Democratic Transition, Judicial Accountability and Judicialisation of Politics in Africa:

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Democratic Transition, Judicial Accountability and Judicialisation of Politics in Africa: The Nigerian Experience

Introduction

The discussion in this article follows closely on a slowly but steadily growing body of scholarly evaluation and analyses of what Hirschl has described as the judicialisation of 'pure politics.' Courts are playing substantive critical roles in the determining the course and dimensions of electoral processes.[1] Thus they have been involved in adjudicating gerrymandering issues, political party funding matters, constitutional terms of office, the right to participation in the democratic process, disqualification of candidates, recognition of political parties, validation of elections and electoral outcomes.

Judicial intervention has been significant in virtually all of these aspects of the democratic process. In particular, judicialisation of disputes on the right to participation, disqualification of candidates and sanction of electoral contests have had resonance in Nigeria's political transition to civil rule after almost three decades of authoritarianism.[2] The inter-play of politics, law and judicial intervention on these issues in Nigeria's transition constitute the foci of this article.

The significance of the foci of this article derives from the observation that despite the increasing incidence of the phenomenon of judicialisation of politics worldwide, academic analyses of it remains relatively superficial.[3] In fact, while there has been some consideration of judicialisation of politics in some democratising politics in Europe, Latin

[1] Ran Hirschl "The New Constitutionalism and the Judicialization of Pure Politics Worldwide" (2006) 75 (2) Fordham Law Review 721 (-754), 729-730. See also Samuel Isaacharoff "Democracy and Collective Decision Making" (2008) 6 (2) International Journal of Constitutional Law 231 (-266).
[2] For a discussion of the truth-telling process, accountability for human rights violations and transitional justice issues arising from the transition, see Hakeem Yusuf "Travails of Truth: Achieving Justice for Victims of Impunity in Nigeria" (2007) 1 (2) International Journal of Transitional Justice 268(-286).
[3] Hirschl note 1 supra at 722.

America and South-East Asia, scholarly discourse on the phenomenon in Africa is practically non-existent.[4]

As a number of scholars, among them, Epstein *et al* have noted, close evaluation of the role of courts in the democratisation process is of particular significance in view of the need to integrate them in to the 'larger governmental process.'[5] Considering the gaps in the literature on this theme outside well established democratic systems,[6] the relevance of an account of the African experience through the prism of the largest potential democracy in the continent, can not be over-stated.

The article aims at drawing attention to an important phenomenon in transitional societies in Africa in particular and the global south in general. The analyses that follow strongly validate the position of several legal scholars that accounts of the political process would be incomplete without reference to the judicial role in it.[7]

The article examines two cases that reflect the expanding incidence of judicialisation of politics in Nigeria's transition experience. The Nigerian judiciary is itself complicit for its role in authoritarianism and remains, despite some attempts at institutional reform, opaque in its accountability credentials particularly even if only from the standpoint of transitional justice.[8] The point about judicial accountability is particularly germane. Its significance comes up for scrutiny for at least two reasons.

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[4] See for instance, Martin Shapiro and Alec S Sweet, *On Law, Politics, and Judicialization* (Oxford University Press Oxford 2002), Alec S Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford Clarendon Oxford 2004), Neil C Tate and Torbjorn Vallinder *The Global Expansion of Judicial Power* (New-York University Press New-York 1995), R Hirschl *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press Cambridge Massachusetts 2004), Jiri Priban *Dissidents of Law* (Ashgate Dartmouth Hampshire 2002), Wojciech Sadurski *Rights Before Courts: A Study of Constitutional Courts in Post Communist States of Central and Eastern Europe* (Springer Dordrecht 2005). But see, H Kwasi Prempeh "Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa" (2006) *Tulane Law Review* 80: 1239 and Tamir Moustafa "Law versus the State: The Judicialisation of Politics in Egypt" (2003) 28 (4) Law and Social Inquiry 883.

[5] Lee Epstein *et al* "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government" (2001) 35 (1) Law & Society Review 117 (-164), 119.

[6] Ibid. at 118.

[7] Ibid. at 120.

[8] Hakeem O Yusuf "Calling the Judiciary to Account for the Past: Transitional Justice and Judicial Accountability in Nigeria" (2008) 30 (2) Law and Policy 194 (-226).

First, courts in the country have been central to setting the ground rules for a rather elusive rule of law in the democratisation process. Second, the judiciary's current interventions in the political sphere (which have been incremental) have largely centred on political accountability. It thus remarkable that notwithstanding it accountability deficit, the judiciary has assumed a primal position in the institutional political power constellation in the country, particularly in the past two years.

The first section presents critical analyses of the phenomenon of judicialisation of politics in the country. The second section focuses on judicial accountability, advancing the argument that the limited success of the institutional mechanism in place is a consequence of a flawed transitional justice management process. The third examines the consequences of politicisation of the judiciary. This is followed by the conclusion of the implications of the interaction of judicialised politics, imperatives of accountability and politicisation of the judiciary for the judicial function in transitional polities.

Judicialisation of politics in Nigeria's transition: a contemporary account

Nigeria is Africa's most populous country, with a population of about a hundred and forty million people. Its size and oil resources have seen it play an important role in the continent. The country's written republican constitution, allocates the powers of the federal state among the branches of government – the executive, legislature and the judiciary.

The operative 1999 Constitution is conceived as a foundation for a constitutional democracy with wide powers of judicial review granted to the courts. The country operates a presidential system and a two-tier legislature at the federal level, the National Assembly consisting of the Senate (upper chamber) and the House of Representatives (lower chamber). The 36 states each have a House of Assembly, a unicameral legislature.

The judiciary has wide powers of judicial review. Adopting Epstein et al's characterisation of constitutional courts, judicial review in the country's court system

though very close to the American system, is best described as a hybrid.[9] Like the American system, the Nigerian court system features a diffusion of the power of judicial review. This is marked by the absence of a constitutional court but rather, a general power of judicial review vested on all 'courts of superior records.' These are the high courts (usually, but not always first instance trial courts in important civil matters relevant to the discussion in this article), the Court of Appeal and the Supreme Court.

The courts possess only concrete, as against abstract, judicial review powers and the locus required to initiate the process are circumscribed, vested in individuals or groups who can establish a real stake in the outcome of the process. From cursory examination of judicial practice coupled with a close reading of the provisions of Sections 6 and 46 of the 1999 Constitution, disclose the Nigerian system of judicial review accommodates both *ex ante* and *ex post facto* judicial review. This is a quality it shares with some European constitutional courts.[10] The powers of judicial review identified here lie at the heart of evaluations of the judicialisation of politics in the Nigerian democratisation process discussed in this article.

A number of dynamics has led to the rise to prominence of judicial power in Nigeria's transition experience. Dysfunctional institutions, inordinate power contestations among the political elite, glaring deficit in the political and democratic legitimacy of the transition process have converged to make the judicialisation of politics an issue if not *the* issue in Nigeria's transition. The trend has accelerated in the past two years. The phenomenon reached a crescendo in the build up to and the immediate period after the 2007 elections in the country.

AC v INEC- *when 'high politics' meets 'high law'*

[9] Epstein *et al* note 5 supra at 121.
[10] Epstein *et al* note 5 at 121.

In the case, *Action Congress (AC) and Alhaji Atiku Abubakar v Independent National Electoral Commission* (*AC v INEC*),[11] judicial intervention was enlisted by prominent political actors, to settle the ground rules on the contentious issue of individual participation and exclusion in the political process. The facts of the case were as contentious as the high stakes of political office in which they arose; eligibility for elections into the presidency of a developing, leading oil-producing country. The case is in fact, one of a series, more than a dozen, instituted by the 2nd Plaintiff/Appellant to stave off the multi-pronged attempts to exclude him from participating in the 2007 presidential elections in Nigeria. The case arose against a background of serious power tussle and intrigues in the highest quarters of governance in the country.

Background

The Action Congress, 1st Plaintiff/Appellant (AC) is an opposition political in Nigeria formed in September 2006. Alhaji Atiku Abubakar, 2nd Plaintiff/Appellant (the Vice-President) was at all times material to the facts of the case, incumbent Vice-President of the Federal Republic of Nigeria. He had been sworn in on May 29 2003 alongside President Olusegun Obasanjo (the President), for a second and final constitutionally prescribed four year-term. They were both of the People's Democratic Party (PDP) at the time of the election. The Independent National Electoral Commission, the Defendant (INEC) is the constitutionally recognised executive agency responsible for the conduct of presidential, gubernatorial and federal legislative elections in the country.

After their inauguration and before the next elections scheduled for the first quarter of 2007 however, the relationship between the two had virtually broken down. In the main, this was due to the surreptitious bid of the President to secure a third term through a

[11] (2007) 6 S.C Pt. II 212 (-314).

constitutional amendment. The 'Third Term Project,'[12] as it was known in Nigerian political circles, created a lot of acrimony on the socio-political landscape.

Not unexpectedly, it had some support from a small cabal of the President's loyalists but was fiercely opposed by majority of the political elite, including leading members of his ruling party, the PDP. It similarly elicited serious opposition from the public. To the relief of most stakeholders in the Nigerian political transition, the Senate frustrated the bid when majority of its members rejected the proposed constitutional amendment on 16 May, 2006.[13] But from then on, noted opponents of the Third Term Project were mobilised against by the forces behind the aborted bid.

Prime target in that category was the Vice-President, himself, a long-standing presidential hopeful. He had led political opposition to the President's ambition. The situation led to an open rift and dissension in the presidency. At a point, the President withdrew all his privileges and staff and rendered him redundant while also going public with the plan to remove him from office through the legislature. But the moves to have the legislature remove the Vice-President failed. Following his expulsion from the PDP, he joined the AC and declared his presidential ambition on the latter's platform.

It had however become obvious that the President (and his loyalists in the PDP) were determined to circumvent the attempts of the Vice-President to contest the elections. The former then set out to frustrate the move by deploying varied administrative and political mechanisms in what came to be the most profound instance of political elite-power wrangling within a civil administration in the country. Elite power-wrangling has

[12] Gilbert da Costa "Nigerian Senate Denies Obasanjo Third Term" *Voice of America* available at: http://www.voanews.com/english/archive/2006-05/2006-05-16-voa68.cfm?CFID=269274608&CFTOKEN=30412515 (last accessed 6 March 2008).

[13] Editorial "Triumph of The National Assembly" *This Day* (Abuja Wednesday 17 May 2006) available at: http://www.thisdayonline.com/nview.php?id=48372 (last accessed 11 March 2008). See also Daniel K Posner and Daniel J Young "The Institutionalization of Political Power in Africa" (2007) 18 (3) Journal of Democracy 126, 127.

become a defining feature of the current civil transition and democratisation process in Nigeria.

The AC and the Vice-President took this action to challenge the decision of INEC to disqualify the Vice-President and exclude him from contesting in the presidential poll. INEC had based its decision on the purported indictment of the Vice-President by an Administrative Panel of Inquiry (Panel) set up by the Federal Government. This followed his investigation by the dreaded Economic and Financial Crimes Commission (EFCC).

The Panel, set up by the President had found the Vice-President culpable for abuse of office in his capacity as the Chairman of the Petroleum Development Fund, one of the agencies under the office of the Vice-President. The Federal Government, in a White Paper, accepted the indictment which was reportedly gazetted.

The suit instituted at the Federal High Court was decided in favour of the AC and the Vice-President about two months later. The trial court held in substance that INEC has no power to disqualify a candidate presented to it by a political party from contesting the 2007 elections. Dissatisfied, INEC appealed. The Court of Appeal in its decision delivered barely a month later, allowed the appeal and AC and the Vice-President appealed to the Supreme Court (the Court).

They sought the determination of the apex of the constitutionality of a non-judicial agency of government disqualifying a candidate duly sponsored and nominated by a political party for elective office, namely the presidency. Their case essentially rested on the juxtaposition of the constitutional provisions on grounds for disqualification of persons from the presidential elections and the Vice-President's fundamental right to fair hearing.

Specifically, the Court was invited to construe Section 137 (1) (i) which provides that a person shall not be qualified for election to the office of president if he has been indicted

for embezzlement or fraud by a Judicial Commission of Inquiry or an Administrative Panel of Inquiry or a Tribunal set up under the Tribunals of Inquiry Act, a Tribunals of Inquiry Law or any other law by the Federal or State Government if the indictment has been accepted by the Federal or State Government, respectively.

The Court was expected to determine whether INEC, a non-judicial agency could enforce or invoke the exclusionary provisions in view of constitutional provisions on judicial powers in Section 6 and the fundamental right to fair hearing contained in Section 36 (1), (4)-(12) of the Constitution of the Federal Republic of Nigeria, 1999 (the Constitution). These questions were all to be determined in 'the context of the system of constitutional democracy established for the country by the Constitution.'[14]

AC and the Vice-President invited the Court to consider whether the Court of Appeal was right in upholding the disqualification of the Vice-President under the provisions of the Electoral Act 2006. The Plaintiffs argued that contrary to the provisions of Section 21 of the Electoral Act, 2002 which vested the power to disqualify candidates in the Defendant, Section 32 of the Electoral Act, 2006 has since divested the latter of such powers which it now vests exclusively in the courts. The Defendant thus lacked the authority to screen, verify or disqualify candidates for elections including the 2nd Plaintiff vying for election as presidential candidate.[15]

The Court distilled the issues in contention to determination of a fundamental question. It was namely, whether the Defendant has the power to disqualify any candidate sponsored by a political party having regard to the Constitution and Electoral Act 2006 which governed the conduct of elections in the country. The Court thus considered the provisions of the Electoral Act and the Constitution, noting that it was required to

[14] *AC v INEC* note 11 supra at 222.
[15] Ibid. at 222-223.

consider them together to 'give effect and meaning to the rights and obligation of individuals.'[16]

At the hearing of the appeal barely two weeks after it was filed, the Court delivered a summary judgement after a brief conference of the justices in camera, with a promise to deliver the detailed reasons for the decision on 29 June 2007. In its unanimous decision allowing the appeal, the Court held that the Defendant lacked constitutional or statutory powers to disqualify any candidate in the 2007 elections.

The Court stated that the Defendant was not empowered by section 137(1) (i), or any other provisions of the Constitution, in view of the fundamental right to fair hearing guaranteed by Section 36(1) and (5) to exclude a candidate from elective office. Only a conviction by a court of law was sufficient to constitute a bar to eligibility to contest for public office. It held further that Section 32 of the Electoral Act had shifted responsibility for the disqualification of candidates for an election to the Courts.

Floundering Politics, Strong Judges

A critical analyses of *AC v INEC* brings to the fore some of the most important features of judicialisation of politics in Nigeria's transition to democratic governance.[17] One of these is the way in which the political branch positively creates a predisposing environment for the increasing incidence of judicialisation of politics.

In this regard it is significant that in the Electoral Act, 2002 legislature had conferred the power to disqualify candidates screened and nominated by political parties for elective positions on INEC, the Defendant. However, as Onnoghen JSC noted, 'Fortunately or unfortunately'[18] the Electoral Act, 2002 was repealed by Section 165 (1)

[16] *AC v INEC* note 11 supra at 228.
[17] 'Civil' governance is, in the view of certain commentators, the incontestable and appropriate description of what the transition has achieved, rather than the aspirational 'democratic rule.' In all events, the country can at only be minimally described as 'democratising.'
[18] *AC v INEC* note 11 supra at 251.

of the Electoral Act, 2006. In enacting the latter legislation, the National Assembly did not consider it apt to confer the power to exclude candidates on the Defendant.

Why, it may be asked, did the legislature take this radical step? After all, selection of candidates, their verification, qualification to stand election and ancillary matters are properly regarded as some of the most profoundly political matters in a democracy. Being matters of such purely political nature, it is logical to expect the political branches to preserve their determination in the political domain.

Ironically, it would appear that it is precisely the intense interest of the political class in the issue that is responsible for positively shifting determination of contestations on candidacy to the *apolitical* branch. Smarting from the arbitrary use of that power by the Defendant during the 2003 elections, segments of the public and the political class short changed by its abuse condemned it. Incidentally, the decision in *AC v INEC* highlights the relevant situational context of the legislative preference.

It is important to note in this regard that previous legislation regulating electoral processes in the country, the Electoral Act of 1982 and 2002 conferred exclusive powers on nomination of candidates on political parties and the courts upheld this power in a line of cases challenging the nomination and candidates' selection processes. The courts invariably declined jurisdiction over such matters.

Thus in *Onuoha v R.B.K Okafor* [19] the Court decided that upon the construction of the provisions of the Electoral Act, 1982, a political party has the exclusive reserved right to choose a candidate to sponsor for political office. The Courts are precluded from reviewing the exercise of the right because it is a *domestic right* and in the nature of a political question. The position was reaffirmed in *Dalhatu v Turaki* [20] decided on similar provisions of the Electoral Act, 2002. Thus, Tobi JSC had stated that

[19] (1983) 2 SCNLR 244.
[20] (2003) 15 NWLR Pt. 843 300.

> From the decision of this court in *Onuoha,* it is clear that the right to sponsor a candidate by a party is not a *legal right* but a *domestic right* of the party which cannot be questioned in a Court of law. The *political organization has a discretion in the matter, a discretion which is unbelted in the sense that a Court of Law has no jurisdiction to question its exercise one way or the other.*[21]

Judicial mediation of the process of nomination and selection of candidates would involve the courts in the domestic affairs of political parties, a jurisdiction outside its purview. This remained the situation of the law in the immediate period of the transition to civil rule and the first two elections of 1999 and 2003. As mentioned earlier however, all that has changed with the passage of the Electoral Act, 2006.

Ogbuagu JSC was quite forthcoming on why the legislature stripped the electoral commission and the political parties of this far-reaching power. He observed rightly that the negative consequences of the use of the powers by the electoral commissions played a significant part in the decision of the legislature to amend the provisions of the electoral law. He noted the noted that in the past

> some candidates were said or alleged to have been disqualified on the very day of some of the elections or when some of the elections were in progress… I believe that the framers or law-makers of the Electoral Act, 2006 and the Constitution, saw or foresaw the inherent danger of such power being misused or abused and/or used arbitrarily or in bad faith and therefore, in very clear and plain language, did not include such power in both the Constitution and the Act.[22]

[21] *Dalhatu v Turaki* note 20 supra at 347.
[22] *AC v INEC* note 11 supra at 265.

Thus, disenchantment with the exercise of an otherwise political power informed the decision to cede it to the judiciary. This was done obviously in the expectation that it would be neutrally and judiciously exercised. In this way, the action of the political branches, for in this case, the two were actively involved and the debates over the Electoral Act, 2006, generated considerable interest in the country. It also signalled an admission of the failure in the management of the political process by an executive agency of government.

Right in the Shadow of Power

Another feature of the judicialisation of politics thrown up by the case is the resolution of disputes around the intersection of individual and group rights with resonance for governance in the polity. This is reflected in the Court's rejection of the contention by the Defendant that it was empowered to disqualify the 2nd Plaintiff from participating in the 2007 elections by virtue of the provisions of Section 137 (1) (i) which it purported was a self-executing provision.

The Court 'not impressed by this contention'[23] insisted that invoking the provisions to disqualify a candidate would require a judicial inquiry. The tribunal or administrative panel that made the inquiry must be one within the contemplation of Section 137(1) (i). Further, the conduct of the tribunal's (or panel) proceedings must comply with the fair hearing principles guaranteed by the constitution, namely the right to be heard by an impartial court or tribunal based on the presumption of innocence.

On this latter count, the Court held that the Defendant erred by relying on the report of the Panel to disqualify the 2nd Plaintiff since the Panel's operations infringed on the constitutional rights of the 2nd Plaintiff to fair hearing. Further, the imposition of penalties could only follow on a trial by a judicially constituted forum. Katsina-Alu JSC eloquently enunciated this position in the lead judgement

[23] *AC v INEC* note 11 supra at 229.

> …trial and conviction by a court is the only constitutionally permitted way to prove guilt…the imposition of the penalty of disqualification for embezzlement or fraud solely on the basis of an indictment for these offences by an administrative panel of inquiry implies a presumption of guilt, contrary to Section 36 (5) of the Constitution of the Federal Republic of Nigeria, 1999… *convictions for offences and imposition of penalties and punishments are matters appertaining exclusively to judicial power.*[24]

Constitutional law scholars have noticed the critical role courts have in confronting the designs of incumbents in power to circumvent democratic competition through artful control of electoral bodies like INEC.[25] An important feature of the Supreme Court decision in this case is the decisive judicial role in a struggle to open up a deliberate constriction of democratic space for access to power by an incumbent intent on subversion of the rule of law and the democratic process.

Amaechi v INEC- power by the grace of the courts

The high-wired political and legal intrigues in *Rt. Hon. Rotimi Chibuike Amaechi v Independent National Electoral Commission (INEC) & 2 Ors* (*Amaechi v INEC*)[26] led to a yet unprecedented level of judicial intervention in the political process in the country's recent democratisation experience. In particular, the far reaching consequences of the Supreme Court decision in the case which informs its choice for discussion here justifies a fairly detailed exposition of the facts.

The dispute between the parties arose out of preparations for the conduct of the gubernatorial polls scheduled for 14 April, 2007, an integral part of the milestone civil-civil-transition elections in the country. In pursuit of his ambition to be the party's

[24] Ibid. at 230. Emphasis mine.
[25] Isaacharoff note 1 supra at 264.
[26] (2008) 1 S.C. Pt. I 36 (-302).

governorship candidate in Rivers State,[27] Rotimi Amaechi, the Plaintiff/Appellant (Amaechi), contested the gubernatorial primaries of his party, the People's Democratic Party, 3rd Defendant/Respondent (the PDP) alongside seven other members. He had been the Speaker of the House of Assembly since the civil transition in 1999.

Amaechi won an overwhelming victory at the primaries. He polled 6, 527 of the 6, 575 cast votes. Celestine Omehia, the 2nd Defendant/Respondent (Omehia) did not participate in the primaries. On 14 December, 2006, in accordance with the provisions of the Electoral Act 2006, the PDP submitted Amaechi's name to the Independent National Electoral Commission, 1st Defendant/Respondent (INEC), as its candidate in the state for the gubernatorial elections. INEC, it would be recalled is the agency responsible for the conduct of gubernatorial and national elections in the country.

Sometime after, it made the rounds that PDP was contemplating substituting Amaechi as its candidate. In a pre-emptive move, Amaechi instituted this action on 26 January 2007 at the Federal High Court (trial court), to stop INEC from giving effect to his planned substitution. However, on 2 February 2007, the PDP went on to write a letter to INEC forwarding Omehia's name as its candidate, stating that Amaechi's was submitted 'in error.' On Amaechi's application, the trial court ordered Omehia and PDP to be joined as parties to the suit.

Amaechi claimed a number of reliefs. Principal among them was a declaration that by virtue of Section 32 (5) of the Electoral Act, 2006, it was only open to a political party or the INEC to substitute a candidate submitted to the latter, in compliance with a court order. He similarly sought a declaration that INEC has no power to screen, verify or disqualify a candidate who presented to it as its nominee by a political party. The

[27] An oil-rich state in the Niger Delta.

purported act of substitution of his name should be declared unconstitutional, illegal and unlawful.[28]

INEC's defence rested on PDP's right of choice of candidate. INEC argued it was bound to uphold the party's decision since it was notified of it within statutorily prescribed time for such action. Further, INEC claimed that justification for the party's substitution of Amaechi had been furnished by the latter's indictment in the government White Paper that emanated from the Administrative Panel set up to review the Economic and Financial Crimes Commission's investigation report on him and others vying for office in the 2007 elections.[29]

The argument advanced for Omehia was simply that the submission of Amaechi's name by the PDP was 'in error,' and this has been corrected with the submission of Omehia's name in substitution. More importantly, Omehia argued, the sponsorship of a candidate for elective office by a party was 'not a guaranteed right of any member.' Thus Amaechi, or any other individual at that, had no statutory or constitutional right to be sponsored by a party as its candidate for an election.[30]

On 15 March, 2007, the trial court ruled that though the reason advanced by the PDP for Amaechi's substitution satisfied the Electoral Act, 2006, the actual act of substitution was invalid because the letter which communicated the decision was written after the matter was *sub judice*. Dissatisfied, he appealed to the Court of Appeal. For also setting aside the letter of the PDP containing the reason it substituted Amaechi, PDP and Omehia also cross-appealed. In the course of the appeal before the Court of Appeal, a number of events with significance for the outcome of the case occurred. In view of their critical bearing on politicisation of the judiciary in Nigeria's transition experience generally, they would be discussed below.

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[28] *Amaechi v INEC* note 26 supra at 54-56.
[29] Ibid. at 56-57.
[30] Ibid. at 58.

Suffice it to say at this point that one of such events was the holding of the election in view at the time Amaechi instituted the action before the trial court. Omehia was declared the winner of that election. The chain of events also led to the appeal proceeding for final determination by the Supreme Court and an additional prayer by Amaechi that he be declared the winner of the election.

Constitutional challenge to political perfidy

At the core of the facts in *Amaechi v INEC* is the challenge posed by the highly perfidious political conduct adopted by a powerful section of the political elite in the post-authoritarian transition politics in the country. As the Court noted, Omehia did not evince an intention to be the party's candidate which was required, even in accordance with the party's constitution, through participation in the primaries, which in this case involved eight candidates. So, the party was in breach of its own constitution.

The Court deplored PDP's breach of its own constitution, the existence and observance of which is a constitutionally created obligation of political parties. The Court noted that the statutory requirement that INEC be notified of a political party's internal arrangements for holding its primaries preparatory to fielding candidates and the optional right of INEC to observe the proceedings was designed to enhance intra-party democracy in order to ensure that and ensure 'our democracy is truly reflective of the people's choice.' So there is simply no room for a candidate, like Omehia, who never contested a primary election, to emerge a party candidate.

Clearly, the facts of *Amaechi v INEC* are a manifestation of the peculiar setting. It is only in the peculiar setting of utter disregard for, and subversion of the basic tenets of democracy and due process that a candidate who did not contest his party's primaries (where it is required as in this case, by the party's constitution) be substituted for one that emerged in the primaries with an overwhelming majority, and be presented to the electorate as the party's flag-bearer.

The extent of the perfidy involved is better appreciated in the against the background that independent candidacy is constitutionally precluded by section 221 of the Constitution which expressly provides that only a political party can canvass for votes for candidates. Thus the judiciary in this case was faced with a classic case of gross abuse of constitutional privilege by a hegemonic group under the auspices of democratic design. Such is the hold of the hegemonic group on power that its candidate, the glaring illegality notwithstanding, went on to *win* the elections.

In a sophisticated socio-political setting, the perversion of the democratic will as happened in this case would cost the PDP dearly. Its perfidy should provide the crest for an opposition candidate to ride to victory. As stated above, this did not happen. There are dimensions to this curious situation outside well outside the scope of this article. Suffice it to say that the dynamics surrounding the political practices in Nigeria's recent democratisation process, justify a key role for the judiciary in deepening democratic culture, as demonstrated by the comprehensive analyses of the two cases in this article.

Beyond Common Electoral Questions

The Court's consternation at PDP's breach of its own constitution connects with a very controversial aspect of the decision, namely what to do with the *fait accompli* of an illegally imposed candidate who has run and emerged victorious in the election. There are two overlapping but separate strands in this issue. First, is the aspect that the dispute arose as a pre-election matter. Second is the nature of the relief that ought to be granted to Amaechi in the light of the supervening event of the gubernatorial election conducted with the participation of the electorate and the emergence of Omehia as the *winner*.

Critical reflection on the foregoing aspect of the case suggests it is at this point that the Court shifts from the terrain of adjudicating ordinary questions of electoral selection[31]

[31] For a detailed exposition of judicial intervention in electoral processes in the context of a liberal democracy, see Richard H Pildes "The Supreme Court 2003 Term Foreword: The Constitutionalization of Democratic Politics" (2004) 181 Harvard Law Review 29 (-154).

more common in the literature on judicialisation of politics.[32] Qualitatively, the dispute in the case transforms to exploration of key polity issues. The dispute takes on the colouration of what Isaacharof and Hirschl refer to as 'first-order questions'[33] which address 'contemplating the very definition, or *raison d' etre* of the polity' respectively.[34]

The complicated political terrain that confronted the Court in *Amaechi v INEC* suggests the need for possible rethink on the nature of electoral design and democratic selection adjudication component of judicialised politics. The case provides substantial premise for the position that contrary to what seems to be the canonical view, depending on the context, otherwise electoral matters may well generate political situations that confront the courts with issues that define fundamental existential questions of the polity, particularly in transitional contexts.

Some scholars of comparative constitutional law, notably Hirschl and Isaacharoff are likely to disagree with this view. They do not regard the electoral adjudicatory dimension of judicialisation of politics as momentous enough to go to the very foundations of the state. This would appear to be in part a result of their focus largely on well established democracies.[35]

It is understandable that in a liberal and well established democratic context, various refined institutional buffers serve to blunt possible sharp edges off electoral disputations. Thus, it is quite difficult to encounter cases adjudicated on facts bounded in high-powered intrigues that challenge the fundamental existential basis of the polity as did the facts in *Amaechi v INEC*.

However, it is quite instructive that for all of the strength of such institutional buffers in an advanced liberal democracy like the United States, the decision in US Supreme

[32] Isaacharoff note 1supra at 231.
[33] Ibid. at 259-262.
[34] Hirschl note 1 supra at 735 to 746.
[35] Hirschl's comparative analyses have included Egypt, see Hirschl note 1 supra.

Court in *Bush v Gore*[36] generated a wave of public reassessment of the role and powers of that court in its democracy. There is for instance the intense and seemingly endless stream of legal and political review and commentary that have trailed the decision, years after it was delivered. The response to the case reinforces the view that adjudication of otherwise customary electoral matters may yield far-reaching socio-legal issues on the foundational arrangements of a polity.

As stated above, *Amaechi v INEC* is remarkable in the way the dispute in it transcends disputations of a purely 'intra-party dispute'[37]or contestation in an electoral process. It raises the fundamental question of whom or what constitutes the relevant *demos* in the context of a troubled democratising polity. Should a person who never contested an election be declared a winner in the bid to checkmate political actors devoted to subverting the rule of law and due process? However, it is curious that the fundamental shift to theoretical and foundational democratic issues constituted by this aspect of the case was made unacknowledged, even denied, by the Supreme Court.

The Court's disclamation of the fundamental majoritarian dimension, and salient issues of democratic norms implicated in the case, is reflected in its response to the challenge on the crucial supervening incident. Note that this was an election in which close to half a million of the electorate in Rivers State voted with the participation of 20 political parties (including the PDP). It led to Omehia's emergence as the governor in the results posted for the election by INEC showed.[38]

Squaring a circle: (un) democratic norms v (un) rule of law

It was argued for Omehia that to declare Amaechi the winner of an election which he did not win would negate fundamental principles of democracy. The Court insisted that

[36] 531 U.S 98 [2000].
[37] Not surprisingly, this is the characterisation of the case by the Court. See the lead judgement per Oguntade JSC, *Amaechi v INEC* note 28 supra at 111.
[38] Independent Electoral Commission "Results for Rivers- Governorship Election State" available at: http://www.inecnigeria.org/election/show_result.php?catagory=Governorship&state=32&election=2558 (last accessed 23 April 2008).

since the case originated as an intra-party dispute, the question of who would emerge the winner at the election was 'irrelevant and not in issue.'[39]

Oguntade JSC stated that the 'central issue' was that Amaechi, not Omehia contested and won the primaries. Thus, the victory of the latter at the elections made him 'no more than a pretender to the office.'[40] And it was appropriate for Amaechi, who had brought a 'pre-election'[41] matter to court, to step in to an office gained after *the* election because he had sought declaration that he was the PDP candidate duly nominated for it. The Court granted this relief and proceeded to declare that in view of the granted relief, he was also the elected Governor of Rivers State. The attitude of the court on this point creates a significant paradox.

It is important to unpack the legal and descriptive paradox created by the decision to declare as winner, a candidate wrongfully excluded by internal party intrigues as the winner in the same election. It serves to recall that the whole case originated from a claim of right by Amaechi to majority votes he won at the party primaries which entitled him to contest as the PDP's gubernatorial aspirant in the election.

A dilemma beyond the semantic, (and there appears to be one in the Court's choice of words in the judgement on the point), arises as to what is meant by the assertion that Omehia is a 'pretender to the office.' The 'office' is ostensibly that of the governor to which Omehia was eventually elected by overwhelming majority votes, if we forget for the moment that he did not contest the primaries. And also that as at the time he contested as the PDP candidate, his nomination had in fact been nullified by the trial court though the case was on appeal, but more of that later. He did contest and win the election, the *ultimate* step to the 'office' in view.

[39] *Amaechi v INEC* note supra 26 at 111
[40] Ibid.
[41] Ibid. at 133-134.

In rationalising the paradox, the Court per Oguntade JSC in the lead judgement averred that

> *The one unchanging feature is that PDP was the sponsoring party*… I ought not to allow my approach to this case to be influenced by a consideration of the fact that PDP eventually won the election. Even *if Omehia had lost the election, this court would still be entitled to declare that it was Amaechi and not Omehia who was PDP's candidate for the Election.*[42]

The Court insisted that any argument to the effect that a new election should be ordered as a consequence of its nullification of Omehia's candidacy, fails to take cognisance of the fact that the case is an appeal on a dispute between two members as to who was the validly nominated candidate of the party rather than an election petition.

Admittedly, the Court found itself in an unprecedented legal conundrum in the country's history. To resolve the difficulty, it however adopted a legal formalism[43] that led it to an adjudication steeped in an artificial construct distant from situational reality. The reality being the incidence of an election in which close to two hundred thousand voters made a choice of a candidate presented on a usurped ticket.

In declaring Amaechi the winner of an election he did not participate in, the Court stated an intention to avoid 'a dangerous precedent'[44] that would require fresh elections be ordered whenever a wrongly nominated candidate is presented to the electorate in a election, irrespective of whether he goes on to eventually win. A sure way out of the quagmire it reasoned, was to disregard the result of the ensuing election because

> The duty of the court is to answer the question which of two contending

[42] Ibid. at 111-112. Emphasis mine.
[43] The Supreme Court has continued to struggle with a well-established plain-fact jurisprudence which it has been argued, is inappropriate for a transition context. See a discussion of this see, in Hakeem O Yusuf "The Judiciary and Constitutionalism in Transitions: A Critique" (2007) 7 (3) Global Jurist 1 (-47) 9-10. Available at: http://www.bepress.com/gj/vol7/iss3/art4
[44] *Amaechi v INEC* note 28 supra at 112.

> candidates was the validly nominated candidate for the election. *It is purely an irrelevant matter whether the candidate in the election who was improperly allowed to contest wins or loses. The candidate that wins the case on the judgement of the court simply steps into the shoes of his invalidly nominated opponent whether loser or winner.*[45]

The Court argued that its jurisprudential preference is based on constitutional statutory provisions that excludes independent candidacy. In this regard, the Court held that since in view of the provisions of Section 221 of the Constitution, a candidate can not contest an election without a political party, it then follows that it is a party that wins an election. As Aderemi JSC puts it 'it is the political parties that the electorate do vote for at election time.'[46] The fact that 'a good or bad candidate may enhance or diminish the prospect of his party in winning' does not detract from the fact that the electoral contest is 'between parties' and 'at the end of the day, it is the party that wins or loses an election.'[47]

In premising its decision to grant the relief of declaring Amaechi the elected candidate, on the argument that the electoral contest is essentially an inter-party contest, the Court took the preposterous view that irrespective of the candidate fielded by a party, it would still win or lose an election. In this, the Court completely discounted the salience of voting across party lines which may, in appropriate contexts, prove decisive in electoral outcomes.

The pre-election argument- when the past counts more than the present

It is germane to explore the 'pre-election' premise of the decision further considering its centrality to the Court's decision. According to the Court, Section 285 (2) of the Constitution vests the power to order fresh elections only on the Elections Petitions Tribunal. While it agreed the matter was election-related, it remained a pre-election

[45] Ibid. at 112. Emphasis mine.
[46] Ibid. at 229.
[47] Ibid. at 110.

dispute. It was however a critical issue that the election had been held. The insistence of the Court to treat the case as a pre-election dispute ought also to have confined it to granting consequential reliefs that flow only from that foundation. It ought to have ignored a relief that amounted to overreaching the interest of other stake-holders in the subject of the dispute.

In order words, it was disingenuous that the Court proceeded on the footing that the matter was a pre-election dispute only to conclude by granting a relief that was clearly post-election in its effect. There is an apparent contradiction in such an approach that appears at once to approbate and reprobate. The Court appeared to have in fact boxed itself into a corner on this aspect of its decision, when it noted that it could not order fresh elections because a prayer to do so was not before it.

In addition to its widely stated judicial power under the Constitution, it further possesses a liberally couched discretion conferred by Section 22 of the Supreme Court Act 1990, to grant consequential reliefs. But it is trite that all judicial powers are to be exercised judiciously. This latter point has been oft-repeated in the decisions and dicta of the Court. In this case however, the Court ended up ignoring this imperative in judicial decision-making.

Even more telling is the Court's own observation that the other parties who participated in the election were not before it. [48] Here again, it is evident the Court displayed no scruples in its neglect of the rights of the other political parties with a stake in the outcome of the casein, all twenty of them, that participated in the elections. But this is precisely what the Court did by not ordering fresh elections.

Again, the question bears asking, what was the legal basis for granting consequential orders clearly inextricable from facts the Court refused to take cognisance of? And these were facts directly relevant to the case, supervening though they may be. On this score,

[48] *Amaechi v INEC* note 26 supra at 151.

Aderemi JSC offers a response unique to his contribution in the unanimous decision, equitable principles. He held that for the Court to order a fresh election in the circumstances of the case 'will negate all notions of equitable principles and of course, true justice.'[49]

It is apposite to observe that this view of equity is as restrictive in its conception as to lose all relevance in its application. Surely, *equity* as a legal principle, more than any other, commends the very contrary of the Court's position. This is the case when the interest of all affected parties, which necessarily includes the millions of people of Rivers State and their constitutional right to decide through majority votes, who the actual (individual-candidate), as against the notional (party-candidate), governor, is brought into the equation. But the Court apparently felt otherwise.

Rule of law as fall-guy

Notice how the Court arrives at a jurisprudential conundrum in *Amaechi v INEC*. It arrives at this troubling destination through the conflation of constitutional provisions on structural political arrangements, individual fair hearing rights, right to participation in the democratic process and majoritarian democratic principles. In seeking justification for its inexcusable conflation of fundamentally distinct constitutional values, the Court takes recourse to another important issue seriously implicated in the facts of the case in particular, and the politics of transition in Nigeria in general, rule of law.

It would be shown in a moment that in proffering the rule of law as basis for its judgement, in whole or part, the Court sought refuge in the important (commonly elusive) principle, as a fall-guy. Put in another way, the Supreme Court propped up the rule of law to take the flak from its highly defeasible judgement sustained essentially by the finality of its decisions in the country's legal system.

[49] Ibid. at 299.

The Court emphasised the imperative of observing due process by the political parties in the conduct of their otherwise internal affairs. It noted that while the PDP was not wrongly headed in seeking to substitute a candidate, it was bound to do so in conformity with due process of law. However, in failing to observe the ground rules on an otherwise legitimate quest, PDP's purported action of substitution had been in futility. According to the Court '*In the eyes of the law*' Amaechi's nomination earlier forwarded to INEC remained intact. [50] Thus, the candidate that wins in court 'simply steps into the shoes of his invalidly nominated opponent whether as loser or winner.'[51]

Curiously, the Court found sufficient grounds in this failure of due process on the part of a political party, for a jurisprudential preference that fundamentally undermines the expression of the majoritarian will of the people of Rivers State at large. The latter it must be noted, is represented by an electorate, a couple of millions strong, some of whom exercised their democratic rights at the election, albeit voting for the wrongly presented candidate, Omehia, as governor.

It is logical for the Court to decide the issue of nomination from the footing of its pre-election origin, and resolve the illegality of Amaechi's substitution in his favour as it did. But declaring as winner, a candidate that did not participate in an election would appear no less reprehensible than the action of the PDP and INEC in imposing Omehia illegally in the first place, the origin of the dispute before the Court. The decision of the Court is decidedly more problematic where it constitutes judicial imposition that effectively trumps the general democratic will, the very value the Court ironically proclaimed it was protecting.

There is good reason to argue that the appropriate consequential order required to meet the justice of the case was to order fresh elections in the state with Amaechi as the

[50] *Amaechi v INEC* note 28 supra at 111. Emphasises mine.
[51] Ibid. at 112.

PDP candidate. But as mentioned above, the Court declined this route on the excuse that it lacked the power to do so. The Court's position would have perhaps been apposite but for the force of the country's common law precedent tradition which points in the legitimacy of making orders for this rejected option.

The recourse of the Court to the need for protecting the integrity of the rule of law in the political process, undoubtedly affronted by the actions of the Defendants in this case,[52] however rings hollow on a cursory reading of the whole judgement itself. A pertinent point missed in this regard is the fact that as at the time Omehia contested the elections on 14 April 2007, his substitution for Amaechi had been voided by the Federal High Court in its decision of 15 March 2007. The decision subsisted till 20 July 2007 when it was set aside by the Court of Appeal. In this wise, Katsina-Alu JSC stated that 'It goes without any argument that the 2nd respondent's participation in the election was clearly an illegal act.'[53]

Thus, Omehia was not only wrongly substituted for Amaechi, but also in contempt of court when he contested. How then could such *victory*, doubly lacking in legality be *transferred* to Amaechi? Plainly, Omehia's participation in the election was pitiably devoid of any modicum of rule of law value the Court sought to salvage. Certainly the rule of law is sooner even if unwittingly, turned on its head by a decision that proclaims as did the Court, that it was *the* basis for the consequential order made in *Amaechi v INEC* to the effect that Amaechi should assume a position which lacked any foundation at all in law.

In view of its apex status in the judicial hierarchy, again a fact that was harped on by the justices in the case, the refusal of the Court to order a fresh election in Rivers State is not devoid of a strong touch of irony. Consider that not only has it declared the need for

[52] Unfortunately, they received a shocking level of support from none less than the Court of Appeal in this case. See the discussion on judicialisation of politics below.
[53] *Amaechi v INEC* note 28 supra at 132.

the judicial process to focus on doing substantial rather than technical justice, it did in fact proclaim the same judicial virtue in this case. Specifically, the Court premised its far-reaching decision in part, on the need to do substantial justice

> In matters of this nature, this court will not allow technicalities to prevent it from doing substantial justice…From the facts of this case, this court has the power and the duty to invoke the provisions of Section 22 of the Supreme Court Act, 1990…*to grant* …*such relief that will completely determine all the issues arising from enforcement of the judgement won by the appellant*.[54]

There is thus a tension between this declared extensive power of the Court and the position that it could not have ordered fresh elections in the case particularly in view of the rather tenuous basis of the consequential relief it granted Amaechi.

Further, the Court also adverted to the customary wide powers of a judicial forum with terminal powers in the adjudicatory process. Referring to the widely couched terms of Section 6 (6) (a) of the Constitution on judicial powers and Section 22 of the Supreme Court Act, it noted that 'there can be no doubt that there is a plenitude of power available to this court to do which the justice of the case deserves.'[55]

The chain of events that followed the filing of *Amaechi v INEC* discussed above presents a profound representation of the travails that the judiciary can encounter in societies witnessing the judicialisation of politics. The intrigues that arose in the case as it progressed particularly exercised the authority and dignity of the Supreme Court. It is little wonder, if highly regrettable, that in repelling what was clearly a grave affront to its institutional integrity, the Court sought recourse in preserving 'the rule of law' to foist a legal paradox that effectively inverted fundamental principles of majoritarian democracy.

[54] *Amaechi v INEC* note 28 supra at 148-149. Emphasis mine
[55] Ibid. at 119-120.

It emerges from the discussion on *Amaechi v INEC* and *AC v INEC* that the judiciary in Nigeria is actively involved in the democratisation process. Specifically, it has been playing a key role in the process of political accountability and the whole process of social transformation that underwrites the important process of transition from years of authoritarian military rule. It is only a transformed judiciary that can effectively play this critical role in transitioning and liberal democratic societies.

The Nigerian judiciary has a questionable record of accountability and has been cited for complicity in the country's experience of authoritarian military rule. It is quite instructive that the exiting military administration tacitly agreed to the urgent need to reform the judiciary during its long hold on power by including provisions for establishment of the National Judicial Council in the 'transition' constitution.

Institutional transformation *sans* accountability?: the case of the National Judicial Council

Given the rot that had bedevilled the Nigerian judiciary in the authoritarian period, it is no surprise that the 'transition' Constitution of 1999 sought to make institutional arrangements for reforming the judiciary. This is captured in the establishment of the National Judicial Council (NJC), a centralised body for the appointment, discipline and promotion of judges in the country. The creation and activities of the NJC, particularly as it relates to the discipline of judicial officers bears on the issue of judicial accountability.

Established as one of fourteen 'Federal Executive Bodies' by section 153 of the Constitution, the NJC has very wide ranging powers on recommending judicial officers for appointment across the spectrum of the superior courts of records in Nigeria. The constitutional listing of the body, headed by the Chief Justice of Nigeria (CJN), as a federal executive body is quite misleading. The creation of the body has been traced to

the recommendations of the Eso Panel of Inquiry set up in 1993 by the Abacha military regime on the reorganisation and reformation of the Nigerian judiciary.[56]

In terms of composition, sixteen of its twenty three members are judicial officers, judges and justices of the High Courts, Court of Appeal and the Supreme Court.[57] The other seven are legal practitioners of high professional standing. Of the latter group, five, nominated by the Nigerian Bar Association, only participate in the deliberations regarding the recommendation of persons for judicial appointment.[58] The other two members not 'jurisdictionally' restricted, are nominated by the CJN. Thus, the pre-eminent body is essentially a judicial affair.

The National Judicial Council has the power to recommend persons for judicial appointment to the head of the respective branch of the executive at the federal and state level. It similarly has powers to recommend their removal from office. Further, it has full disciplinary powers over judicial officers of all superior courts of record. It also has powers to 'deal with all other matters relating to broad issues of policy and administration'[59] of the judiciary.

In practice, the 'recommendatory' powers of the NJC have been potent, if not decisive, in the appointment and dismissal of judges. Its recommendations on judicial appointments have been the most important factor in nomination of judicial officers by the executive for screening and ratification by the legislature all over the country since the return to civil rule in 1999. It has been quite active in investigating complaints (petitions) of judicial misfeasance and recommending appropriate action on the part of the executive.

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[56] Oluwatoyin Badejogbin "The National Judicial Council: Weaving a Patchwork of Praiseworthy Accomplishments and Ruinous Shortfalls" (2005) 3 Judicial Observatory Journal available at: http://www.accesstojustice-ng.org/toj3national.htm#Scene_1

[57] Paragraph 20 (a-h). Schedule 3, Constitution of the Federal Republic of Nigeria, 1999.

[58] Paragraph 20 (i-j).

[59] Paragraph 21. (a-i).

On its recommendation, an unprecedented number of judges have been suspended or dismissed from office. It is significant to note that within three years of its operation, over 50 judicial officers had been investigated for corruption or other judicial misfeasance.[60] By the end of 2005, more than a dozen had been dismissed as a result of its findings.[61] And a couple of others have since been similarly dealt with. To date only justices of the Supreme Court have completely escaped the axe of the NJC.

However, the NJC has sometimes been criticised for high-handedness, failure to observe fair-hearing and selectivity in its recommendations. In some cases, its decisions have been challenged for eroding rather than affirming judicial independence.[62] Joseph Otteh, Director of Access to Justice, a leading NGO, committed to an independent legal and judicial system in Nigeria, made the point very well when he noted that

> Although the Council is making an important difference in the fight to control corruption in the judicial estate and strengthen the independence of the judicial branch, many might believe that the signals coming from the Council is now mixed, and that the Council is missing opportunities, compromising consistency, and undermining its own authority. [63]

Interestingly, save in one instance however, judicial challenges to its decisions have been unsuccessful.[64]

From the perspective of cohesion, the predominant composition of the body by judicial offices is one of the NJC's strongest points. But it is also one its Achilles heels. Despite its acclaimed role in sanitising the judiciary, leading members of the NJC, including the

[60] 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.
[61] Badejogbin note 56 supra.
[62] Editorial "NJC and Oyo Judiciary Saga" *Daily Independent* Online Edition (Lagos Thursday 13 2008)
[63] Joseph Otteh "Enugu Chief Judge Appointment Saga: How the NJC Shot itself in the Foot" (2005) 3 Judicial Observatory Journal available at: http://www.accesstojustice-ng.org/toj3enugu2.htm#Scene_1 (Last accessed 27 April 2008).
[64] Yusuf note 8 supra at 219.

highest echelons of the judiciary, have themselves sometimes been mired in allegations of bribery and corruption.[65]

Recall that the judiciary like all civil governance institutions in the country had suffered serious institutional decay. The administration of justice had come to disrepute from 30 years of authoritarian military rule.[66] Virtually all the judicial officers on the membership of the NJC (all of whom are there by various statutory permutations, notably their specific headship of levels of courts), were appointed to the bench by one or the other previous military administration in the first place.

It is pertinent to reiterate that judicial officers were exempted from administrative lustration applied to some public office-holders, especially serving military and a handful of police officers in government, retired as part of the transition measures and the demands for a break with the past. Thus, the NJC, since its inauguration in 1999, has by default been securely in the hands of the 'old-guard' in the judiciary. This is a body of judicial officers who had held office during a part of the authoritarian period. The judiciary as an institution, it has been argued, bears complicity for political illegitimacy, corruption and misgovernance for which it was not brought to account in the transition to civil rule.[67]

Not only the spectre of an unaccounted past, but well-founded apprehensions of unchanged ways, foreshadows the workings of the NJC. Critics have also identified inconsistencies in its operational procedures as well as a lack of courage in its approach to some cases.[68] All of these have cast a serious slur on the institutional accountability

[65] Badejogbin note 56 supra.
[66] Yemi Osinbajo "Getting Justice Sector Reform on the Political Agenda: The Lagos State Experience" (Paper delivered by Prof. Yemi Osinbajo, the Attorney-General and Commissioner for Justice, Lagos State, Nigeria at the Conference on Justice Reform in Sub-Saharan Africa: Strategic Framework and Practical Lessons- Nairobi 21-22 November 2006) available at: www.britishcouncil.org/it/prof_yemi_osinbajo_presentation.doc (last accessed 9 April 2008).
[67] Yusuf note 8 supra at 211-216.
[68] Badejogbin note 56 supra.

measure which the NJC represents (as far as its disciplinary powers are concerned) in the post-authoritarian period.

The current state of affairs regarding the operation of the NJC and its efforts at ensuring judicial accountability in Nigeria calls to mind, the argument that judicial accountability through an accessible public process ought to be made a significant part of transitional justice processes. In this regard, it has been argued that a publicly accessible mechanism of accountability in the nature of a truth-telling mechanism is well-suited to institutional scrutiny of the judiciary in transitions.[69]

On this view, it is not the argument that the truth-telling process should have taken the place of a body like the NJC. Nor is it the proposition that subjecting the judiciary to public accountability would have cured all its institutional short-comings. Rather, the contention is that ventilating the judicial role in the pre-transition period through the truth-telling process would have facilitated acknowledgement of its role in the suffering that the authoritarian period brought on the Nigerian society.

Perhaps more importantly, it would have facilitated a robust public engagement with the judiciary in the critical task of social reconstruction. Surely, the incidence of widespread judicialisation of politics all over the world has dispelled any hitherto existing doubts as to the ramifications of the judicial function in society and its direct implications for governance in contemporary times. In view of that, serious attention ought to be directed at the judicial function in societies in transition even in the same way as it is in liberal democracies.

As it is, the accountability gap on the institutional role of the judiciary in Nigeria during the country's troubled period haunts the judicial function. It has continued to challenge its attempts at self-transformation and regulation constituted by the establishment of the NJC. The task of the NJC is not made any easier by the fact that it is a creation of a

[69] Yusuf note 8 supra.

constitution foisted on the country through an un-negotiated transition. It is thus no surprise that the NJC, with the best intentions, falls short of transforming the judiciary to a transparent institution.

At best, the operations of the NJC and its continued struggle to sanitise the judicial institution (a task which has continued to prove Herculean), has served as a constant reminder of the judicial accountability gap in the post-authoritarian period in which the judiciary has been saddled with great expectations.[70] The NJC's apparent inability to curb the level of judicial misfeasance eight years after its establishment gives cause for concern. Just when public confidence in the judiciary had improved considerably with the judicial interventions in the controversial 2007 elections, the NJC was saddled with investigating petitions on allegations of alarming sleaze on the part of some judges of the Electoral Petitions Tribunals in various parts of the country.[71]

More important to the discussion here, keen observation of the Nigerian socio-legal scene suggests judicial misfeasance is sometimes a product of political interference and defective legal and political (structural) arrangements.[72] These implicate the need for a holistic approach to judicial transformation which a publicly accessible accountability process appears well adapted to.

The claim made here on public accountability of the judiciary as part of the transitional measures is a relatively modest one. Essentially, it is a route which is unlikely to have waived or obviated the need for a body in the conceptual nature of the NJC. Rather, it concedes the relevance of the NJC, designed as a permanent body for the rigorous monitoring, accountability and administration of the judiciary.

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[70] Ikechukwu Amaechi "Judiciary and the Burden of Expectation" *Daily Independent* Online Edition (Lagos Tuesday 25 March 2008) available at: http://www.independentngonline.com/?c=144&a=13115 (last accessed 25 March 2008),

[71] Joe Nwankwo "N2.1b Bribe: NJC Probes Allegation against Tribunal Judges" *The Daily Independent* Online Edition (Lagos Thursday 10 April 2008) available at: http://www.independentngonline.com/news/tfpg/article01

[72] Femi Ajayi "The Power to Destroy a Country Lies with the Judiciary: Nigerian judiciary at a Cross-Roads" (2007) Nigerian World. Available at: http://nigeriaworld.com/columnist/ajayi/040407.html (last accessed 12 April 2008).

In sum, the truth-telling process and the opportunity for public accountability it portends, would have provided a forum for constituting the NJC (or any such similar body), in a manner that would have better secured its potential for institutional transformation for which it is conceived. This would have been the case granted the benefit of an inquiry into the judicial function in the past. At the least, the NJC would have been constituted as a more representative body along societal aspirations for social reconstruction. Such a body would arguably assist in better fortifying the judicial institution against the vagaries of judicialised politics which potentially challenges any judiciary, drawn as the Nigerian courts are, into mediating highly contested political choices and questions.

Robed into trouble: the challenges of a politicised judiciary

Due to the flexible nature of political institutions in a democracy, courts face 'inherent difficulties' when they are placed in a position to supervise the political process.[73] This difficulty would appear to stem from one of the basic characteristics of law, its predictable or fixed nature paired against the fluid character of political institutions.

The discussion of the cases in this article demonstrates judicialisation of politics can threaten judicial integrity itself. Just how exerting judicialised politics can be for the judicial function comes to the fore in how the Supreme Court felt in dire need of preserving the judicial institution by seeking justification in rule of law to undermine fundamental democratic principles and ethos of majoritarianism.

It is instructive that the Court took umbrage at the lawless conduct of the Defendants in the case. Decrying their efforts to foist a fait accompli on the courts in the matter, Oguntade JSC in the lead judgement lamented the intrigues that dogged the case and condemned the deplorable conduct of the Defendants. He noted that the PDP, INEC and Omehia had acted in a manner to frustrate Amaechi and the judicial process.

[73] Isaacharoff note 2 supra at 261.

The three Defendants did 'everything possible to subvert the rule of law.'[74] Worse still, they had jointly conducted themselves in manner that undermined the authority of the judiciary, holding it out before the public as an institution that was 'supine and irrelevant.'[75] However, as I alluded to above, it is important to note that in this particular instance, the authority of the judiciary was undermined with the active participation or more accurately, collusion, of the penultimate level of the judicial institution in Nigeria, the Court of Appeal. A critical commentary of the negative role of the Court of Appeal featured in the leading and contributory decisions of the justices of the Court.[76] It is apposite to highlight the conduct of the Court of Appeal in the case.

At the time *Amaechi v INEC* went to the Court of Appeal in Abuja,[77] that court had just decided a case on similar facts, *Ugwu v Ararume*[78] which was then on further appeal to the Supreme Court. *Ugwu v Ararume* had also arisen from the fact of alleged illegal substitution by the PDP based on the same premise of 'error.' The Court of Appeal had declared the substitution of Ararume illegal and the appeal in the Supreme Court was on the dissatisfaction of the PDP with the judgement.

At the hearing of *Amaechi v INEC* on 4 April 2007, the Court of Appeal drew the attention of the parties to this fact. It sought and obtained their consent to adjourn the matter for the decision of the Supreme Court in *Ugwu v Ararume*. This was based on the understanding that the judgement in *Ugwu v Ararume* would be binding on it in deference to the principle of *stare decisis*. Following the agreement of the parties, the Court of Appeal adjourned the case to await the decision of the Supreme Court in the latter case which was to be delivered the next day.

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[74] *Amaechi v INEC* note 26 supra at 116.
[75] Ibid.
[76] For instance Oguntade JSC condemned the Court of Appeal's conduct in *Amaechi v INEC* note 28 supra at 117-118, so did Katsina-Alu JSC at 128, and Mohammed JSC at 158-159 respectively.
[77] The Court of Appeal, like the Supreme Court is a federal court with its headquarters in Abuja, the nation's capital. However, unlike the latter, the Court of Appeal seats with various panels in a number of states in the country based on considerations of geographic spread balanced against the volume of appeals. A recurring concern has been conflicting decisions of the various panels on the same issue.
[78] (2007) 6 SC Pt. I 88.

On 5 April 2007, nine clear days to the elections, the Court upheld the finding of the Court of Appeal in declaring the substitution of Ararume illegal. It thus cleared the way for the Court of Appeal to make a similar finding in *Amaechi v INEC*. But this was not to be. On 10 April 2007, the PDP expelled both Ararume and Amaechi, no doubt to frustrate the efficacy of the judgement of the apex court in favour of the former and pre-empt a similar finding for the latter. To seal the fate of Ararume, the PDP further declared it was no longer fielding a candidate in Imo, the state for which he had been declared the party's legally nominated candidate.[79]

But the PDP did not stop its rampage against rule of law there. The next day, along with Omehia, it proceeded to the Court of Appeal with an application that the appeal in *Amaechi v INEC* should be struck out. This was on the ground that consequent on his expulsion (which the latter had immediately challenged at another high court), he lacked the *locus standi* to sustain the case and the Court of Appeal, the jurisdiction to hear it.

Rather than reject the application and punish the PDP and perhaps Omehia for obvious contempt of the judicial process, the Court of Appeal acceded to the application and struck out *Amaechi v INEC* pending before it. But this decision was delivered on 16 April, two days after the election, the dispute on who was the valid candidate of the PDP been held. Omehia had gone on to contest on the platform of the PDP and won. Amaechi hurriedly appealed to the Supreme Court. Meanwhile, Omehia waited to be sworn in on 29 May 2007.

The Supreme Court, on 11 May 2007 decided the matter. It found the Court of Appeal in error and ordered the case before the latter be heard 'expeditiously' on the merits. But on 21 May 2007, counsel to Omehia brought an application for stay of proceedings pending clarification of the directive of the Supreme Court. On 25 May 2007, to the shock of observers, the Court of Appeal upheld the ludicrous claim, stating that it

[79] *Amaechi v INEC* note 28 supra at 116-117.

required 'further clarification'[80] before it could obey the directive of the apex court. The Court of Appeal then granted a stay of proceedings. It further granted Omehia seven days within which to file an application before the Supreme Court to clarify its ruling. This action again cleared the way for Omehia to be sworn in as Governor of Rivers State.

In obvious exasperation at the conduct of the Court of Appeal, the Supreme Court in correspondence to the former insisted its directive was unambiguous. It ordered the Court of Appeal to comply with it, decrying its action as 'an unfortunate development and ridicule on the hierarchy of courts.'[81]

Finally, the Court of Appeal delivered its judgement on 20 July 2007 on the merits of the case. The Court of Appeal distinguished the facts of *Amaechi v INEC* from *Ugwu v Ararume*. On that footing, it dismissed Amaechi's claims. Thus the public and the legal community watched in bewilderment as the Court of Appeal openly violated its self-imposed commitment made to the parties on how to proceed with the appeal. The action of the Court of Appeal in this regard amounted to a judicial 'summersault' and was, as the Supreme Court noted, a violation of a settled principle of Nigerian law.[82]

Perhaps more significantly, it affronted the fundamental principle of abiding by the principle of precedent, *stare decisis*, entrenched in the country's common law tradition. There was hardly any reason to take a different view from the position that the Court of Appeal was acting a prepared script designed to buy time for the Defendants. Rather than follow the dictates of law, the Court of Appeal, as the Supreme Court noted, preferred to 'dance to pedestrian tunes totally irrelevant in the case.'[83]

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[80] Ibid. at 119.
[81] Editorial "The Amaechi vs Omehia Case and the Court of Appeal" *The Guardian* Online (Lagos Thursday 19 July 2007) available at: http://www.ngrguardiannews.com/ArchiveIndex07_html?pdate=190707&SUBMIT=Submit (last accessed 28 April 2008).
[82] *Amaechi v INEC* note 28 supra at 144.
[83] Ibid. at 128.

Amaechi on his part proceeded to the Supreme Court for the third time where the matter was finally settled in his favour by the Supreme Court which relied heavily on its earlier decision in *Ugwu v Ararume* which arose contemporaneously and under similar facts with *Amaechi v INEC*. But as the Supreme Court lamented, the havoc had already been done. The Court of Appeal had assisted in actualising the scheme of the Defendants to ensure that Amaechi was excluded from the elections. As the Supreme Court noted, these chronicle of 'improper behaviour' on the part of the Defendants with the support of the Court of Appeal, 'needlessly brought the administration of justice to disrepute.'[84]

The Supreme Court was right on point when it further declared that the judiciary, 'like all citizens' of Nigeria, cannot be impervious to attempts by anyone at subversion of the administration of justice.[85] But clearly, such noble turn of mind is scarcely shared down the hierarchy of the judiciary itself.

The attitude of the Court of Appeal in *Amaechi V INEC* is a sad reminder of the institutional malaise of judicial corruption, indiscipline and misfeasance. All of these had dogged the judicial function in the country during the authoritarian period. They have continued to feature sometimes with bizarre dimensions in the transition to civil rule. This is especially the case with at the lower levels of the court system coming as it has, under the strong influence of the political elite, particularly at the state level.

A prominent method of judicial misfeasance is the grant of *ex parte* injunctions. The judicial grant of such orders, a notorious feature of the authoritarian era, had from time to time reared its head in the transition period. Despite the judicially sanctioned urgency of combating the scourge of corruption in the country,[86] the country's anti-corruption

[84] *Amaechi v INEC* note 28 supra at 119.
[85] Ibid.
[86] *Attorney-General of Ondo State v Attorney-General of the Federation & 35 Ors* (2002) 6 S.C. Pt I.

agency lamented the judiciary was frustrating its efforts to prosecute well-heeled accused persons through indiscriminate grant of *ex parte* orders to stall their prosecution.[87]

To cite but one recent topical example, a state governor recently applied to and obtained from a federal high court, an *ex parte* injunction to stop the investigatory activities of the Economic and Financial Crimes Commission against his predecessor for abuse of office and misappropriation of state funds running into millions of dollars during his eight year tenure. The injunction included prayers to halt the investigatory body's request for official documents on financial transactions during the period.[88]

So rampant were instances of unlawful grant of *ex-parte* orders that a number of judges were dismissed for granting them. Such orders have contributed immensely to disrespect for judicial authority in the country. Thus, when the Federal Government rushed to and secured one such order from a Lagos High Court to forestall an impending nationwide industrial action, it was disregarded by the national workers union. In rebuff, the leadership of the workers congress dubbed it a 'black market' injunction[89] not worth the paper it was written on.

Another angle to the consequences of judicialisation of politics is the variegated responses it evokes in the public (and political domain) and the implications of the responses for the rule of law. Reactions to judicial determination of overly political cases can range from acceptance and due compliance by the political branches to studied silence or outright rejection of such decisions. In cases where the jurisprudential basis is opaque, it could simply lead to multiplication of legal challenges on the issues in dispute. And this last is the case with *Amaechi v INEC*.

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[87] Abraham Ogbodo "Stalling EFCC through Ex-parte Orders" *The Guardian* Online (Lagos Sunday 21 2007) available at: http://www.ngrguardiannews.com/ArchiveIndex07_html?pdate=211007&SUBMIT=Submit (last accessed 28 April 2008).
[88] Ibid.
[89] Ibid.

After an initial prevarication, realising reabsorbing Amaechi into the party was the least line of resistance in its bid to hold on to power in Rivers State, he was reconciled into the fold of the PDP after his inauguration. Not surprisingly however, candidates of some other parties who participated in the election alongside Omehia have since returned to the courts to challenge the Supreme Court decision.[90] Thus, the circle of litigation ignited by his illegal substitution has continued full blast, even after he was sworn in as the first governor in the country's history who never contested in the elections in which he was judicially declared winner.

The proclivity for re-litigation is sometimes plain expression of the bad-loser attitude prevalent among the country's political elite. The seeming endless circle of litigation on matters that have ostensibly been laid to rest by the decision of the highest court in the country has the potential to weaken judicial authority. However, such institutional weakening may be self-inflicted.

At the least, the public reaction to *Amaechi v INEC* suggests it is sometimes driven by questionable jurisprudential leanings of a judiciary confronted with the challenges of a society yearning for social reformation and its (judicial) institutional burden of an unaccounted past. The implications of the decision more than any other in recent memory, for the democratisation process, has been subject of intense public discussion.

The public reaction has been largely mixed. There is a general support for the Court's serious attempt to salvage the rule of law from the almost unrelenting assault of the principle by the political class. To this group, the judiciary has been instrumental in preventing anarchy in the country, acting as a forum for the resolution of very contentious disputations and misuse of power as demonstrated by the cases discussed in this article.

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[90] Abraham Ogbodo "Battles in the Court" *The Guardian* Online (Lagos Sunday 20 April 2008) available at: http://www.guardiannewsngr.com/sunday_magazine/article01//indexn2_html?pdate=200408&ptitle=Battles%20In%20The%20Courts (last accessed 26 April 2008).

The judiciary has been credited for acting as a stabilising force in the political process and preventing the break of law and order which has occurred elsewhere in Africa. Not surprisingly, leading members of the legal profession have featured prominently in the vanguard of support for the increased judicial role in the political process in the country.[91]

Ironically, on the same score, the Court has come under heavy criticism for an unprecedented and in its turn, dangerous, violation of majoritarian democratic principles. This has been the response of some to the decision in Amaechi v INEC for instance. To this latter group, the Court was wrong in its declaration of an invalidly excluded candidate as the winner of a state-wide general election. Some highly placed members of the political elite, particularly in the opposition, fear such decisions could derail the democratic process.[92]

Institutional transformation and strengthening of the judiciary, in view of its potential to foster development and the rule of law, is a key aspiration in a democratising polity. Thus weakening the judicial function is, to say the least, clearly undesirable. This is particularly so in the Nigerian context where the political branches suffer from democratic legitimacy deficit and the judiciary is the temporally, the viable public option for deepening the democratic culture and instituting accountability in governance.[93]

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[91] See for instance Chijioke Ogham-Emeka "In Defence of the Supreme Court" *Daily Independent* Online Edition (Lagos 15 November 2007), Ibe Uwaleke "How the Judiciary Stopped Crude Challenge of Constitutionalism by Politicians- Olanipekun" *The Guardian* Online Edition (Lagos Tuesday January 15 2008) available at: http://www.ngrguardiannews.com/ArchiveIndex08_html?pdate=150108&SUBMIT=Submit (last accessed 28 April 2008), Lemmy Ughebe "Judicial Activism Sanitised the Polity in 2007, Says Ameh" *The Guardian* Online Edition (Lagos Tuesday 22 January 2008) available at: http://www.ngrguardiannews.com/ArchiveIndex08_html?pdate=220108&SUBMIT=Submit (last accessed 28 April 2008) and Iba Uwaleke "How Judiciary Stabilised the Nigerian Polity in 2007, by Ladi Williams" *The Guardian* Online Edition (Lagos Tuesday 8 January 2008) available at: http://www.ngrguardiannews.com/ArchiveIndex08_html?pdate=080108&SUBMIT=Submit (last accessed 28 April 2008). All four respondents are legal practitioner. Three have attained the rank of Senior Advocates of Nigeria, the equivalent of Queen's Counsel in the United Kingdom.

[92] Saxone Akhaine "Balarabe Musa Faults Amaechi's New Status" *The Guardian* Online Edition (Lagos Saturday October 27 2007).

[93] Yusuf note 8 supra at 203.

Conclusion

The foregoing analyses disclose that the political branches have through their contestations for hegemony and domination, provided ample opportunity for the ascendance of the judiciary as a principal force in governance and democratisation in a polity yearning for social reconstruction. The judiciary intervenes in setting the ground rules for political competition within the democratic space opened up after years of military authoritarian rule. It is also at the vanguard of preserving the rule of law assailed almost continuously by a largely-self serving political elite with suspect legitimacy credentials.

Despite considerable public approbation, the waters of a troubled transition sometimes prove too treacherous for otherwise well-intentioned judicial interventions. This leads to quite questionable adjudication and jurisprudential preferences which threaten rather than promote important social values like democracy and the rule of law. Further, in the course of playing an important role in the task of ensuring political accountability, institutional as well as social reconstruction and rule of law-building, it soon becomes apparent that the judiciary is itself severely challenged by the malaise of a deep–rooted accountability gap. The gap in judicial accountability and resultant institutional distortions it leads to complicate the judicial attempt at fostering the rule of law particularly in democratising societies.

AC v INEC and *Amaechi v INEC* aptly present the directionalities of the phenomenon of judicialisation of politics and the inversed impact of politicisation of the judiciary. The judiciary ought to play an important role in the reinstitution of the rule of law and deepening of democratic culture, both important aspirations in transitional societies. The judiciary has a very critical role in promoting social transformation, at the heart of transitioning processes.

This does not however obviate the challenges inherent in that enterprise, a critical one being the potential for politicisation of a judiciary actively engaged with policy and political decision-making processes. The judicialisation of politics may be quite desirable, sometimes an imperative, in the context of transitional societies in particular, it presents serious challenges to a judiciary not well prepared to take on the daunting task.

The discussion in this article provide opportunity for critical reflection on an important aspect of transition politics in post-authoritarian Nigeria, namely the (mis) use of state agencies and institutional organs for exclusion in the electoral process. The relevance of the focus on this issue in the democratisation process in Nigeria is germane. A more sinister and extreme weapon, 'political' assassinations have become a notorious feature of elitist power struggles from the inception of the political transition in 1999 to date.[94]

The recourse to judicial intervention for resolving debacles on individual participatory rights are thus quite important in as much as they constitute a formal and decorous mechanism for disputes resolution. Perhaps even more important is the opportunity they offer for sustaining the culture of democracy in the Nigerian society.

Assuaging sectional frustrations based on feelings of exclusion and marginalisation, real and imagined, had been a justificatory staple for military intervention in the country's politics right from the outset in post-independent Nigeria. After nearly three decades of predatory authoritarian military rule, just how opportunistic the claim has been in the hands of ambitious military officers is now a matter of significant historical record of accounts of governance in the country.

In *Amaechi v INEC*, perhaps more than in any other it has decided in the country's current democratic transition, the Court boldly acknowledged the highly politicised nature of the case before it. References to democracy and democratic principles are replete in the various contributions to the unanimous decision of the highest judicial

[94] Ughebe note 91 supra.

panel in the Nigerian polity. Ironically, it is also one that would likely be recorded in the country's judicial annals as one decided on extremely suspect democratic foundations. Many Nigerians seem to excuse the decision on the basis of the expedience of protecting judicial integrity rather than sound principles of law, equity or democratic virtue law to which the decision strenuously pretends. And so probably will posterity.