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The Pathology of Judicialization: Politics, Corruption and the Courts in Nigeria

Basil Ugochukwu

Abstract

Judicialization of politics, the practice whereby judicial power is expanded well beyond adjudication in purely orthodox terms to embrace the core of politics and governmental policy is becoming a global phenomenon. In this paper, I argue that despite its growing popularity and acceptability, the process of political judicialization should be contextually detailed. Using Nigeria as an example, I assert that, although there might be justification for judicial intervention in the countries of Africa, the prevalence of corruption in the judiciaries makes such intervention a double-edged sword, deserving adroit handling. I also argue that the judicialization of politics on the continent is fuel for corruption. As such, removing political questions from the courts, difficult as this might be, could be an important anti-corruption strategy.

KEYWORDS: corruption, Nigeria, judicialization, courts, Africa

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I. INTRODUCTION

Judicialization of politics, the practice whereby judicial power is expanded well beyond adjudication in purely orthodox terms to embrace the core of politics and governmental policy, is becoming a global phenomenon.¹ Hirschl describes it as “the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies.”² Where it was previously thought that politics is a game for politicians and that political questions are better resolved politically rather than considered issues for the courts, the phenomenon of judicialized politics under the guise of adjudication continues to penetrate legal regimes across the world.

Current literature in this field appears substantially skewed in favor of inquiries into the reasons for its rise, in other words the “whys” of judicialized politics.³ Although the consequences of the practice are frequently discussed, it is often not to the same level of detail. Moreover, those previous writings were concentrated to a large extent but with a few exceptions on the practices of a few state regimes, mainly those in the developed West.⁴ The assumption in those analyses that what obtained in these advanced environments represented worldwide manifestation of how political judicialization played out in practice disregarded nuance and context. In this paper I argue that despite its growing popularity and acceptability, the process of political judicialization should be contextually detailed. I do so with the Nigerian environment in mind in particular, and with election cases in the country since 1999 as specific examples.

More particularly, I argue that because of variations in legal and political contexts the role of the courts in politics in specific circumstances should be closely circumscribed. Although there may be sufficient justification for judicial intervention to resolve significant political stalemates in a country like Nigeria, the prevalence of corruption and prebendal politics⁵ makes this a double-edged

¹ C.N. Tate and T. Vallinder (eds.), *The Global Expansion of Judicial Power* (New York: New York University Press, 1995); T. Ginsburg, *When Courts and Politics Collide: Mongolia's Constitutional Crisis* 14 *Columbia Journal of Asian Law* (2001), 309; T. Moustafa, *Law versus the State: Judicialization of Politics in Egypt*, 28 *Law & Social Inquiry* (2003), 884.

² See Ran Hirshl, *The Judicialization of Mega – Politics and the Rise of Political Courts*, 11 *Annual Review of Political Science* (2008), 94.

³ See, e.g. R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004).

⁴ Hirschl, a leading scholar in this area of law had previously narrowed his work to the developments in four countries, namely Canada, New Zealand, Israel and South Africa. See Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 *Law & Social Inquiry*, (2000), 91.

⁵ See R. A. Joseph, “Class, State and Prebendal Politics in Nigeria” in P. Lewis (ed.), *Africa: Dilemmas of Development and Change* (Colorado: Westview Press, 1998), p. 44.

sword, requiring both caution and deliberation. The judicialization of politics in Nigeria might be fuel for judicial corruption and removing political questions from the courts, notwithstanding the difficulties this entails, and could be an important anticorruption strategy in that country. I cast the judiciary in a dual role in my analyses. On the one hand, their unrestrained exposure to politically charged cases could make them a fertile ground for grand corruption. On the other hand, they have an equally important role to play in constraining corrupt behavior, a role they cannot fulfill if battling the same menace, or the appearance of it, at their very doorsteps.

This issue is significantly illustrated by what occurred after the 2000 U.S. presidential election. On November 12, 2000, the United States Supreme Court, for the first time in its history as well as for the first time in America's over-two-centuries-old democracy, gave the final decision on who became the president of that country.⁶ It was a significant development and one well worth the storm that it raised both in America and elsewhere. In its aftermath, the Supreme Court was slated in the media and by the academe for not only lightly spending its political capital but seemingly "overdrafting" on it.⁷ In one such coarse commentary the word "corruption" was used and the judges were accused of bias and of losing "all sense of perspective."⁸ The election from which that case arose and the decision itself threatened to cost democracy to a degree never before experienced in America's long and eventful romance with that form of government. Expectedly, those events reverberated across the world. It was a typical situation of gold going rusty to the utter amazement of hardwood. Here was a case in which one of the problems that many less-established democracies grappled with on an ongoing basis knocked audaciously at the door of the world's most advanced system and practitioner.⁹

⁶ *Bush v. Gore*, [2000] 531 U.S. 98.

⁷ See E. Chemerinsky, *Bush v. Gore was not Justiciable*, 76 *Notre Dame L. Rev.* 1093 (2000); R. Pildes, *The Supreme Court, 2003 Term – Forward: The Constitutionalization of Democratic Politics*, 118 *Harvard Law Review* (2004), 29; James L. Gibson, G. A. Calderia and L. K. Spence, *The Supreme Court and the US Presidential Election: Wounds, Self-Inflicted or Otherwise?*, 33 *British Journal of Political Science* (2003), 535.

⁸ J. M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 *Yale Law Journal* (2001), 1408.

⁹ Ben Nwabueze, *The Judiciary as the Third Estate of the Realm* (Ibadan: Gold Press Ltd, 2007), 53 ("In advanced democracies the court is seldom called upon to determine as between two candidates who actually won an election, the reason being that election rigging in its various forms... is generally unknown. The role of the court, for the most part, is to determine whether or not the election is invalid by reason of the unlawful exclusion of a validly nominated candidate, non-compliance with prescribed electoral procedures, or corrupt practices during election such as treating, canvassing at polling stations, undue influence, intimidation and so on. A decision invalidating an election does not constitute the court an arbiter of who should govern; the choice is simply referred back to the electorate in a fresh election").

Three years after the American episode, Nigeria also organized general elections in which the office of president was among those contested. This large West African country with a population tipping 150 million has what resembles a presidential constitution of the American model with a few similar government branches and institutions. But the similarity seemingly does not go far enough, especially in the actual practice of the two systems. Where the judicial contestations in 2000 tested the American system and forced the country into a frenzy of reforms, in Nigeria the 2003 presidential election also ended up in the courts but there was neither shock nor drama. The case was simply shepherded through the court system in a routine manner, although what happened in Florida in the 2000 U.S. presidential election was child's play compared to the gross malpractices that marred Nigeria's own elections in 2003.¹⁰ Although those responsible for the Nigerian infringements actually mouthed slogans about reforming the system this did not happen, with the result that in the next cycle of elections in 2007 every available record on how to manipulate election outcomes in Nigeria was broken.¹¹ That too ended up in the courts.¹²

The major focus of this paper is the problem with relying heavily on the courts to clear the mess of electoral mismanagement. It is divided into five sections, including this introduction. The next section situates the problem that I foresee in the context of prevailing global judicialization of democratic politics. It examines some justifications that have been advanced for the practice. The third section provides a conceptual and theoretical background to the issue of political corruption, and highlights those theories that most appropriately situate the problem in Nigeria. Section 4 analyzes electoral politics in Nigeria and how the courts have shouldered increased roles to mediate conflicts arising from elections. It also looks at the damage this exposure has done to that institution and how real corruption and perceptions of it have spread in the process. Section 5 contains some concluding reflections.

II. DECAYING NUTS, BROKEN MORTAR

Requests to the courts to resolve electoral disputes in Nigeria is not a recent development. The absence of any sense of outrage is little wonder when this happens as routinely as it does. Since 1979 every single presidential election conducted in the country has been legally challenged, as have several other

¹⁰ Transition Monitoring Group, *Do the Votes Count? Final Report of the 2003 General Elections in Nigeria* (Abuja: Transition Monitoring Group, 2004).

¹¹B. Ugochukwu, *Democracy by Court Order: An Analytical Evaluation of the 2007 Election Petition Tribunals in Nigeria* (Lagos: Legal Defence Centre, 2009).

¹² See for example *Abubakar v. Yar'Adua*, [2008] 4 NWLR (Pt. 1078) 455.

contested political elections in the country. Slightly fewer than 1000 cases were filed by politicians disputing results in the 2003 general elections, for example.¹³ By 2007 those figures had increased to around 1, 273.¹⁴ These were not cases canvassing marginal questions regarding electoral management or procedure. In all of them, the protesting litigants demanded a reversal of the declared results in their favor or that new voting be conducted. They often alleged fraud of egregious proportions. Such cases can be described as posing political questions par excellence given that in all of them a court decision is sought to replace the results of the ballot box. In essence, the courts have transferred to them “matters of outright political nature and significance”¹⁵ because issues presented for judicial determination are not simply legal but contain political ingredients of far-reaching implications. Decisions rendered on them have the tendency to ruffle policy feathers, and often strike at the very foundations of the political system itself.

The involvement of courts in political cases is no longer as contentious as in the past. Because of the pull that such cases exerted on government policy, it had been thought that disagreements that would result in policy dilemmas were better resolved by politically accountable branches of government, and that the courts were inappropriate forums for decisions on such controversies. For example, in *Baker v. Carr*,¹⁶ the famous U.S. case on political questions, most of the factors offered to explain when litigation implicates political questions pertained to how rendering a judicial decision in such cases would antagonize separation of powers principles. Among those factors are (1) that there exists a textually demonstrable commitment of the issue in question to a coordinate political department, (2) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion, (3) the impossibility of a court’s undertaking independent resolution without expressing lack of respect due to coordinate branches of government, and (4) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Clearly, these considerations, however relevant they may have been in the past, have been overtaken by the new constitutionalism and have ceased to burden the power of courts over political questions. In fact, what has happened points to an irreversible demise of the political question doctrine in constitutional theory.¹⁷

With the apparent blurring of such neat demarcations of governmental functions and the progressive accretion of more powers to the courts in the

¹³ B. Ugochukwu, *Nigeria: Tribunals and the 2003 Elections* (Lagos: Legal Defence Centre, 2004).

¹⁴ Ugochukwu (2009), *supra* note 11, 201.

¹⁵ R. Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 *Fordham Law Review* (2006), 723.

¹⁶ (1962) 369 U.S. 186.

¹⁷ R. Hirschl, *Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 *Canada Journal of Law & Jurisprudence* (2002), 191, 193.

formulation of government policy in most jurisdictions across the world, the anxiety over the involvement of courts in political controversies has subsided to a reasonable extent. Rather, for a variety of reasons that will be summarized later in this paper, the courts are being used to resolve some of the most significant political dilemmas that a society can face, be it pronouncing the outcome of a presidential election,¹⁸ settling districting and apportionment disputes,¹⁹ defining the nation,²⁰ increasing judicial scrutiny of core executive prerogatives,²¹ or issues as diverse as “multicultural citizenship in Western Europe, the place of Germany in the EU, the war in Chechnya, the near constant political turmoil in Pakistan, quandaries of transitional justice from the post-communist world to post-authoritarian Latin America to post-apartheid South Africa [and] the eminence of Shari’a law in Egypt.”²²

Ferejohn identifies three distinct ways through which the courts have taken on new political roles relative to more political branches of government. The first is the willingness and ability of the courts to limit and regulate the exercise of parliamentary authority by imposing substantive limits on the power of legislative institutions. The second is that the courts have increasingly become places where substantive policy is made; while the last is the enthusiasm of the courts in regulating political activity itself, “whether practiced in or around legislatures, agencies, or the electorate – by constructing and enforcing standards of acceptable behaviour for interest groups, political parties, and both elected and appointed officials.”²³ In Nigeria, political controversies have been presented to the courts in the shape of substantive electoral disputes, registration of political parties,²⁴ devolution of fiscal powers and monitoring of revenue disbursements,²⁵ federal control over countrywide anticorruption policy,²⁶ and the extent of liability of past leaders of an authoritarian regime.²⁷ Developments here reflect the worldwide phenomenon of politicized justice. It is clear that Nigerian courts are increasingly being called on to break political and policy gridlocks.²⁸

¹⁸ Hirschl (2004), *supra* note 3, 7.

¹⁹ *Ibid.*

²⁰ *Ibid.*, p. 13.

²¹ *Ibid.*, p. 9.

²² *Ibid.*, p. 5. See also D. L. Horowitz, *The Courts and Social Policy* (Washington D.C.: The Brookings Institution, 1977), p. 4.

²³ J. Ferejohn, *Judicializing Politics, Politicizing Law*, 65 *Law & Contemp. Probs.* 41 (2002).

²⁴ *Independent National Electoral Commission v. Balarabe Musa*, [2003] 1 S.C. Pt. 1, 106.

²⁵ *Attorney General of Abia State & ors. v. Attorney General of the Federation & ors.*, [2006] 7 NILR 71.

²⁶ *Attorney General of Ondo State v. Attorney General of the Federation & ors.*, [2002] 9 NWLR (pt. 772) 222.

²⁷ *Justice Chukwudifu Oputa & ors. v. General Ibrahim Babangida & ors.* (2003) M.J. S.C 63.

These developments indicate that countries are less concerned about the possible negative implications of the judiciary's involvement in politically sensitive cases. Rather, the prognosis favours even more heightened involvement of courts in such politically contentious litigation.²⁹ Previous literature on this subject dwelt primarily on the justifications for overt political courts and the contextual issues that drive this rapidly expanding culture. Some accounts deal with how political accountability in the form of elections pressure more-political players to avoid decisions in politically divisive issues, allowing the courts to make such decisions instead. Typically judges are not elected, and are therefore immunized from the political calculations that are inevitable when explosive issues bordering on pure politics are settled by politically exposed branches and officials rather than detached courts.³⁰

At the same time, the view persists that court decisions are politically constructed and that the judiciary only uses legal language, or what Stone Sweet and Matthews call the "rhetoric of justification,"³¹ to cover its political agenda.³² Such views do not see contemporary judicialization of politics as anything out of the ordinary and are therefore clearly unimpressed by the undue homage that current legal scholarship pays to its development. As Balkin asserts, the U.S. Supreme Court is seen by political scientists as being part of the national political

²⁸ A.O. Enabulele, *Implementation of Treaties in Nigeria and the Status Question: Wither Nigerian Courts?*, 17 *African Journal of International & Comparative Law* (2009), 330 (Arguing that both the Supreme Court and the Court of Appeal in Nigeria "make policy decisions that impact on the conduct of the Nigerian people, both in their personal and official capacities"); H. Yusuf, *The Judiciary and Political Change in Africa: Developing Transitional Jurisprudence in Nigeria*, 7 *International Journal of Constitutional Law* (2009), 656 ("The judiciary, particularly the appellate courts [in Nigeria], has been inundated with 'political' cases and has become a strategic actor in policy-decision making at a level unprecedented in the country's history").

²⁹ M. C. Dorf and S. Issacharoff, *Can Process Theory Constrain Courts?*, 72 *University of Colorado Law Review* (2001), 923.

³⁰ D. L. Horowitz, *The Courts as Guardians of the Public Interest*, 37 *Public Administration Review* (1977), 148. ("Judicial opinions state results in terms of reasons. Judges and juries are insulated from extraneous influences. They are shielded from the clash of opposing interests and the process of 'give-and-take' that are supposed to constitute integral parts of the other governmental processes. The courts take pride in their ability to work their way through the tangle of 'special interests' and to handle issues 'on their merits'... The assumption of the judicial process is that, where reason resides, the public interest will emerge"); see also D. L. Horowitz, *The Judiciary: Umpire or Empire?*, 6 *Law & Human Behavior* (1982), 138.

³¹ A. S. Sweet and J. Matthews, *Proportionality Balancing and Global Constitutionalism*, 47 *Columbia Journal of Transnational Law* (2008), 82.

³² See Hirschl (2004), *supra* note 3, p. 24 ("Taking the notion of courts as political institutions even further, recent political science scholarship suggests that judicial review is often politically constructed, and that elected officials may have political and policy reasons for empowering constitutional courts").

coalition.³³ He is joined by those who believe the courts should stop acting politically and exit from all political arenas.³⁴

However, I have a different worry concerning this somewhat legitimate “judicial oversight of democratic politics”³⁵ Judicial mediation is undoubtedly pertinent in democratic politics given the tendency of majoritarian impulses to stultify the effective political competition that generates genuine political choices.³⁶ The results that could be achieved when this is done may vary across jurisdictions. A strong, independent judiciary operating with substantial institutional legitimacy may be suited for such political exertions. On the other hand, a dependent and weak judiciary, struggling with its image, risks losing what little it has by taking political cases. As Yusuf asserts, “judicialization of politics can threaten judicial integrity itself.”³⁷ This, in my estimation, includes the possibility of the institution being exposed to corruption.

Nigeria is among many countries that have adopted anticorruption legislations to reverse the vice’s endemicity.³⁸ Global and regional instruments have also been elaborated for the same exact purpose.³⁹ The Nigerian situation demonstrates that legislation is not always sufficient to reduce the social deviance that it aims to curb. Criminal legislation directed at corruption also needs to foster the social and political conditions necessary for achieving its objectives. What I propose here in the context of the larger questions posed is a different paradigm

³³ J.M. Balkin, *What Brown Teaches Us about Constitutional Theory*, 90 *Virginia Law Review* (2004), 1538; See also R.A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 *Journal of Public Law* (1957), 279 (“To consider the Supreme Court of the United States strictly as a legal institution is to underestimate its significance in the American political system. For it is a political institution, an institution, that is to say, for arriving at decisions on controversial questions of national policy.”).

³⁴ *Colegrove v. Green*, [1945] 328 U.S. 549 at 553-554 (According to Justice Frankfurter, “It is hostile to a democratic system to involve the judiciary in the politics of the people... courts ought not to enter this political thicket); see also K.I. Butler, “Reapportionment, the Courts, and the Voting Rights Act: A Resegregation of the Political Process?”, 56 *University of Colorado Law Review* (1984-1985), 1.

³⁵ R.H. Pildes, *The Supreme Court 2003 Term Forward: The Constitutionalization of Democratic Politics*, 118 *Harvard Law Review* 29 (2004 – 2005), 41.

³⁶ *Ibid.*, 43.

³⁷ H. Yusuf, *Democratic Transition, Judicial Accountability and Judicialization of Politics in Africa: The Nigerian Experience*, 50 *International Journal of Law & Management* (2008), 253.

³⁸ P.D. Ocheje, *Law and Social Change: A Socio-Legal Analysis of Nigeria’s Corrupt Practices and Other Related Offences Act, 2000*, 45 *Journal of African Law* (2001), 173; O. N. Ogbu, *Combating Corruption in Nigeria: A Critical Appraisal of the Laws, Institutions, and the Political Will*, 14 *Annual Survey of International & Comparative Law* (2008), 99; O. Oko, *Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus*, 34 *New York University Journal of International Law & Policy* (2001-2002), 397.

³⁹ See for example K. Olaniyan, *African Union Convention on Preventing and Combating Corruption: A Critical Appraisal*, 4 *African Human Rights Law Journal* (2004), 74.

that attacks corruption not just by merely criminalizing it but by reducing the possibility of it happening. From my point of view, corruption is an opportunistic deviance to the extent that it requires a combination of criminal will and the opportunity to operationalize it in order to thrive.

III. CONCEPTUALIZING POLITICAL CORRUPTION

In composing a conceptual sketch of political corruption in this paper, I am aware of its circumscription by the dimensions of the questions posed. The paper cannot possibly address political corruption in all its ramifications. Rather, as stated earlier, it focuses on the temptation to corruption posed when courts become overly involved in political cases. Nevertheless, in order to understand judicial corruption it may be useful to analyze it first in its wider context. I understand that the concern about courts becoming enmeshed in political cases may be redundant in certain contexts where courts have sufficient institutional legitimacy or “political capital”⁴⁰ to see them through situations in which they may rightly be accused of acting corruptly.

For example, the U.S. Supreme Court decision in *Bush v. Gore*⁴¹ had many commentators seething with indignation, yet while analyzing the decision’s possible impact on the institutional legitimacy of the court, Balkin, though admitting that in the short term the court’s legitimacy could be in play, still concludes that in the long run the decision will make little difference regarding the court’s legitimacy in the eyes of the American public.⁴² Such legitimacy, enough to shield the courts through waves of public denunciations, is not present everywhere, and definitely not in Nigeria. Courts in regimes of such low legitimacy would therefore do well to avoid being exposed to those political cases that would further erode political capital, in which is already in dire straits. Dyzenhaus captures this dilemma in detail, especially for judges in a transition regime, when he posits that “judges in a transition are often faced with deciding deeply political matters, which force the issue of their authority and their independence to the surface.”⁴³

The issue of legitimacy is crucial to discussions about how exposure to political cases affects the credibility of judges or the judiciary as an institution. In jurisdictions where the judiciary as an institution has high public legitimacy it is

⁴⁰ See, e.g., E. Chemerinsky, *The Supreme Court, Public Opinion and the Role of the Academic Commentator*, *South Texas Law Review* (1999), 948.

⁴¹ *Bush v. Gore*, (2000), *supra* note 8.

⁴² J.M. Balkin, *supra* note 8, p. 1450

⁴³ D. Dyzenhaus, *Judicial Independence, Transitional Justice and the Rule of Law*, *10 Otago Law Review* (2003), 347-348.

rarely linked to corruption, political or otherwise. The legitimacy that the institution enjoys ensures that claims or allegations to the contrary are either quickly counteracted or ignored. The same cannot be said of jurisdictions where the legitimacy of the courts is low. Here claims and allegations of corruption, real or imagined, soon acquire a life of their own. The absence of legitimacy makes it easier for those claims and allegations to become entrenched in public consciousness from which they eat away at the very foundation of that institution's credibility.⁴⁴

Without a doubt, cultural, political and social conditions all count toward the measure of a judicial regime's legitimacy. The prevalence of corruption in the larger political theatre tends to rub off negatively on the judiciary, especially if that institution persistently acts in ways that make it appear that it is part of the political elite. This may be an offshoot of what Dobel characterizes as "factional politics."⁴⁵ He argues that certain patterns of moral loyalty and civic virtue are necessary to maintain a just, equal, and stable political order and that the privatization of moral concerns and the accompanying breakdown of civil loyalty and virtue are the cardinal attributes of a corrupt state.⁴⁶ Dobel sees extensive inequality in wealth, power, and status, "spawned by the human capacity for selfishness and pride," as generative of the systematic corruption of the state, a situation in which members of the upper classes sacrifice their basic civic loyalty in order to gain and maintain their positions. The established inequality undermines the loyalty and substantive welfare of the general citizenry.⁴⁷ This thesis can be applied directly to Nigeria, where suspect public legitimacy for the courts can be linked to the attribution of upper-class status to judges.

Continuing along this line, Dobel hypothesizes that the change in the moral quality of life of the citizen, coupled with the inequality referred to earlier, generate factions. To Dobel,

Factions are objective centers of wealth, power, police and policy which, by their own dynamics, usurp vital governmental and political functions. Factional politics involves the systematic attempt to corrupt public agency and law. Membership and practice in the factions changes the moral

⁴⁴ See e.g. Ugochukwu, *supra* note 11, at p. 99, referring to the comments of a Justice of the Nigerian Court of Appeal, Olu Adekeye, that allegations of bribery of judges in Nigeria are often generalized and given wide publicity even when those who make those allegations provide no proof of them. The judge therefore urged Nigerians "to be slow to accept sensational rumours of endemic corruption in its judiciary in order not to tarnish the reputation of its otherwise credible personnel."

⁴⁵ J. P. Dobel, *The Corruption of a State*, American Political Science Review (1978), 958.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

character of persons, undermines their loyalty to the community and encourages radical selfishness or limited loyalty to factions.⁴⁸

He further argues that continued conflict among factions and the inequality this breeds extends corruption to the entire citizenry. “Violence increasingly becomes the dominant substratum of all relations, and political discourse is reduced to transparent rationalization. Public office, law and adjudication become tools of faction and class.”⁴⁹ It is the roles that “law and adjudication” play as factors in political factionalization that is of immediate concern to this paper, and I will return to it later.

As some theorists, notably Heywood, have stated, “it would be impossible to develop one generalizable and uncontested definition of political corruption”⁵⁰ More poignantly, he admitted that one could argue that “the meaning of political corruption might vary with the nature of the political system in question”⁵¹ Yet what Heywood describes as “incommensurable relativism” had long been associated with theorizing on what could or could not be considered corrupt behavior. According to Nye, the same conduct could be considered corrupt or not, depending on the level of development of the societies where it occurs. Nye states that “behaviour that will be considered corrupt is likely to be more prominent in less developed countries because of a variety of conditions involved in their under-development,”⁵² including great inequality in distribution of wealth, political office as the primary means of gaining access to wealth, conflict between changing moral codes, the weakness of social and governmental enforcement mechanisms, and the absence of a strong sense of national community.⁵³ Similar behavior in more-developed countries would thus be characterized differently.

Notwithstanding, there seems to be unanimity that corruption, whether political or not, involves some form of abuse of public trust for private gain.⁵⁴ Nye describes it as “behaviour which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence.”⁵⁵ Recognizing that the definition of corruption poses

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ P. Heywood, *Political Corruption: Problems and Perspectives*, 45 *Political Studies* 417 (1997).

⁵¹ *Ibid.*

⁵² J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 *American Political Science Review* (1967), 418.

⁵³ *Ibid.*

⁵⁴ See further Heywood (1997), *supra* note 50.

⁵⁵ *Ibid.*

serious problems, Nye describes it as perversion or a change from good to bad, and covers a wide range of behavior from venality to ideological erosion.⁵⁶

For his part, Peters, while agreeing with Nye's ideas, classifies the definition of political corruption according to three different criteria. Some definitions are based on legality, such as Nye's. Others are based on a theory of public interest while other definitions are based on public opinion.⁵⁷ Corruption on the basis of legal criteria "assumes that political behaviour is corrupt when it violates some formal standard or rule of behaviour set down by a political system for its public officials."⁵⁸ For the definition of corruption on the public or common interest criteria, Peters accepts that offered by Rogow and Lasswell that "[a] corrupt act violates responsibility toward at least one system of public or civic order and is in fact incompatible (destructive of) any such system."⁵⁹ Finally, Peters uses the public opinion criteria to suggest that "a political act is corrupt when the weight of public opinion determines it so."⁶⁰

The public opinion criteria is particularly relevant to the Nigerian situation because of its implications for what Peters goes on to categorize as "black," "white," and "grey" corruption. The categorization reflects the antinomy of views, on the one hand, of the public and the political elite, and on the other in their assessment of what constitutes appropriate standards of political conduct.⁶¹ His argument is that the public opinion judgment of what is political corruption is limited by the underlying fact that the public and political elite may have differing opinions on what is politically corrupt at any given time. Hence "black" corruption accommodates behavior judged particularly heinous or corrupt by both the public and political elite that would want curbed. On the other hand, it is "white" corruption when an action is judged corrupt by both the general public and public officials, but that neither feels is severe enough to warrant any form of sanction. "Grey" corruption drives the divergence to its limit because either the public or the elite wants a specific action punished as corruption while the other does not.

Similarly well received in the field of theories about corruption is Alatas's schema,⁶² which puts corruption into seven distinct categories based on what

⁵⁶ *Ibid.*

⁵⁷ J. G. Peters, *Political Corruption in America: A Search for Definitions and a Theory or If Political Corruption is in the Mainstream of American Politics, why is it not in the Mainstream of American Politics Research?*, 72 *American Political Science Review* (1978), 974.

⁵⁸ *Ibid.*

⁵⁹ A. Rogow and H. Lasswell, *Power, Corruption and Rectitude* (New Jersey: Prentice-Hall, 1963).

⁶⁰ Peters (1978), *supra* note 57.

⁶¹ *Ibid.*

⁶² H.S. Alatas, *Corruption: Its Nature, Causes and Functions* (Kuala Lumpur: S. Abdul Majeed & Co., 1990).

Heywood typifies as a “minimalist definition” of corruption in terms of “the abuse of trust in the interest of private gain.”⁶³ Alatas refer to autogenic corruption, which is self-generating and involves one perpetrator alone, such as a person using insider information to unfairly influence a stock market. Defensive corruption, he says, involves situations where a person needing critical service is compelled to bribe to prevent unpleasant consequences. Extortive corruption occurs when a person demands personal compensation in return for services, whereas the person engaged in investive corruption is not out for any immediate favor in the present but only acts in anticipation of future situations when the favor may be required. Nepotistic corruption involves some form of preferential treatment for friends or relations, or their unjustified appointment to public office in violation of prevailing guidelines. Supportive corruption is carried out to strengthen existing corruption; it does not involve any financial or immediate material gains. However, transactive corruption brings two parties together as willing participants in a corruption scheme that confers advantages on both parties.⁶⁴

Anyone familiar with the Nigerian political environment and the hold that corruption has on the social, economic, and especially political systems can be in no doubt that the vice occurs at varying levels of intensity in one or more of the forms described above. Yet the observational learning theory that Gire⁶⁵ analyzes is equally relevant to any effort to understand which social factors make corruption prevalent. This theory is associated with Bandura, and simply postulates that “much of what we learn is obtained by observing others, and that this is much more efficient than learning through direct experience because it spares us countless responses that might be followed by punishment or no reinforcement of any kind.”⁶⁶ The theory states that people are able to observe or attend to corrupt behavior (of a model) and, in the absence of any sanctions to the person whose conduct they are observing or attending, (the model), are able to replicate it.

Gire makes this argument directly relevant to the Nigerian situation when he asserts that:

It is obvious that many Nigerians see cases of corruption everywhere. Many of the kickbacks received by top officials go through intermediaries, some of whom are subordinates of these officials. People who are hitherto living

⁶³ Heywood (1997), *supra* note 50.

⁶⁴ See generally J.T. Gire, *A Psychological Analysis of Corruption in Nigeria*, 1 *Journal of Sustainable Development in Africa* (1999), 5.

⁶⁵ *Ibid.*, p. 6.

⁶⁶ A. Bandura, *Social Foundations of Thought and Action: A Social Cognitive Theory* (New Jersey: Prentice-Hall, 1986).

from hand to mouth often begin to build houses and are commonly seen driving around in flashy cars shortly after being appointed to ‘lucrative’ positions that grant them access to money or influence. Therefore, attending to the behaviour of the model is not a problem here. It is also certain that these people are able to remember the corrupt activities that they have observed.⁶⁷

Finally, in this exercise of conceptualizing political corruption, I return to Dobel’s political factionalization idea and how law and adjudication relates to it. Dobel states that when civic virtues decline under conditions of inequality and factional competition, it produces a pattern of politics characterized by, among several factors, “the disintegration of effective public law and fair adjudication.”⁶⁸ According to him, in a healthy state coercive enforcement is peripheral to the law. The loyalty to law is reinforced by constitutional limits, political participation, and reliable and fair methods of adjudication and conflict resolution. However, once certain groups can unduly influence legislation, buy immunity from judgment and punishment, or use the judicial system against their opponents, citizens will lose faith in the state and join factions for their own protection.⁶⁹

Dobel’s conclusions represent some of the most prevalent social realities in the Nigerian polity. The Nigerian judiciary has long distinguished itself as a bastion of political stability over and above “truth and legitimacy,”⁷⁰ often avoiding decisions that could rock the established political order. Although not clearly related to any allegations of corruption, when political stability cautions judicial expediency and the courts choose literal, mechanistic legal interpretations, serving the needs of political expediency rather than legitimacy,⁷¹ their credibility is called into question. When this is combined with intense corruption at the political level as well as serious questions about the institutional independence of courts from political control, the same corruption that taints politics is perceived as affecting the courts as well. Perception is the key here, as I previously stated, and there is a strong relationship between perceived overall corruption and perceived judicial corruption. As Barrett argues, “It might be reasonably expected that countries with lower perceived overall corruption would also have lower perceived judicial corruption. Also, since the judiciary is a branch

⁶⁷ Gire (1999), *supra* note 64.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ See M. Tomoszek, *Judicial Control of Elections in Czech Republic, Poland and Slovakia: Guarantee of Stability or Democratic Legitimacy?*, 16 *Journal of Constitutional Law in Eastern & Central Europe* (2009), 121.

⁷¹ B.O. Okere, *Judicial Activism or Passivity in Interpreting the Nigerian Constitution*, 36 *International & Comparative Law Quarterly* (1987), 803.

of the government it could be expected that a citizenry that perceives high levels of judicial corruption would also perceive high levels of overall corruption.”⁷²

IV. CONFRONTING FRANKENSTEIN’S MONSTER

It is crucial to understand the nature of politics in Nigeria because of the light this shines on the dangers of allowing the courts to become entangled in it. I earlier made reference to Nigeria’s prebendal politics that provides oxygen for corruption. Richard Joseph describes prebendalism as a pattern of political behavior that rests on the justifying principle that state offices should be competed for and then utilized for the personal benefit of officeholders as well as for their reference or support group, and which relegates the official public purpose of these offices to a secondary concern.⁷³ The political stakes are unusually high in Nigeria. The occupation of political office is the clearest route to unbelievable wealth and power. The contest for power, feeding on ethnic and class rivalries, is usually brutal. Elections are actually wars by other means. It also often happens that even though much time is spent organizing elections, they are so corrupted that voters’ preferences have no bearing on their outcome. Narrating his experience monitoring the 1999 presidential election in Nigeria, one writer noted that “no one had any illusions that anything but high-stakes bargaining within the military and the political class would determine the structures of power in the civilian government. Elections would influence this process to the extent that the crowd influences a soccer match.”⁷⁴ Although massive crimes riddle Nigerian elections, the perpetrators are hardly punished. There is therefore enough incentive for persistent electoral malfeasance to take place and taint successive elections. Political participants do not have equal leverage to use inordinate means to obtain the objects of their ambitions. The political field is never level for various reasons, including the inequality of financial means and the unusual impact that the power of incumbency has on electoral contests. Every so often, many disadvantaged participants are left with no alternatives other than to rush to

⁷² K. Barrett, *Corrupted Courts: A Cross-National Perceptual Analysis of Judicial Corruption* (M.A. Thesis, Georgia State University, 2005) [unpublished] online: <http://etd.gsu.edu/theses/available/etd-04202005-151027/unrestricted/barrett_kathleen_r_200505_mast.pdf>.

⁷³ Joseph (1998), *supra* note 5; see also Richard Joseph, *Democracy and Prebendal Politics in Nigeria: The Rise and Fall of the Second Republic* (Cambridge: Cambridge University Press, 1987), 8; Shaheen Mozaffar, *Book Review of Democracy and Prebendal Politics in Nigeria: The Rise and Fall of the Second Republic by R. Joseph*, 22 *International Journal of African History Studies* (1989), 500.

⁷⁴ D. Kew, *Democracy – Dem Go Craze, O: Monitoring the 1999 Nigerian Elections*, 27 *Issue: A Journal of Opinion* (1999), 29.

the courts for redress if they feel cheated during elections. The danger here is that politicians generally carry their manipulative propensities and their high-level venalities to the courts as well.

Allegations of corruption have consistently been made against the Nigerian judiciary. In a 1997 research study conducted by the Nigerian Institute of Advanced Legal Studies (NIALS), corruption was cited as a key problem for the administration of justice by 30 percent of judges, 54 percent of litigants, and 50 percent of lawyers.⁷⁵ A different report claimed that over 55 percent of Nigerians had confidence in their reformed legal system.⁷⁶ A report by the International Commission of Jurists on Nigeria stated that “judicial corruption remains a major concern, and between 2002 and 2005, no fewer than 6 superior court Judges, including 2 Justices of the Court of Appeal, were removed from their posts on charges of corruption, while a number of other judges are under investigation.”⁷⁷ In Lagos state a 1999 study indicated that 99 percent of lawyers surveyed agreed that there was corruption in the state judiciary, while in the same report 70 percent of Nigerians surveyed across the country believed the judiciary was corrupt.⁷⁸ A judge invited to speak to other Nigerian judges on the fight against corruption in the country’s judiciary stated that the topic presupposed that there was an ongoing fight against corruption, then wondered, “Is there [a fight against corruption?] When was it launched? How do we determine that there is an ongoing fight?”⁷⁹ Needless to say, he provided no answers to these queries.

One notices that the results of these surveys do not match and that the degree of divergence is not insignificant. While this may affect the credibility of those reports, particularly with the possibility of exaggerations or overgeneralizations, they nevertheless confirm in relative terms the presence of corruption in the Nigerian judiciary. Langseth and Bryane place judicial corruption in two distinct categories: administrative corruption and operational corruption. They define administrative corruption as what occurs when court administrative employees violate formal administrative procedures for their private benefit, while operational corruption takes place in grand corruption

⁷⁵ P. Langseth and B. Michael, *Foreign-Sponsored Development Projects in Africa: The Dialogue between International and African Judicial Integrity Projects* 5 *Journal of Sustainable Development in Africa* (2003), 3.

⁷⁶ Barrett (2005), *supra* note 72, p. 2.

⁷⁷ International Commission of Jurists, *Attacks on Justice: Federal Republic of Nigeria*, available at: <<http://www.icj.org/IMG/NIGERIA.pdf>>.

⁷⁸ K. Zannah, “The Fight against Corruption in the Nigerian Judiciary: The journey so Far” (Paper presented to the All Nigeria Judges Conference, 5 – 9 November 2007) [unpublished], available at:

<http://www.nji.gov.ng/index2.php?option=com_docman&task=doc_view&gid=86&Itemid=180>.

⁷⁹ *Ibid.*, p. 6.

schemes where political and/or considerable economic interests are at stake.⁸⁰ My concentration in this paper is with the latter because though corrupt tendencies among court administration personnel may have corrosive consequences similar to that perpetuated by judges, that brand of corruption is outside the remit of this paper and must be the subject of a different inquiry.

My focus here is the kind of corruption that occurs or is likely to occur when courts are exposed to political cases. While it might be expected that this brand of corruption involves only the transfer of financial incentives to secure a favorable judicial decision, this is by no means the only way in which judicial corruption can happen. Here I return to Alatas's categorization⁸¹ to indicate that what is usual within the Nigerian judiciary is corrupt behavior of the investive, nepotistic, and supportive variants. What one writer describes as "ethnic considerations and political prejudices, friendship, gratitude for past favours, receipt of or expectation of gratification"⁸² can be subsumed in all these. I should highlight as well that corruption within the Nigerian judiciary is for the most part at the realm of perception, since only rarely are allegations of corruption against judges actually proven. For our purposes, however, it should not matter whether the allegations are proven or not, given the fact that both corruption in perception and corruption in actuality produce the same negative results for the legitimacy and credibility of the judicial institution.

Whatever role the Nigerian judiciary played in electoral politics remained well in the background until the presidential election of 1979, which heralded the first return to civil rule since 1966 and the abdication of political power by the military. The part that the courts, particularly the Supreme Court, played in shaping the ultimate outcome of that election has remained controversial to this day. It was equally a harbinger of a more active involvement of the judiciary in subsequent elections, with mixed implications for the credibility of that institution. Events leading up to that election and the plain facts of the legal dispute involved have been well documented,⁸³ yet the decision of the Supreme Court raised more questions than it answered, setting the pattern in the process for subsequent judicial somersaults in especially political cases. Moreover, Richard A. Joseph's summary fully captures its real implications. According to him, "Before the Supreme Court actually met to consider the electoral appeal of Chief Awolowo, the SMC [Supreme Military Council] announced the appointment of a new Chief Justice of the federation. ... The choice ... seemed satisfactory. ...

⁸⁰ Langseth and Michael (2003), *supra* note 75, p. 3.

⁸¹ Alatas (1997), *supra* note 62.

⁸² O.N. Ogbu, *The Judiciary in a Polity – A Force for Stability or Instability? The Nigerian Experience*, 11 *African Journal of International & Comparative Law* (1999), 732.

⁸³ R. A. Joseph, *Democratization under Military Tutelage: Crisis and Consensus in the Nigerian 1979 Elections*, 14 *Comparative Politics* (1981), 75; See also Okere (1987), *supra* note 71, p. 801.

Nevertheless, the designation of a Chief Justice is one of the prerogatives of the President under the new Constitution, and it appeared a hasty act for the military to perform just before Shagari assumed office, and at a time when his election was to be reviewed by the Supreme Court.”⁸⁴

The judgment in this case was therefore surprising only to the uninitiated, as was the admonition of the court that its judgment should not be cited in future cases as the template for resolving disputes of that kind.⁸⁵ By 1983 the orientation of the court had moved from the questionable to the ridiculous. In two different governorship electoral disputes, decided within an interval of less than two weeks and having similar facts, the Supreme Court arrived at two contradictory decisions.⁸⁶ Nigeria’s foremost constitutional scholar stated that this seemed to “caricature justice” because the public could only speculate as to the Supreme Court’s motives.⁸⁷ In both cases the petitioners claimed to have won the majority of lawful votes cast in the elections but that the results eventually declared by the electoral body were marred by falsification and other criminal offenses. While in the case of *Nwobodo v. Onoh* the Supreme Court claimed that allegations of crime were made and needed the higher threshold of proof beyond reasonable doubt, in *Omoboriowo v. Ajasin*, containing identical allegations of fraud and falsification, the court removed one technicality and decided the case based on the lower threshold of proof on balance of probabilities. In a stinging dissent in the *Nwobodo* case, one of the judges stated that “a candidate is required to have a majority of the votes. ... To employ such technicalities ... is to prepare ground for appointment of a Governor ... by mere technicality and not by majority of votes.”⁸⁸ The election itself had been overshadowed by violence, especially in Ondo state and other parts of Western Nigeria. Under threat, Omoboriowo fortunately slipped into the bush from where he made his way to Lagos.⁸⁹

Characteristically, the bungling of the 1983 elections and mounting evidence of corruption among politicians gave the Nigerian military ample justification to abolish democracy and restore dictatorial rule yet again. The

⁸⁴ *Ibid.*, Joseph, p. 82.

⁸⁵ A. Maja – Pearce, *From Khaki to Agbada: A Handbook for the February, 1999 Elections in Nigeria* (Lagos: Civil Liberties Organization, 1999).

⁸⁶ *Nwobodo v. Onoh* (1983) 10 S.C. 42; *Omoboriowo v. Ajasin* (1983) 10 S.C. 178.

⁸⁷ B.O. Nwabueze, *Nigeria’s Presidential Constitution 1979-83: The Second Experiment in Constitutional Democracy* (London: Longman Press, 1985), 461; See also Ogbu (1999), *supra* note 82, p. 732.

⁸⁸ See Ogbu (1999), *supra* note 82, p. 732.

⁸⁹ A. Apter, *Things Fell Apart? Yoruba Responses to the 1983 Elections in Ondo State, Nigeria*, 25 *Journal of Modern African Studies* (1987), 493 (Stating: “A crowd of mostly old and middle-aged women mobilised first, carrying sticks, cudgels, and yam-pounding pestles, quickly joined by young girls and boys. Their first act of protest was to overturn and set fire to a Peugeot station-wagon owned by an N.P.N. nurse, who fled into the C.M.S. church, whereupon the pastor started ringing the bells - more a call to action than for help.”).

military promised to re-establish democracy but showed neither willingness nor commitment to carry the plan through. Rather, corruption intensified and human rights violations became endemic. The judiciary was, for the most part, shackled. By 1993 the military had suffered avoidable reverses in its credibility, promising and then failing repeatedly to hand power back to civilians. Under severe pressure from within and outside the country, the institution organized presidential elections on June 12, 1993, only to yet again truncate the outcome as the results were being collated. Tellingly, in an unsigned statement annulling the result of that election, the military said it had been motivated to take that action to “protect our legal system and the judiciary from being ridiculed both nationally and internationally.”⁹⁰ Before this declaration no fewer than six different courts from across the country had issued orders, mostly contradictory, with regard to that election.⁹¹ Ibrahim Babangida, who had organized these elections, was forced out of power, leaving behind an illegitimate interim regime that was sacked just months later. The military regained full powers under Sani Abacha, who would go on to unleash the worst form of brutality ever meted out to the citizens of the country.

The next time Nigerians would hear of elections and the courts was in 1997 when, as part of the process of its disengagement, the Abacha regime organized elections for local government councils across the country. In addition to organizing yet another deceitful transition to civil rule program, Abacha also ran a very corrupt regime. Little wonder that immediately after the local council elections angry politicians quickly swamped judicial tribunals established to treat these grievances. In dealing with these cases the tribunals raised the bar for avarice and fraud.⁹² Some members of the tribunals were caught red-handed in the act of corruption, some were removed, and others were arrested. Abacha was so embarrassed that he established a committee to reexamine the tribunals’ work.⁹³ The results were not completed before Abacha suddenly died in 1998.

The military eventually restored civil rule in 1999. In the elections that formed part of the process of their disengagement the courts were called on, probably more than ever before, to break voting stalemates. The bias of the military in favor of certain interests in the elections was starkly apparent for the world to see, yet voting infringements were a small price to pay in the estimation of Nigerians if the military would quit the political stage without further bloodshed. As usual, aggrieved politicians swamped the specially constituted

⁹⁰ Civil Liberties Organization, *Annual Report on Human Rights 1993* (Lagos: Civil Liberties Organization, 1993), 168.

⁹¹ Ogbu (1999), *supra* note 82, p. 733.

⁹² B. Ugochukwu, *Electoral Justice Reform in Nigeria* in J. Otteh (ed.), *Reforming for Justice: A Review of Justice Sector Reforms in Nigeria 1999 – 2007* (Lagos: Access to Justice, 2007), p. 147.

⁹³ *Ibid.*

tribunals to question the results in different parts of the country. Reports of corruption at the tribunals continued to be made until the assignment was completed. No acts of corruption on the part of judges were proven.⁹⁴

The tide changed dramatically in the 2003 election cycle, along with the heightening of political stakes. The ruling party had performed rather poorly in its first term in power but was bent on retaining it by any means possible. Both on intra- and interparty levels, fraud escalated to a hypernormal rate while the elections themselves produced more than the usual share of absurd outcomes. The judicial tribunals brimmed with angry politicians. Claims that judges had been corrupted were a daily political occurrence, but this time some were caught with their hands in the cookie jar. Four judges -- M. M. Adamu, T. Ahura, James Isede, and A. M. Elelegwu – who participated in the tribunal that examined the governorship election petition in Akwa Ibom state were dismissed from their posts for bribery in 2004. A fifth, David Idiong, the state chief judge at that time, allegedly distributed the bribes. He could only stave off an indictment by filing a case for injunction against the country's anticorruption agency.⁹⁵ Another judge, Chrisantus Senlong, though not a member of the tribunal, was similarly dismissed for attempting to bribe the tribunal members on behalf of another party.

In 2005, arising from their handling of the appeal in a senatorial contest in Anambra state, Okwuchukwu Opene and David Adeniji, both of the Nigerian Court of Appeal, were removed from their posts for well-proven acts of corruption. In fact, their judgment ended in a bizarre drama when members of the audience, in an expression of anger when the judgment was being read, forced the judges to flee in different directions. A committee set up under the auspices of the National Judicial Council and chaired by a retired judge of the Court of Appeal established that Opene took 15 million naira (US\$100,000) in bribes while Adeniji accepted 12 million naira (US\$80,000). The third judge, Kumai Bayang Akaahs, rejected the amount offered him and instead delivered a dissenting judgment.⁹⁶

This trend continued in 2007 when the general elections worsened in terms of their management. They characteristically spawned the largest amount of election cases in the country's history. Allegations of corruption were made afresh against the tribunals; again, though no judges were caught, in some cases those allegations contained credible claims that could have been further investigated but for the most part were not. In Anambra state, for example, a

⁸⁷See generally B. Ugochukwu and C. Ononiwu, *The Judiciary and Democratic Transition in Nigeria* (Lagos: Legal Defence Centre, 2000).

⁹⁵ See *supra* note 77, p. 8; See also B. Ugochukwu, *Nigeria: Tribunals and the 2003 Elections* (Lagos: Legal Defence Centre, 2004), 69; Gani Fawehinmi, "The Role of Election Tribunals", available at: <<http://nlii.org/files/fawehinmi.pdf>>, accessed 11 April 2011.

⁹⁶ *Ibid.*

member of one of the state tribunals resigned as its chair, citing pressure from unnamed sources to transfer cases on three different occasions to another tribunal for no given reason.⁹⁷ The chairman of the tribunal that first examined the 2007 presidential election petition, James Ogebe, was promoted to the Supreme Court just days before the judgment of the tribunal he chaired was due.⁹⁸ Apparently reacting to public outrage at this development, he stayed away from the tribunal on the day judgment was given. The government had no explanation for why the promotion could not at least be delayed until the job of the tribunal was completed.

In Osun state incontrovertible evidence existed that the chairperson of the tribunal, Thomas Naron, had informal phone contact forty-six times with the lawyer for one of the parties in the state governorship petition while it was pending. Several text messages also passed between them.⁹⁹ The lawyer in question offered no defense to this allegation other than a letter from the telephone company indicating that they did not authorize the release of the call records. Similarly, in Ondo state the chairperson of the tribunal, Joseph Ikyegh, alleged an attempt by unidentified persons to bribe the tribunal members to the tune of 100 million naira . However, he recanted the claim the very next day.¹⁰⁰

The tribunals knew that actual corruption or allegations that it had taken place would affect their work. At inaugural sessions in Ekiti, Borno, and Lagos states they thus pleaded that no bribery efforts be made,¹⁰¹ but this did very little to dissuade claims of corruption even if they were unproven. The chief justice of Nigeria promised to launch an investigation into widespread allegations that one of his predecessors in office was named in attempts to interfere with tribunals in a particular region of the country. The result of this investigation, if it ever took place, remains unknown. The lower arm of the national parliament allegedly received up to eighty-two petitions, complete with bank statements, concerning how alleged corruption marred the work done by tribunals across the country.¹⁰²

The question could be asked: why bother with allegations of corruption that are not proven? Although legitimate, settling this issue on the basis of this

⁹⁷ See Ugochukwu (2009), *supra* note 11, p. 103.

⁹⁸ *Ibid.*, p. 102. A similar thing happened after the after the 2003 elections only that the difference this time was that the judge involved, George Oguntade took his spoil, promotion to the Supreme Court after delivering the required judgment. He had ruled after that year's presidential election that though the law under which the election was organized was not properly passed by the National Assembly, it did not affect the election at all since the law had already been applied and nullifying the election would lead to widespread disruption of national life.

⁹⁹ A. Adegbamigbe, "On a Rescue Mission", *The News* 31:21, 01 December 2008, available at: <<http://thenewsng.com/cover-story/on-a-rescue-mission/2008/11>>, accessed 11 April 2011.

¹⁰⁰ Ugochukwu (2009), *supra* note 11, p. 100.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*, p. 101.

question neglects the negative consequences of perceived corruption as opposed to actual or proven corruption. Corruption surveys do not agree on the percentage of proven cases; rather, perception is critical to the extent that its impact can be more deleterious than actually proven cases. The Nigerian situation exemplifies this to a great extent. On the basis of the number of cases that are actually proven and in which the corrupt persons were punished, it could be concluded that the level of corruption in Nigeria's electoral tribunals is not as grim as imagined. Yet when the proven cases are placed alongside widespread allegations, which in most cases remain unproven only because political calculations frustrate the commencement of investigations, it becomes clearer that the less the courts are exposed to such cases the better for the society.

In addition to my claim that electoral adjudication exposes courts to avoidable corruptive practices, decisions rendered in cases where corruption had possibly taken place are often not well considered and come back to haunt the political system. A court faced with the same facts in two different cases that arrives at two contradictory decisions has a mountain to climb in extricating itself from claims that it had been corrupted. The political system has an even harder job picking through a cluster of opposing judgments on similar facts. Apart from the cases arising from previous elections that I have already mentioned, after the 2007 elections the governorship results in Kebbi and Sokoto states presented similar facts before the tribunals established in each state. Those tribunals reached the same verdict while on appeal the Court of Appeal strangely came to two different verdicts. Not so surprising was the little matter of the more-favorable verdict going to the party in the case in Kebbi state who is married to the president's daughter.

In governorship election cases, the Court of Appeal is the final court; no further appeals are possible after its verdict. As in all other common-law jurisdictions, Nigeria's legal system thrives relatively on the certainty of judicial precedents. Assuming that a lower tribunal is faced with a future situation that would require the application of the two contradictory judgments of the Court of Appeal on the same facts, which one would such a tribunal choose? The dilemma is made more real given that the Court of Appeal did not indicate that it was departing from the earlier judgment, as required by the principles of precedent.¹⁰³

Second, when a court takes a stand on, say an electoral case, even before reviewing the facts and applicable legal principles, it puts itself, the judicial institution, and the political system in great peril. In a situation not so different from the one analyzed above, such a court is forced into judicial calisthenics in the effort to arrive at the desired answer. When that is the case it is possible for

¹⁰³ This concern is discussed in greater detail by E.Essien, *Conflicting Rationes Decidendi: The Dilemma of the Lower Courts in Nigeria*, 12 *African Journal of International & Comparative Law* (2000), 23.

the court, through a single judgment, to unlock ghosts that can menace the political and legal system for years. One such case that readily springs to mind, and which has wreaked incalculable havoc to popular electoral participation and democracy in Nigeria, is the (add date here) decision of the Supreme Court in *Onuoha v. Okafor*.¹⁰⁴ This case was a clear example of people seeking resolution of a political conflict gravitating to the courts because political branches that should have ordinarily dealt with the issue acted unfairly.¹⁰⁵

In this case a contestant who won his party's nomination to the ballot had his name removed from the list by his political party without offering any cogent reasons for doing so. In its judgment, most likely tainted by corruption, the Supreme Court confounded even itself when it held that the question of which of two contestants should represent a political party in an election was political and that the courts had no jurisdiction over it. It did not matter that in arriving at its choice, as happened in this case, the party subverted its own internal procedures for choosing a candidate. Up until 2006 when a new electoral law now prescribed that a political party wishing to substitute a candidate whose name had previously been included in the candidates' list should offer cogent and verifiable reasons for so doing, this judgment truncated internal democracy in Nigeria's political parties. As was a rampant practice during the 2003 general elections, political parties continued to change their candidates up to the eve of the elections, and in some bizarre cases well after voting had been concluded. Candidates who had won fair primary elections but were removed as candidates without justification and who sought redress at the courts were turned back because of this judgment.¹⁰⁶

What makes election cases in Nigeria special? How can such cases be stopped from being presented before Nigerian courts? I have to admit that it will be difficult to stop aggrieved politicians from flocking to the courts for redress since in a great many cases that may be the only option left to them. In addition, any arbitrary step taken to stop this flow of cases or to prevent legitimate grievances from being presented would run contrary to democratic principles. Yet from my standpoint, political cases are dangerous for the courts in Nigeria, which is a common belief. Following widespread complaints over the conduct of the 2007 general elections in Nigeria, the government, which benefited from that situation, formed a committee to suggest ways of reforming the electoral process. In its final report the committee delivered this timely warning: "While the courts have discharged [the] important responsibility [of adjudicating electoral

¹⁰⁴ (1983) 2 SCNLR 244.

¹⁰⁵ See Ferejohn (2002), *supra* note 23, p. 55.

¹⁰⁶ See generally H. Yusuf, *Democratic Transition, Judicial Accountability and Judicialization of Politics in Africa: The Nigerian Experience*, 50 *International Journal of Law & Management* (2008), 236.

complaints] creditably, care should be taken not to drag the judiciary into the political arena too often as this can affect their credibility.”¹⁰⁷

Yet the situation is not beyond redemption. Just as I am suggesting that limiting the manner in which political cases are taken to Nigerian courts could be an important anticorruption strategy, this could be further extrapolated to cover those conditions that facilitate political grievances that require only judicial intervention for their resolution. Though only of unproven and presumptive value, organizing better and more credible elections could reduce the number of possible complaints. The 2010 governorship election in Anambra state is a clear example. It had its shortcomings, but many who monitored it believed that the outcome reflected the will of the voters. For the first time to the knowledge of many Nigerians, many of the defeated candidates lined up to congratulate the victorious candidate. The fact that complaints regarding this election were only half-hearted proves that with more credible elections, complaints would stop being presented to the courts and therefore save them from both warranted and bogus corruption allegations.

V. CONCLUSION

It is without doubt that corruption is haunting Nigeria’s democracy. The vice not only undermines democracy, it also reduces the potential for economic growth and threatens the freedom and security of citizens.¹⁰⁸ In this paper I show how corruption is fed by prebendal Nigerian politics and how this has proved costly for the legitimacy and credibility of the courts. Because government decisions are politically constructed, more and more people seeking entry points for participation in the political process are left with no better option than recourse to the courts. Because the courts are surrounded by actual and perceived corruption, their exposure to political cases comes at heavy cost.

Politicians in Nigeria claim that there is an ongoing war against corruption. At this time that so-called battle appears to be a losing one. Where the courts have clear powers to participate in this war, they are also confronted by the menace of corruption. The factor of politics further complicates their positions either as anticorruption activists or as the forum where corruption is more likely to occur. Citizens struggling to free themselves from abuses that deny them participation in the political process are entitled to look to the courts for protection, but the intervention of the courts can only be fruitful if that institution is free from the inordinate control of the same political authorities from which the citizens seek

¹⁰⁷ See “Exclusive: The Electoral Reform Committee Report” Vanguard, 12 December 2008, p. 19.

¹⁰⁸ Barret (2005), *supra* note 72, p. 2.

legal protection. When maintaining political stability counts more for the courts than protecting rights or enforcing legal legitimacy, the tendency to view them as factions of the corrupt political elite escalates.

Since 1966 Nigeria has had a regrettable history of military disruptions of democratic governance. Periods of military rule are generally characterized by the whittling down of the powers of the courts. The return to democratic governance ought to strengthen the hands of the judiciary, especially its ability to resist control by the other branches of government. Where this is not possible, the courts would continue to face claims that it serves the interests of the political elite or those able to buy its judgments. Political cases only worsen the situation of the courts in this regard. However, since it may be clearly impossible to stop political cases from being presented before the courts, how to restrict the numbers and frequency of those kinds of cases is indeed a major challenge.

Some suggestions for achieving this may be in order here. Regarding electoral cases, I have already mentioned that conducting better elections that the participants consider credible and fair could be appropriate. Second, politics should operate under fairer rules that provide participants with avenues to seek redress for whatever grievances they may have. So much depends on them to keep the courts out of the political fray and in not tempting them into corruption if disputes cannot otherwise be resolved. As Dobel summarizes, "Corruption is a part of the human condition, and practical honest politics requires structures designed to limit, discourage, and channel these tendencies. Day-to-day politics must be conditioned by a concrete evaluation of the moral beliefs of citizens and their willingness to obey laws."¹⁰⁹ Politicians involved in proven acts of corruption must also take responsibility for such actions. In all the cases where judges had been punished for acts of corruption while treating election cases in Nigeria, those politicians responsible for corrupting them suffered no sanctions at all. This is a situation that has to change to discourage others from conducting themselves in the same manner in the future.

¹⁰⁹ Dobel (1978), *supra* note 45, p. 972.

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