating emergent disputes to facilitate effective delivery of public services.

Thus, in adopting the blue pencil approach to judicial review of legislation where a more activist approach was desirable, the Court was following Teitel's propositions of transitional constitutionalism. In "constructing liberalizing change" transitional judiciaries have to balance "ideal justice" with "political reality."[52] An all out activist approach in the context was capable of threatening the institutional power and relevance of the judiciary itself. The Court, having been nurtured in an atmosphere of authoritarianism, must have been apprehensive about the prospects for implementation of such radical decisions by the political branch. But there is another worry. While privileged by its relatively stable institutional role, it could not take public confidence, a vital normative value for the legitimacy and effectiveness of its decisions, for granted. Thus, the blue pencil approach, in important political cases, constituted a relatively safe jurisprudential choice from an institutional perspective.

3.3 Cooperative federalism

Section 2 (2) of the Constitution prescribes that the country shall be a "Federation consisting of States and a Federal Capital Territory." But while this foundational principle has been textually preserved through successive constitutions, the experience of military rule for almost three decades has hollowed it out, rendering it one of the most often breached of those principles, second only perhaps to the Supremacy Clause.

[52] TEITEL, *supra* note 11, at 213.

In practice, the military ruled in a unitary fashion easily suited to its command-based institutional structure. However, federalism remained such a sensitive issue in the country that the military was obliged to pay lip service to its preservation. The single bold attempt to formally replace the federal arrangement with a unitary system was a major element in the country's descent into a thirty-month civil war.[53] All the same, the military left the country as a lopsided federation with an incongruent allocation of powers to the center and what has grown into thirty-six weak, fractionalized states; a far cry from the powerful three regions in place at the inception of military rule in 1966.[54]

The federal government has acquired so many powers that is has come to exercise control over virtually every aspect of day-to-day governance. It not only controls foreign affairs, the security agencies, the armed forces, and currency, it also exclusively controls or oversees commerce and trade, social security, labor, weights and measures, and vital aspects of land policy within the states. It has effectively taken over the arena of "ordinary governance,"[55] extending well beyond the regular spheres contemplated for a central government within a regular federation. Predictably, this dominance by the federal government has secured for it a disproportionate share of the country's resources.[56] Military authoritarianism likewise ensured the repression of any serious discontent with this state of pseudofederalism. It is thus little wonder that claims on federalism would emerge from military authoritarianism as a major source of conflict in intergovernmental relations in the political transition.

In mediating the consistent demands for restructuring the country away from this state of affairs, the Court, explicitly in one case and implicitly in others, has advanced the

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[53] Hakeem O. Yusuf, *The Judiciary and Constitutionalism in Transition—A Critique*, GLOBAL JURIST vol. 7, issue 3, article 4, 1 (2007), *available at* http://www.bepress.com/gj/vol7/iss3/art4/. *See also* IGNATIUS AKAYAAR AYUA & DAKAS C. J. DAKAS, FEDERAL REPUBLIC OF NIGERIA 1, 4 (2005), *available at* http://www.forumfed.org/libdocs/Global_Dialogue/Book_1/BK1-C08-ng-AyuaDakas-en.pdf.

[54] Jonas Isawa Elaigwu, *Federalism in Nigeria's New Democratic Polity* 32 (2) PUBLIUS: THE JOURNAL OF FEDERALISM 73, 76-77 (2002).

[55] NWABUEZE, *supra* note 28, at vi.

[56] Ladipo Adamolekun, *Nigerian Federation at the Crossroads: The Way Forward* (2005) 35 PUBLIUS: THE JOURNAL OF FEDERALISM 383, 390.

doctrine of "cooperative federalism." It has been a major feature of the Court's approach to renegotiating the country's federalism in series of intergovernmental disputations that have challenged effective governance in Nigeria from 1999 to date. In his dissent in the *Urban Planning* case, Justice Ayoola made explicit the doctrine. He enunciated the principle as the basis for holding that the "Environmental Clause" contained in section 20 of the Constitution conferred concurrent powers of urban and regional planning on both the states and the federal government. The justice observed that it was quite possible for the two tiers of government to work together for achieving environmental protection goals without compromising the norms of a federation as envisaged by the Constitution.[57]

As envisaged by Justice Ayoola, the principle allows the federation to legitimately pursue certain constitutional goals, particularly those stated in the directive principles in Chapter II of the Constitution, without compromising the autonomy of the states. The legitimacy of the approach may also be located in the need to ensure the fulfillment of an international obligation.[58] But the subjective fluidity and inherent tensions of this principle have made its application hugely contentious, rendering problematic its explication in the Court's transitional jurisprudence. The question that necessarily arises is how to ensure a balance in the operation of such an approach to ensure compliance with the letter of other constitutional provisions and the overall tenor of the Constitution. This is germane given the Court's focus on ensuring compliance with due process and rule of law in governance, in contradistinction to the autocratic approach of military rule at the root of breaches of the federalism principle.

Justice Ayoola addressed this issue by formulating a two-part test to determine the legitimacy of policies that threaten the federal principle. In the first stage, the court determines whether from the provisions of the enactment in question, such an enactment is 'rationally referable' to achieving an objective set out in the directive principles of the

[57] *Urban Planning* case, *supra* note 43, at 173 (emphasis added).
[58] *Id.* at 179.

Constitution. In other words, a court examines whether or not the exercise of the power in dispute clearly lies outside the goals of the Constitution *properly* construed. If it does not, the case should proceed no further. If it does, then a court should ask whether the implicated provisions conform to the recognition of federalism as a fundamental constitutional element of the country's political arrangements.[59]

It is difficult, if not impossible, to reconcile the cooperative approach, with its inherent notion of overriding subnational autonomy, with preservation of the fundamental principle of federalism as guaranteed by the Constitution; at least not in Justice Ayoola's articulation in this case. The formulation appears dubious, not least because it elides the very basis of the country's adoption of federalism—the need to preserve the autonomy of the regions and provide them opportunities for development based on their preferences. It is thus not surprising that the justice came to the interesting determination (despite dissenting) that the disputed Urban and Regional Planning Act did not pass the tests of validity that he devised. This, despite his opinion that the Environment Clause could justify federal legislation aimed at delimiting planning powers in a manner that would ensure environmental protection without compromising the sovereignty of the states. According to Justice Ayoola, "imagination and perspicacity" were all that was required to achieve this.[60]

What manner of imagination or the nature of the perspicacity Justice Ayoola has in mind remains undefined. Suffice to note that the majority did not share that view. Interestingly too, he found no validation for the Act at issue because its provisions regulated land use and granted the central government power of a nature that would lead to the demise of the federal principle.[61] The judiciary, as guardian of the Constitution must prevent such an outcome.[62] He thus ended by granting the reliefs sought by the

[59] *Urban Planning* case, *supra* note 43, at 176.
[60] *Id.* at 179 (Ayoola, J.).
[61] *Id.* at 180.
[62] *Id.* at 180.

plaintiff on virtually the same basis (upholding federalism *stricto sensu*) as did the majority decision (of four of the seven-justice constitutional panel).

Maintaining the federal status of the country as a foundational principle has long been a fundamental issue in postindependent Nigeria. Notwithstanding brazen violations of the principle by successive military regimes, it is been accepted that only a federal polity can ensure equity and protect the rights of hundreds of minority groups amalgamated by colonial power into a nation state. The opportunity for political change afforded by democratization brought to the front burner real and imagined complaints of marginalization from all parts of the country.[63]

Judicial preference for a cooperative approach, essentially a pacifist approach to the resolution of a highly sensitive and divisive issue, has the trappings of transitional adjudication with its intrinsic feature of constructivism. In the Nigerian context, the judiciary, in recognition of the need to restore the distorted equilibrium of power and the agitations for true federalism, proclaimed the extensive physical planning and development powers of the federating states within their boundaries. However, partly in recognition of the various infrastructural developments (sometimes improperly) undertaken and located by the central government in the states, it sought to temper the impact of a full-blown recognition of state control over physical planning and development. Not the least because of the interest of third parties who despite their stakes could not join the case as a result of procedural exclusions.

In summing up, it can be said that agitations for *true* federalism remain highly contentious in the postauthoritarian period. Many hold the view that meaningful and

[63] Indeed, the truth process initiated after the departure of the military in 1999 (known as "the Oputa Panel," after its chairman), found to its chagrin that all major ethnic groups in the country complained of marginalization, as did minorities at its public hearings around the country. *See* 7 HUMAN RIGHTS VIOLATIONS INVESTIGATION COMMISSION OF NIGERIA, OPUTA PANEL REPORT: SUMMARY, CONCLUSIONS AND RECOMMENDATIONS (2004) *available at* http://www.nigerianmuse.com/nigeriawatch/oputa/. The site also has the full report. Given this background, it is understandable that the "federal question," and resolution of the agitations generated either by self-serving, power-seeking elites or by genuine feelings of marginalization on the part of communities, became a prominent issue in the postauthoritarian period. *See also* Yusuf, *supra* note 9, for a discussion of the process and outcome of the Oputa Panel.

sustainable development can not take root in the country without it. The role of the Court in resolving critical political contestations framed in legal terms, resolution of which has largely eluded the political branches, remains important. It is in this circumstance that the Court again fits Teitel's model of the transitional judiciary perforce involved in a "constructivist role" in a postauthoritarian society.

3.4 Fundamental objectives and directive principles of state policy

The Court has also utilized the fundamental objectives and directive principles of state policy to much effect in developing transitional jurisprudence. An important innovation in constitution making in postindependence Nigeria was the introduction of fundamental objectives and directive principles of state policy (directive principles) in Chapter II of the 1979 Constitution. Driven perhaps by disenchantment with the cumulative experience of decades of colonialism succeeded by military rule, the directive principles include provisions for economic, social, and cultural rights. It provides for social justice and democracy as the basis of governance, proclaims the objective of national integration, and prohibits discrimination. Section 13 stipulates that it shall be duty and responsibility of all organs of government, authorities and persons exercising legislative, executive, or judicial powers to conform to, observe, and apply the provisions of the chapter. They likewise affirm that the State shall abolish all corrupt practices and abuses of power in addition to setting out specific duties of citizens. In general, the chapter (and this has been repeated in the 1999 Constitution) provides for a robust body of virtually all conceivable noble objectives and broad policy statements to which a modern state may aspire.

Significantly, like similar provisions in the Indian Constitution, these directive principles of state policy are nonjusticiable. Section 6 (6) (c) of the Constitution inveighs decisively against judicial review or enforcement of the rights that appear embedded in the section. According to it, the judicial powers conferred by section 6 shall not, except

as otherwise provided by the Constitution, extend to any issue as to whether any act or omission by any authority or person, or any law or judicial decision, is in conformity with the directive principles.[64] It is this provision that has led to the description of the directive principles as "exhortations of best practices."[65]

However, in a significant jurisprudential move, the Supreme Court has recently made it possible for the otherwise nonjusticiable provisions of Chapter II to be given effect. In the *ICPC* case, it held that some of the directive principles could be made justiciable through legislation.[66] The Court rejected the plaintiff's claim that the creation by the National Assembly of offenses of corruption and a monolith agency with jurisdiction over all public and private residents of Nigeria by the National Assembly was unconstitutional. The plaintiff's argument was that this did not form part of the Exclusive and Concurrent Legislative Lists of the powers of the National Assembly and the Federal Government and that, in line with constitutional law and practice in Nigeria, corruption was a residual matter within the exclusive jurisdiction of the states.

The federal government based its defense largely on a joint construction of sections 15 (5) and 88 (2) (a) (b), and item 60 (a) of the Constitution. Item 60 (a) provides that the National Assembly has the power to establish and regulate authorities for the federation or any part of it in order to promote and enforce the observance of the directive principles contained in the Constitution. Section 15 (5) provides that "The State shall abolish all corrupt practices and abuse of power." Finally, section 88 (2) (a) (b) of the Constitution provides that the National Assembly shall have the power to "expose corruption, inefficiency or waste in the administration of laws within its legislative competence."

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[64] CONST. FED. REPUB. NIGERIA 1999.

[65] Hakeem O. Yusuf, *Oil on Troubled Waters: Multi-National Corporations and Realising Human Rights in the Developing World, with Particular Reference to Nigeria*, 8 AFR. HUM. RTS. L.J. 86 (2008).

[66] *ICPC* case, *supra* note 36, at 104.

The Court upheld the legality of the Corrupt and Other Related Offences Act No.5 of 2000 (ICPC Act).[67] It found that it was within the powers of the National Assembly to enact the ICPC Act under item 60 (a) of the Constitution as argued by the federal government. Chief Justice Uwais stated in the lead decision that the directive principles with respect to section 15 (5) on the duty of the State (federal and state governments) to abolish corrupt practices can only be enforced by legislation. The chief justice dismissed the argument that the anticorruption law ought to be limited to public officials and the three branches of government: a liberal interpretation commended extension of its purview to all persons and institutions in the country for the objective to be realized.[68] In all events, since corruption is "not a disease which afflicts public officers alone," any measure designed to combat it "must be pervasive to cover every segment of the society."[69] Justice Uwaifo similarly expressed the view that the purpose of the directive principles is best served when they come alive rather than remain "mere or pious declarations."[70] The National Assembly and the Federal Executive were empowered to enact legislation to make them effective as the situation required.[71] Thus the Court employed the directive principles to strengthen the foundations of governance in the country.

The timing of the decision and the position of the majority could not be more apt considering, as stated earlier, the disturbing record of corruption in the country. The majority view constituted the settled position of the law in recognition of the expedience of transitional constitutionalism articulated by Teitel. Here, the attitude of the Court, it can be argued, is that the law, though unchanged in its letter had to be moved, at least in spirit, closer to the needs of the society, especially at a time of critical political change. In

[67] While it rejected the claim for the whole of the IPC Act to be invalidated, the Court did strike down some of its provisions as unconstitutional; these were provisions it held to be of a judicial nature.

[68] *ICPC* case, *supra* note 36, at 28–30.

[69] *Id.* at 28.

[70] *Id.* at 113.

[71] *Id.* at 113.

this way, the decision mirrors Teitel's proposition that transitional jurisprudence sometimes displaces existing conceptions of law in society.

Further, it is remarkable that each of the three dissenting justices (including Chief Justice Uwais) in the *Urban Planning* case referred to *ICPC*, stating that the interpretation given therein to section 15 (5) of the Constitution to uphold the validity of the ICPC Act should apply equally to section 20, at issue in this case, so as to validate the Nigerian Urban Planning Decree. The slim majority of four justices had declared a number of provisions of the decree unconstitutional for purporting to confer on the federal government the powers of urban and regional planning for the whole country. Justice Tobi emphasized that the case, like *ICPC*, turned on the directive principles of state policy, dealing in this instance with the environment and so should be decided in the same manner.[72]

Clearly, the Court is moving toward a radical position on the constitutional relevance of directive principles to fill a perceived gap in existing legislation. The motive appears to be the need to bridge the distance between aspirational values expressed in the Constitution into beneficial, tangible, and accessible social experience in view of the peculiar realities of the times. In other words, in its advertence to the directive principles, the Court evinced a strong intention to reshape social experience in the country. This approach is shared both in the unanimous decision in *ICPC* and the strong minority opinion in *Urban Planning*.

3.5 Peace, order, and good government

The need to maintain peace, order and good government has been another central theme of the contestations in the country's transitional jurisprudence. The "Good Government" clause, contained in section 4 of the Constitution, provides that the National Assembly shall have the power to make laws for the "peace, order and good government of the

[72] *Urban Planning*, *supra* note 43, at 185–186.

Federation or any part thereof." Reliance on this provision constituted a key element of the federal government's claim in a number of cases relating to delimitation of central and subnational powers in the federation.

While the Good Government Clause formed a *ratio decidendi* in the unanimous decision of the Court in the *ICPC* case, the Court was aware the decision was essentially policy-based and, to a considerable degree, undermined the federal status of the country as enshrined in the Constitution. Justice Ogwuegbu was perhaps the most forthright in his admission that the ICPC Act constituted an affront to the principle of federalism because it directly interfered with the autonomy of the states. However, he found it tolerable to sacrifice such autonomy in favor of the overriding priority that he and other members of the Court's Constitutional Panel accorded to the power of the National Assembly to make laws for the "peace, order and good government of the Federation." According to Justice Ogwuegbu, "Corrupt practices and abuse of power can, if not checked, threaten the peace, order and good government of the Federation or any part thereof," [73] and the ICPC Act was a fitting enactment for ensuring the peace, order, and good government of the country.[74] Since the law was enacted by the National Assembly, it was entitled to have "paramount force" in the country.[75] He was supported in his opinion by Justice Uwaifo.[76]

Thus, in the *ICPC* case, a fundamental policy objective attracted unanimous support of the Court even as it compromised another constitutional imperative. However, the Court will not necessarily uphold such an approach if the issue at stake is a purely political matter, as was evident in *Attorney General of Abia & 35 Ors v Attorney General of the Federation* (the *Electoral Act* case),[77] a decision delivered barely three months earlier. The crux of the case for the plaintiffs (the states of the federation) was that

[73] *ICPC*, *supra* note 36, at 59.
[74] *Id.* at 61.
[75] *Id.* at 62.
[76] *Id.* at 116.
[77] (2003) 3 SC 106.

certain provisions of the Electoral Act 2001, a law made by the National Assembly to regulate federal, state, and local elections, exceeded the assembly's jurisdiction and threatened the very existence of the country. The federal government contested this position, seeking essentially to rely on the powers of the National Assembly under section 4 (2) of the Constitution, the Good Government Clause.

In dismissing the federal government's defense, the Court took a stand against the overt federal attempt to appropriate all powers incidental to the regulation of the political process, upholding a restricted ambit of the Good Government Clause. The full significance of the Court's position is best appreciated in the context of the political backdrop to the case. In Nigeria, control of electoral mechanisms and processes, particularly electoral commissions, has translated directly into political victory. Given specific provisions of the Constitution on the matter, the law in contention would most likely not have passed legislative scrutiny, but for the overwhelming majority control wielded by the ruling party.

Although the *Electoral Act* case predated *ICPC*, the Court has since left little doubt that it prefers a more restricted view of the Good Government Clause as the right approach to the interpretation of section 4 (2) of the Constitution. In the *Revenue Monitoring* case (decided later), it rejected the federal government's attempt to rely on the holding in *ICPC*, which would give priority to a policy argument—namely, the need to check corruption and abuse of office.[78] The Court declined, however noble the objective, to turn a blind eye to unconstitutionally passed legislation,[79] thus rejecting the broad-based policy approach to corruption that dominated the unanimous decision in *ICPC*.

Even more telling, the Court rejected the attempt by the National Assembly to create a criminal offense under the Revenue Monitoring Act to check diversion of local

[78] *Revenue Monitoring* case, *supra* note 33, at 5–6.
[79] *Id.* at 25–26.

government funds by state government officials. It conceded that the assembly could make legislation that contained penal provisions, but with the caveat that it must be "vindicated" by the Constitution.[80] In this way, the Court made an implicit turnaround in its perspective on the salience of section 4 (2) and the amount of weight to be accorded to an anticorruption policy that was in explicit tension with a fundamental constitutional principle. The majority distinguished *ICPC* from the *Revenue Monitoring* case by making the dubious claim that corruption was not a prominent aspect of the latter.[81]

Significant in this case, however, is the dissent of two members of the constitutional panel. In particular, there is Justice Musdapher, who referred to the unanimous decision of the Court in *ICPC* and the *ratio decidendi* that supported the anticorruption initiative of the federal government. His solidly founded opinion recalls the holding in *ICPC* that the national legislature is best suited to make legislation on subject matter whose impact is felt all over the country (and even beyond its borders). The exercise of such legislative power, on a liberal construction of all relevant parts of the Constitution, cannot be considered an interference with the autonomy of the states.[82]

Justice Musdapher found no justification for deviating from the policy-based approach of the earlier decision.[83] He emphasized that the Supreme Court has "the sacred duty" to give "life" to the "noble ideas" located in the Constitution; thus, it was obliged to adopt a judicial approach that actively translates "abstract concepts" articulated in the Constitution into reality.[84] According to him, the Good Government Clause empowered the National Assembly to ensure transparency and check "the twin vices of corruption and abuse of power."[85] Provided the Revenue Monitoring Act was intended to achieve

[80] *Id.* at 21.
[81] *Revenue Monitoring* case, *supra* note 33, at 22.
[82] *ICPC* case, *supra* note 36, at 138 (emphasis added).
[83] *Revenue Monitoring* case, *supra* note 33, at 42.
[84] *Id.* at 41.
[85] *Id.* at 44

this objective of the Constitution, the National Assembly was acting within its powers to have enacted it.[86]

The court's about-face in *Revenue Monitoring* can be explained in transitional jurisprudential terms, given some background: The ICPC Act was passed a few months after the inauguration of the new civil administration of President Olusegun Obasanjo, whose proclaimed anticorruption policy attracted immense popular support. The country was reeling from revelations of staggering corruption of past military regimes, particularly that of General Sanni Abacha, which by some accounts had run into billions of dollars. Public utilities and basic social infrastructure like roads, public health institutions, potable water, electricity, and others were in state of dilapidation or were altogether absent. Many were unable to afford three meals a day.

When the Court heard *ICPC*, it was aware of the depth of public outrage at the perceived reluctance of the National Assembly to pass the ICPC Act, and of national and international concern over the situation. As Justice Ogwuegbu put it, "all Nigerians" with the exception of "those who benefit from it" were "unhappy with the level of corruption"[87] in Nigeria, which, according to Justice Mohammed, might be among "the most corrupt nations on earth."[88]

We see at play in *ICPC* the constructive role of adjudication in transitional contexts as contemplated by Teitel. The Court consciously promoted policy over law displaying an active engagement with the society in transition. The judicial approach constitutes identification with the social realities of its environment where there is a consensus that national development has been stunted by corruption for decades, and the urgent need for comprehensive action to combat the menace at all levels; local and national, public and private.

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[86] *Id.* at 44.
[87] *ICPC*, *supra* note 36, at 59.
[88] *Id.* at 70.

While the work of judges, particularly nonelected ones, is theoretically immune from considerations of public outrage, the extent to which judges take cognizance of public opinion remains open to debate.[89] Political science research suggests that the United States Supreme Court's decisions, for example, have substantially reflected prevailing mass public opinion.[90] While there are no such studies on the Nigerian judiciary, the Court's unanimous decision in support of an anticorruption policy in the *ICPC* case presumably responded in some measure to the prevailing indignation on the issue.

Moreover, *ICPC* offered the Court, as the apex judicial body, an attractive opportunity for institutional self-redemption and movement away from a compromised institution by the *ancien regime*. Having itself borne the stigma of a corrupt institution over the years, the judiciary was well aware of the need to utilize all available opportunities to secure a modicum of legitimacy for its otherwise complacent judicial approach to and legitimation of military rule in the country.[91] Realizing the need for a moral high ground for legitimizing judicial authority in the postauthoritarian period, the Court seized on the leverage afforded by *ICPC.* Again, as Teitel suggests, this is not an unusual course for a transitional judiciary adjudicating highly political cases in societies undergoing drastic political change.

However, following judicial support for the sweeping powers of the anticorruption agencies, the apprehension in quarters opposed to the thrust of the anticorruption legislation appeared to have been vindicated to some extent. In the implementation of the policy, it was constantly alleged that the federal government invoked those powers selectively, targeting political opponents in the run-up to the

[89] Cass R Sunstein, *If People Would Be Outraged by their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 212 (2007).

[90] THOMAS R MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (Unwin Hyman 1989).

[91] Yusuf, *supra* note 8, at 207–216.

crucial 2007 general elections.[92] This led to renewed calls for restructuring of the government and decentralization to achieve fairness and equilibrium in the allocation of powers and resources among the tiers of government. Calls for restructuring were perhaps strongest in the area of fiscal federalism to which the criminalization of corrupt practices was connected. This background seems to have set the stage for a more cautious approach in subsequent judicial encounters with the anticorruption policy.

At the time the Court heard *Revenue Monitoring*, it felt itself on fairly safe ground to rethink its rather robust support for the (by this time suspect) anticorruption policy of the Obasanjo administration. Much as it affirmed continued support for an anticorruption agenda, the Court adopted a different jurisprudential approach in *Revenue Monitoring* than it had done three years earlier in *ICPC.* In *Revenue Monitoring*, the majority chose to strike down legislation that sought to override the principle of federalism.[93] There was presumably an institutional decision, discernible in the judgment of the Court in the *Revenue Monitoring* case, to hold the federal government more accountable to other constitutional values, particularly in light of the prevailing sociopolitical preference for a truly federal polity. Put another way, the Court was alert to the need to distance itself from the federal government, which had lost some ground in its effort to portray a robust anticorruption policy as justification for the continued erosion of the federal principle.[94]

The Court's position is reflective of public disillusionment with the manner in which the Obasanjo administration was pursuing its policy objectives. That administration had alienated many otherwise supportive stakeholders in the country, not least the states, most of which challenged the validity of the anticorruption motive as a

[92] Omotola, *supra* note 5, at 223–225.
[93] *Revenue Monitoring* case , *supra* note 35, at 55
[94] *Id.*

ground for eroding the country's federal character. The federal government had dissipated valuable public and institutional support for the anticorruption "war".[95]

The Court's decision in the *Revenue Monitoring* case highlights the convergence of the constitutive and transformative role of law that, according to Teitel, marks out law in transitional societies as *sui generis*. The Court found itself in a rather fluid social constitutive process that characterizes transitional adjudication; hence the apparent tension between the judicial preferences in *ICPC* and *Revenue Monitoring*.

Challenged by the limits of available legal instruments in the varied political and policy disputations it has been called upon to adjudicate, the Court has sought to reach out of its customary parochial jurisprudential preference to avail itself of judicial experiences elsewhere.

3.5 International and comparative law

Scholars of comparative constitutional law and transitional jurisprudence have pointed to the value of reference to international and comparative law as important sources for progressive and rights-based adjudication.[96] In the Nigerian experience, adoption of this new trend is commendably demonstrated in the *ICPC* case. This is quite significant when it is considered that the Court, particularly under authoritarian rule, had hitherto demonstrated a judicial proclivity for ignoring even relevant international law obligations of the country. However, in this case, while relying heavily on the fundamental directives of state policy, the Court referred to various international instruments and norms in support of its unanimous decision to validate the ICPC Act as appropriate legislation for combating a national menace in the context of political change.

To provide a basis for prioritizing political considerations over the fundamental principle of federalism, the justices, among other considerations, took notice of the

[95] Omotola, *supra* note 5, at 224.

[96] *See, e.g.*, Teitel, *supra* note 12, at 2028; H. Kwasi Prempeh, *A New Jurisprudence for Africa*, 10 J. DEMOCRACY 135, 146 (1999).

Organisation for Economic Cooperation and Development (OECD) Recommendation on Bribery and Corruption in International Business Transactions. They likewise cited the resolution of the United Nations Economic and Social Council on corruption[97] to justify their support for a "centrally coordinated approach to the fight against corruption."[98] Justice Uwaifo was unequivocal about the importance of international considerations, asserting that the corruption and abuse of power had become one of international concern. This reality, he opined, justified addressing the problem through a federal agency.[99]

In addition, the Court registered approval for comparative law as it sanctioned the position that the directive principles of state policy contained in the Constitution could be made justiciable. These are ordinarily treated as soft laws, and nonjusticiable in Nigerian constitutional law. In this regard, Justice Uwaifo referred to India and Ireland, whose fundamental constitutional objectives and directive principles of state policy are similar to Nigeria's. He quoted approvingly an excerpt from Durga Das Basu's *Commentary on the Constitution of India*:

> Under the Irish Constitution, it has been suggested that the Courts, in deciding cases relating to the subject-matter of the declarations are bound to take cognizance of the general *tendency* of these declarations, *even while legislative effect has not been given to them.*[100]

Justice Uwaifo noted that the position in India strongly suggested the need to ensure the directive principles were not "a dead letter."[101] He went on to review various Australian, American, Canadian, and Indian authorities,[102] to seek judicial support for validating legislation that, even by the admission of the chief justice, impinged upon the

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[97] *ICPC* case, *supra* note 36, at 108–110.
[98] *Id.* at 110.
[99] *Id.* at 116.
[100] *ICPC* case, *supra* note 36, at 113 (emphasis in the original) (quoting 2 DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDI 312(5th ed.)).
[101] *Id.* at 113.
[102] *Id.* at 115–134. Note that all four are federated States.

autonomy of the states.[103] All other members of the seven-justice panel[104] similarly cited foreign authorities in their concurrences.[105] Thus, the Court found justification in comparative law for its decision as it sought to achieve a major policy objective.

Commendable as this approach may be, the legal status of comparative law in Nigerian transitional jurisprudence remains unclear. A pall of uncertainty has been cast, ironically, by a contemporaneous decision of the Court in *Justice Chukwudifu Oputa (Rtd.) and Human Rights Violations Investigation Commission and Gani Fawehinmi, v General Ibrahim Babangida, Brigadier Halilu Akilu and Brigadier Kunle Togun* (*Oputa Panel* case).[106] In that case, the Court demonstrated a marked reticence toward international and comparative law, lamentably so, considering that *Oputa Panel* related to the country's international obligation to provide redress for gross violations of human rights that had taken place during the period of authoritarian rule. Rather than relying on *ICPC*, the Court cited section 35 (1) of the Constitution, which guarantees personal liberty, to reject the right of victims of gross violations of human rights to truth under regional human rights instruments and international law.

The Court did not utilize the opportunity presented by *Oputa Panel* to contribute to the developing jurisprudence on the right to truth for victims of gross human rights violations. This right has been developed more clearly in regional human rights systems elsewhere, particularly in the Inter-American Human Rights System.[107] In the case of Africa, it is argued that the right to truth is guaranteed by article 19 of the Universal

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[103] *Id.* at 30.

[104] With the notable exception of Justice Katsina-Alu.

[105] *ICPC*, *supra* note 36, at 57–61, 69-70, and 154–180, respectively.

[106] [2003] M.J.S.C 63.

[107] The Inter-American Court, along with its sister mechanism the Inter-American Commission on Human Rights, faced with a large number of "enforced disappearance cases," has stated in a number of its decisions that there is a right to truth for relatives of victims of such disappearances. The *locus classicus* on the matter is *Velasquez Rodriguez v. Honduras*, Inter-Am. Ct. H.R.(ser. C) No. 4 (1988), where the Court held that relatives of an individual who was arrested, reportedly tortured and then "disappeared" were entitled to have the report of an independent and transparent investigation carried out by the State into the disappearance. *See* SCOTT DAVIDSON, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM (Dartmouth 1997)

Declaration of Human Rights and article 9(1) of the African Charter on Human and People's Rights (African Charter).

The Court rejected the applicant's reliance on and reference to the African Charter as basis for the truth-telling process in the country. Although it conceded the Oputa Panel was set up to deal with human rights violations, the Court held that for treaty obligations to apply, there would have to have been specific legislation establishing the Oputa Panel and investing it with the powers to carry out an inquiry of this nature. The constitutional panel of the Supreme Court of Nigeria made only a token reference to international human rights law despite the country's double obligation in respect of the African Charter, which is at once an international treaty as well as national legislation. Here, the Court was clearly reluctant to assume an activist stance.

It has been argued that the Court's interpretive approach in *Oputa Panel*, even in relation to other constitutional provisions and legislation within the national context, is erroneous.[108] This derives from the fundamental disregard of the important role of international and comparative law in the context of transition in the decision. Clinging to an unrepentant and rigid formalist jurisprudence, the Court essentially facilitated state impunity for gross violations of human rights committed during almost three decades of military authoritarian rule in the country. The approach of the Court in *Oputa Panel* cast doubts on the sincerity of its progressive references to international law in the contemporaneous *ICPC* case.

Set against other features of transitional adjudication discussed above, reference to and conformity with international law remain a point on which the Court's transitional jurisprudence seems ambivalent, although *ICPC* constitutes a significant attempt to move away from the distinctly parochial approach that pervaded the Court's decisions in the authoritarian period. It may be observed that, at the time of *Oputa Panel* and *ICPC*, the Court was engaged in a struggle to come to terms with the implications of the changed

[108] Yusuf, *supra* note 53, at 7.

political situation in the country—a struggle that has yet to abate. Nonetheless, the intermittently receptive attitude of the Court toward international and comparative law has had beneficial results for the resolution of some of the challenges the Court has faced in the context of an unnegotiated political transition with its legacy of contentious but unaddressed issues.

4. Conclusion

There is something to be learned from the interplay of politics, law, and adjudication in the African experience of transition that remains largely ignored in the literature. In the illustrative Nigerian experience, the judiciary has undertaken review in controversial areas (such as federalism and anticorruption) with direct significance for the sociopolitical problems and challenges of political transition from authoritarian rule. While this reflects an impetus to transformation, it is nonetheless apparent that the judiciary is limited by its constitutional status, the country's legal and political traditions regarding judicial review, and the judiciary's status as a holdover institution. These two competing realities have made for interesting opinions, split decisions, and, occasionally, the resort to a minimalist approach, as reflected in the so called "blue pencil" rule. They have also spurred the use of comparative law in the court's jurisprudence, as it has had frequently had need for an alternative source of normativity as a basis for adjudication. The results have predictably been mixed.

Transformative adjudication is a vital, if not plainly indispensable, tool for social reconstruction in postauthoritarian societies. The role of the courts in deploying law to the service of societal renewal is clearly challenging in negotiated transitions that are usually accompanied by the establishment of new and unencumbered judicial institutions. But it is decidedly tasking where the judiciary is itself in need of transformation and where political change has come about through an unnegotiated process of political change. The attempts of the Nigerian judiciary—through forging a transitional jurisprudence— to come to terms with political change, illustrate the challenges of such

an enterprise. The process can be unsettling for the judiciary itself, despite the latter's presumed institutional advantage in transitional societies. The fluidity of political action in particular poses a huge challenge to transitional jurisprudence. The judiciary must navigate uncertainty, inconsistency, and abuse of power while attempting to craft a forward-looking jurisprudence in response to novel situations, and must address issues that ordinarily would be subject to political determination.

The Nigerian Supreme Court is aware, at least implicitly, of the value of "transformative adjudication" that Teitel describes as "self-regarding."[109] Though salient questions remain as to the clear emergence of a transitional jurisprudence in the Nigerian setting, it can be reasonably argued that the judicial terrain has changed since the end of authoritarian rule. In working toward what may be optimistically regarded as a transitional jurisprudence, the judiciary, characterized in the past as complicit with gross violations of human rights and misgovernance,[110] seems to be seeking institutional redemption.

In the cases discussed herein, and in others, the Court has employed an expansive interpretation of existing texts, such as the Supremacy Clause and the Good Governance provisions of the Constitution, to mediate critical political disputes in the postauthoritarian period. In this process, the Court has to some degree articulated a jurisprudence to meet the needs of the political transition. In particular, its innovative take on the interpretation of the relevance and status of the fundamental objectives and directive principles of state policy has signaled a promising break with the conservative jurisprudential attitude of the past.

The evolution of jurisprudential preferences from the earlier stances of the Court in the *ICPC* case to the later *Revenue Monitoring* case, on principally the same policy

[109] Teitel, supra note12 at 2034.
[110] Yusuf, *supra* note 8.

question, poignantly reflects the paradox inherent in the constitutive and transformative role of law in the flux of political change. When the country embarked on a truth-telling process at the dawn of the transition, the judiciary—as an institution that had actively participated in governance in the period of authoritarian rule—remained unaccounted for. This underscores the need for judicial accountability in postauthoritarian contexts.

A related point that emerges from the discussion in this article is the nature of the internal conflict with which the transitional judiciary sometimes must struggle. This can be particularly acute in the determination of intergovernmental contestations. It is instructive in this regard that, concluding his concurring decision in the *Urban Planning* case, Justice Ejiwunmi explained that he was unable to conclude the matter as decided by the Chief Justice.[111] Such divided opinion speaks to the jurisprudential gulf that can be found in the decisions of judges in overly political matters even in the highest courts. The Nigerian Supreme Court is no exception.

Notwithstanding noticeable tension in some of the decisions of the Court in the postauthoritarian period, it is now almost beyond doubt that neither the Court's jurisprudence nor Nigeria's sociopolitical terrain will be the same again. The Court's involvement with adjudicating transitional disputes has ensured this. Through this involvement, the Court in particular and the Nigerian judiciary in general, have finally taken a strategic position in governance after years of institutional lethargy. Despite the absence of a new judicial institution in the country, certain judicial decisions of the Court suggest that "rehabilitated" judicial powers can be deployed to achieve similar results to those obtained from newly created constitutional courts elsewhere.

Judging from the Nigerian experience however, it appears that courts burdened with a tarnished institutional past are unable to avail themselves of the hope inherent in the "clean slates" that new courts enjoy. Transitional jurisprudence may indeed be better suited to an unburdened judiciary. It is this reality that weighs like an albatross around

[111] *Urban Planning*, *supra* note 43, at 112.

the collective neck of the Nigerian judiciary as it plays an inevitable active role in reconstructing a postauthoritarian society based on liberal democratic principles.