THE JUDICIARY AND THE CHALLENGES OF GOOD GOVERNANCE IN NIGERIA AN EVALUATION - This article is published in (2008) 1 Journal of Private & Commercial Law P. 113

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INTRODUCTION

The term "good governance" is frequently used nowadays to denote best practices in the exercise or management of state power. Bad governance appears to be found on the opposite side of the spectrum. Bad governance is, therefore, conceived as the root cause of most of the evils associated with the acquisition of state power.

It is now almost settled that democracy is the form of government which best guarantees opportunities for good governance. Neither Montesquieu nor John Locke was concerned with forms of government, when they advocated for the separation of governmental power. Indeed, they appeared to be more concerned with how to minimize and not how to supplant the absolute power of the monarch. But their model has won the admiration of advocates of democracy. And it seems one could hardly speak about democracy today while overlooking the important role which the separation of powers plays in it. At the heart of the tripartite division of state power lies the important function of the judicial arm. Albeit, the third arm its role in good governance appears to be most challenging. This could be discerned from the enormity of trials which it has often been exposed to.

This paper attempts to outline the most important trials and the travails of the judiciary, in Nigeria. But, it is submitted that it has not always been travails as there have been moments of triumph as well. Attempts will also be made at suggesting fundamental or model principles of good governance and the tools with which the judiciary as an institution can utilize in contributing to entrenching good governance. For case of discussion only we shall segment the paper into: the fundamentals of good governance as it relates to the judiciary; its role during the post – independence era; the period of military dictatorship; the second republic era and; the present period of democratic governance.

FUNDAMENTALS OF GOOD GOVERNANCE

The concept of good governance has no precise definition. However the fundamentals of good governance refer to a standard setting model of good governance from which no deviation is permitted. In relation to the Courts, it means those principles that should guide them in discharging their responsibility of interpreting laws.

Anything beneath such standard should constitute bad, governance. Eight major characteristics have been associated with good governance[1]. By their nature, they are:

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1 **See script posted on the web: http//www.unescap.org**

> *"It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision - making. It is also responsive to the present and flaure needs of societ[2]".*

Clearly, there is need for an integrative, co-operative and united approach by all the three arms of government, in order to achieve good governance, in terms of the above principles. But it can also be safely assumed that the constitution, especially in Nigeria, has always contained adequate provisions which encapsulate all the principles outlined above. To this extent, the courts do not need any much input from the other two arms in the discharge of their responsibility. This point can be illustrated by discussing some of the principles.

PARTICIPATION

The court can ensure that citizens have an opportunity always to participate in governance, by interpreting statutory enactments, especially electoral laws, in such a way as to remove impediments to the free exercise of the franchise. Here then lies the agitation for a relaxation of the rules of standing; freer access to the litigation of election cases; the expeditious disposal of election petitions, etc.

Further more, the constitutionally guaranteed right to freedom of association and expression must be protected by the courts, through a liberal and purposive interpretation of the constitution, whenever its jurisdiction is invoked in this regard.

THE RULE OF LAW

This is one of the concepts upon which good governance is based. Due to its abstract nature, this concept has no precise meaning. Various writers from Aristotle[3], Bracton, Coke, John Locke[4], Wade[5], and Dicey[6] have given various definitions of what the concept of Rule of law is.

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2 **Ibid**

3 **Aristotle, Politics II Volume Ill Page 16 (Transl. Jowett Edition Davis) stated that the Rule of Law was preferable to that of any individual. Bracton was of the opinion that the world was governed by law, either human or divine and that the king himself might not be subject to man but "he is surely subject to God and to the law because it is law that makes him King".**

4 **John Locke's idea of the Rule of Law was that: 'freedom of men under government is to have a standing rule to live by, common to everyone of that society and made by the legislative power created it, and not to be subject to the inconstant, unknown, arbitrary will of another man". (See John Locke: An Essay Concerning the True Original extent and end of Civil Government (1960) Section 22).**

5 **Professor Wade in his book Administrative Law at Pages 22 - 25 classi meaning of the Rule of Law into five:**

- **(a) Everything must be done according to law.**
- **(b) Government should be conducted within a framework principles which restrict discretionary power.**
- **(c) The rule of law may mean that disputes as to the legality of governmental action are to be decided by Judges who are wholly independent of the executive.**

However, the most widely accepted definition is that of Professx A.V. Dicey who has given it three different interpretations:

(1) The absence of arbitrary power. No one is to be punished except for a distinct breach of law, established in the ordinary legal manner before the law courts.

This interpretation has been given constitutional effect by the combined effect of Section 36(1), (8) and (12) of the 1999 Constitution. The Judges have also given effect to these provisions that a person can only be tried by a Court of law or Tribunal duly constituted to ensure its independence and impartiality[7].

(2) Equality before the law. Thus, everyone whatever may be his rank or condition should be subject to the ordinary law and the jurisdiction of the ordinary Tribunals.

(3) That the general principles of the British Constitution - especially the liberties of individuals, such as personal liberty, freedom of speech and public meeting were the result of judicial decisions in particular cases. The Constitution to him was judge - made.

Most, if not all modem constitutions recognize the predominance of the rule of law. Hardly can there be any serious discussion about constitutional democracy without according the rule of law primacy. But the courts must be prepared to enforce the principals of the rule of law in a fair, fearless and dependable manner. For example, it is submitted that amounts to judicial abuse of the rule of law for a court to consciously overstep its constitutionally prescribed territorial jurisdiction, as happened recently in Enugu State, where a High Court purportedly gave an order which had the effect of removing the Governor of Anambra State from office[8]. This will not be in furtherance of good governance. The rule of law requires that the judiciary should be independent of the other two branches of government. May be the desired independence is still an ideal to be attained. But the judges themselves must constantly and consciously strive at maintaining even the present level of individual independence. They should as much as possible strive to shield themselves from political maneuver by politicians. On this point, we would like to point out that the present method of appointment of judges, which is by recommendation, is hardly adequate to guarantee individual independence of a judge. In theory, it is the National Judicial Council that recommends appointment of judges to the Superior courts[9]. But in practice, we have observed that politicians have exhibited strong influence on the choices made by members of the Council.

(d) Law should be even-handed between the Government and the citizens such there would be no unnecessary privileges and exemptions from law.

(e) No one should be punished except for a legally defined crime or offence.

6 **A. V. Dicey, Laws of the Constitution, 10th Edition, Page 202**

7 **See:** *Bamgboye v. University of Ilorin (1999) 6 S.C.N.J. 295*

8 **The court of appeal in** *Ngige v. Achukwu (2005) 2 N.W.L.R (Pt. 909) 123* **white allowing the appeal held inter aim, that virtue of Section 285(1) of the 1999 constitution, the High court of a state lacked the jurisdiction to entertain any suit for the determination of any question whether the term of office of a Governor of a state had ceased.**

9 **Sections 231, 238, 250, 256, 261, 266, 271, 276, 281 of the 1999 Constitution**

We submit that the method should be more open and transparent, with well spelt-out criteria. We suggest that a prospective applicant should complete an application form issued by the judicial Council. The names of applicants should be published in the media for public scrutiny. It might be easier, by this means to determine before hand the types of persons that aspire to administer public justice as well as the criteria used in recommending a candidate for appointment, If political leaders are subjected to public scrutiny before elections, there seems to be nothing wrong with using the same standard to adjudge prospective judicial officers.

The courts must ensure equal access to justice and should remain at all times the last hope of the common man. This requires reforms in the rules of procedure that impede access to justice, especially by the weaker members of society, such as street hawkers, urban squatters and slum dwellers, etc. The recent inclusion of a rule in the revised rules of the FCT High court rules, which permits of class action, is commendable as a step in the right direction, which is borne out of experience[10].

There are two types of judicial independence: the independence of the individual judge and institutional independence. Both species could be variously affected by the adequacy or otherwise of funds available to support the work of the court. Even the method of obtaining the funds matters a lot. Going cap in hand to the executive branch each time to secure the release of the vote for the judiciary is debasing and is capable of weakening its institutional independence. Inadequate funding of the judiciary is the most important factor that militates against access to justice. The constitution seems to provide for the funding of the judiciary[11].

TRANSPARENCY AND ACCOUNTABILITY

We do not need to emphasize this point anymore than stating that transparency simply denotes openness in the management of affairs. In relation to governance, especially the role of the judiciary, transparency should mean adherence to time honoured principles of justice and rectitude. There should le respect for precedent and the doctrine of *stare decisis,* for an example Abure, all, no court should be induced to make an order which it cannot justify or which is incapable of being enforced. To this end, we submit that every judge should be conscious of the role of public opinion, as may be articulated by the media, from time to time. It is therefore not enough for a judge to satisfy itself that it has power to make an order. He should go a step further to consider what the public might feel, having regard to the time the order is made, the status of the parties involved and all else that is geared towards transparency. In a country with a high degree of ethnic and other sectional cleavages it is important for the judge to always exercise caution in the administration of justice. If he acts in a particular way he could be accused of having favoured his tribesman or church member. Should he act otherwise, he might be accused of having taken a bribe or that he simply deferred to the wishes of the rich and powerful.

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10 **See: Order 10 Rule 9 High Courts of the Federal Capital Territory (Civil Procedure) Rules 2004.**

11 **Sections 84(1),(3),(4) and 162(9), 1999 constitution. But see the Supreme Court decision in** *A.G. Federation v. A.G. Abia State (2002) 6 N.W.L.R (Pt.764) 542.* **(The resource control case) and the Allocation of Revenue (Federation Account) Modification Order 2002.**

Accountability is a complement of transparency. It is important that the judiciary should ensure that its officers are accountable to the Dublic for whatever decisions are made, within the framework of constitutional guarantee of judicial immunity. But, beyond this is the perennial problem of bribery and corruption in public office, generally. It is intolerable behaviour for a judge who is expected to act as an unbiased umpire and do justice in appropriate cases.

Accordingly is a complement of transparency. It is important that the judiciary should ensure that its officers are accountable to the public for whatever decisions are made, within the framework of constitutional guarantee of judicial immunity. But, beyond this is the perennial problem of briber and corruption in public office, generally. It is intolerable behaviour for a judge who is expected to apply the law in judging alien turns around to break the very law by receiving bribe, inducement or gratification in order to twist the hand of justice. When this happens it becomes difficult to hold other public officials accountable for their action or inaction. The argument has always been that it is a 'Nigerian thing' especially in tints past when there was poor remuneration for judges. But with growing improvement in theft welfare package it is hoped that the problem of corruption in the judiciary will soon be minimized. Like Caesar's wife they must live above board. There are some vocations which require a measure of sacrifice and self denial, once a person accepts the responsibility.

SUSTAINING DEMOCRACY THROUGH A PURPOSIVE INTERPRETATION OF THE CONSTITUTION

The contemporary attitude is to interpret the constitution in such a way as to preserve the purpose for which it was ordained. The purpose of a constitution is to ensure that government is run according to predetermined rules. And the only form of government that is amenable to this is a democratic government. To this end, the constitution must be interpreted so as to serve the ends of democracy. On this score, the late Dr. Akinola Aguda has urged that our judges should move away from the common law tradition of conservatism and imbibe a more purposeful outlook. Only in this way may opportunities for social justice could be enhanced[12]. It is for this reason also that the Honourable Justice Bhagwati of the Supreme Court of India has exhorted judges to take activist and goal-oriented stance in the interpretation of the constitution[13]. In his own contribution the Honourable Justice Oputa stated what should be the objective of statutory interpretation generally:

> *"Law is interpreted not only because of the imperfections of language, but also because of the inherent impossibility of encompassing the complex realities of social intercourse-within the neat and logical framework of a statute, coupled-with the fact that the law has to be applied to the endless diversity of human situation*[14]".

It seems that there is an increasing awareness that the constitution is the epitome of the values and precepts of democracy and the rule of law. This is why them is a renewed interest in constitution-making. All over Africa and the rest of the developing world, people

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12 **T. A. Aguda The Judicial Process and Third Republic (1992) P. 6**

13 **P. N. Bhugwati, Domestic application of Human Rights Norms in Developing Human Rights Jurisprudence Vol. 4. P. 27 (1992)**

14 **C.A. Oputa, "Forward and the ascription of glory" in C.C Nweze & O.C. Nnamani Imprints on Law and Jurisprudence, (1996) P. xvi**

are increasingly concerned about the constitution by which their affairs are governed. They longer seem to be content with constitutions that are made for them. Rather they want one which they can call their own; one in which their wishes and aspirations are preserved - an autochteneuos constitution. This change in attitude by the people calls for equal change in attitude by the courts in the exercise of their interpretative jurisdiction especially in human rights cases.

This is why the Honourable Justice Kayode Eso would state that:

> *"Having regard to the nascence of our constitution, the comparative educational backwardness, the socio-economic and cultural background of the people of this country and the reliance that is being placed and necessarily has to be placed, as a result of this background on the courts, and finally, the general atmosphere in the country, I think the Supreme Court has a duty to safeguard the fundamental rights in this country*[15]".

We hope our judges will take a cue from the foregoing sentiments and live up to expectation. They really have a great role to play in leading the way of sustaining democracy.

TRIALS AND TRAVAILS OF THE JUDICIARY: THE POST- INDEPENDENCE ERA (1960 - 1966)

We consider it unnecessary to focus on the colonial era, since it is very clear that power was still wielded by the colonizing power, even in judicial matters. Our starting point should, therefore, be the post-colonial era, when power was transferred to the indigenous people.

It could be said that the greatest challenge of the judiciary at all time is how to keep the other two branches of government in check, by ensuring that they act within the limits prescribed by the constitution, and to minimize abuses that are inherent in the exercise of power, in regard to the constitutional guarantee of individual rights. In contemporary, constitutional jurisprudence, this task is expected to be discharged by the court in the course of its interpretative jurisdiction. It calls for a balanced, purposive and liberal approach to the interpretation of constitutional and other statutory provisions. But the judiciary in post-colonial Nigeria is reported to have adopted an unduly restrictive and austere approach to the interpretation of the provisions of the 1960 and 1963 constitutions, respectively[16]. The courts of this era have been accused of adopting a passive attitude of undue restraint and deference to legislative wisdom. For example, the decision of the Federal Supreme Court in the cases of *DP? v. Chike Obi*[17], *R. v. Amalgamated Press*[18], *Olawoyin v. A. G. (Northern Region*[19]) and *Adegbenro v. Akintola*[20], respectively, have been severely criticized as being too restrictive on the protection of individual rights which were put to question in those

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15 *Ariori v. Elemo (1983) S.C.N.LR. 18 at 42*

16 **See: G. Ezejiofor "A Judicial Interpretation of the Constitution: The Nigerian experience" in A.B. Kasumu (ed) The Supreme Court of Nigeria (1956 - 1970) Heinman Publishers, Lagos (1977).**

17 *(1961) 1 ALL N.L.R. 187.*

18 **Ibid at Page 199**

19 **Ibid at Page 269**

20 **Ibid (Part 2) at P. 469.**

cases[21]. Indeed, Professor Gaius Ezejiofor, in a seminal presentation damningly remarked that during this era:

> *"The judges probably feared that an active and interventionist policy of interpreting the constitution in a liberal spirit would lead to open confrontation with the politicians and the consequent weakening of judicial authority*[22]".

Another scholar has observed that had the courts of this era adopted a more purposive attitude to the interpretation of the constitution, the excesses of politicians of that time might have been put in check. This judicial attitude has been adjudged as one of the reasons for the fall of the first Republic[23].

It is submitted, however, that whatever the short coming of the judicial branch at this time should be viewed with deep equanimity as part of every learning process. More over, the judges of this era were still steeped in the common law judicial philosophy, which defers to parliamentary supremacy in legislative matters. It should be noted that most of the Judges were trained under the common law system with unwritten constitutions. Owing to this they might have failed to easily distinguish between an ordinary statute and a constitutional instrument. They probably needed some exceptional experience to draw them out this consciousness.

Another important dimension to the difficult situation the judiciary faced in the exercise of its interpretative jurisdiction in the post-colonial era may be attributed to a measure of imprecision in the language of some of the provisions of the constitution. In particular, the attempt by the British to export, almost wholesale, the Westminster model constitution to its ex-colonies led to a consequential problem of adaptation or configuration of its largely unwritten rules into written constitutions for the newly independent nations. This is aptly exemplified by the decision in the case of *Akintola v. Aderemi & Ors.*[24], decided by the Federal Supreme Court and the Privy Council. The point in dispute in this case had to do with the interpretation the provision of Section 33(10) of the Western Region Constitution which was an attempt at incorporating in express letters what was purely a rr of conventional practice in England. The greatest difficulty which the Federal Supreme Court had to contend with was the complete absence of precedent on the point in issue before it. In the words of Sir Lionel Brett, in a dissenting opinion:

> *"If is not on record that a situation analogous to the one with which we are now concerned has ever arisen in the United Kingdom, and it does not appear to me that there is a sufficiently clear as to what Her Majesty might with propriety do in such a situation to justify any presumption as to what the Governor... may lawfully do".*

In the face of such a complete lack of precedent in dealing with what is non-justiciable in England but made otherwise in our jurisdiction, as shown above, pitfalls in

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21 **See: Ezejiofor, Ibid at Page 167. See also C.C. Nweze, 'Judicial sustainability of Constitutional Democracy in Nigeria, etc' in CC. Nweze & B.O. Okere, (eds.); Essays in honour of Prof. Okonkwo (2000 A.D), Jite Books, and Port Harcourt. Pages 228 - 229**

22 **Ezejiofor up cit. P. 229.**

23 **See: C.C. Nwcze. Op. cit. P. 229.**

24 *(1962) All N.L.R 442*; **the Privy Council decision is reported in** *(1963) 3 W.L.R. 63*

decisions of the type which the courts of this era are now accused of are not totally abnormal or, at best, it could be said that they could hardly have been avoided.

Despite the above situation of helplessness the judiciary of the 1st Republic in Nigeria has been accused of partisan bias in favour of the ruling parties. And that the fact that each Region was controlled by an ethnics majority party predisposed the judges to a measure of ethnic nationalism in many of the politically sensitive cases that came before the courts. For an example the Alkali court is reported to have been used as an instrument of oppression or repression against the opponents of the Sarduana-led Northern People's Congress[25]. The situation was not really better in other regions, but in the Mid-West in particular, the cultural organization known as the Owegbe Cult to which many of the judges in that region owed allegiance had a pervading influence[26]. Indeed, Professor Ben Nwabueze has painted the picture (rightly or wrongly) as follows:

> *"The efficacy of a court's legitimating function depends on a number of factors..., the public confidence in the integrity of the courts is vital ... even an appearance of bias in favour of the government is calculated to undermine its acceptability and credibility. The experience of Nigeria from 1960 - 1966 illustrates this very well. The fact that, with one exception[27], all the constitutional cases went in favour of the government deprived the decisions of much of their legitimating effect...*
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> *The point here is not that ever one of the decisions handed down... between 1960 and 1965 was necessarily wrong in law, but that they should all have gone in favour of the government is remarkable, and naturally created the impression of political bias.... The situation was all the more lamentable because most of the decisions concerned individual liberties.. ..It began to look as if the courts were actively aiding the politicians in the persecution of opponents in the perversion of the constitution... This situation represented a real tragedy in Nigeria v political experiment....*[28]"

THE ERA OF MILITARY RULE

This is divided into two periods: 1966 - 1979 and 1983 - 1999. But for our purpose the two periods, in relation to the experience of the judiciary will be discussed together. Furthermore, we are not unmindful of the fact that the topic in hand deals with the role of the judiciary in democracy. An insight into its experience under military rule is, nevertheless, thought to be helpful and instructive, especially in terms of the lessons to be drawn from this aspect of our constitutional history. Perhaps, the greatest lesson here is that an overview of this era will help in deepening the attitude of all stake holders in the collective resolve to reject military rule, because it is an example of bad governance.

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25 **See: B.O. Nwabueze, Judicialism in Commonwealth Africa, Enugu & Lagos (1977) C. Hurst & Co.et al P. 275 - 276.**

26 **Ibid**

27 *Adegbenro v. Akintola & Anor. (1963) 3 W.L.R. 63.* **The ruling coalition government (N.C.N.C/N.P.C.) is reported to have severely criticized the Privy Council decision and almost accusing it of bias. See Nwabueze, op cit at P. 276.**

28 **Ibid P. 242 – 244**

The first casualty every successful military coup constitution itself. It usually undergoes various forms of 'torture', ranging from the suspension of some of its provisions; the modification of some others, to a complete abrogation of others. Clearly the idea of having a constitution is inimical to the nature of military rule. To this end, all democratic institutions established by the constitution are usually set aside. Curiously, however the judiciary and the courts are left to continue, albeit t bent knees. Its' constitutional power of judicial review[29] is usually emasculated and severely restricted with that devious and obnoxious legislative devise infamously known as the 'ouster clause'. The misuse or abuse of this mechanism constituted one of the objectionable aspects of military rule in Nigeria.

Even though many scholars have criticized the conservative stance of the judiciary in the first Republic, what remains undeniable is that it demonstrated its, suspicion of military intervention at the very onset of military rule in this country. In *Lakanmi & Org. v. The Ait-Gen. of the West*[30], the Federal Supreme Court in a unanimous judgment held that the military government led by General Ironsi (and later by General Gowon) was a product of a national necessity, within the meaning of the 1963 constitution.

That the extent of the power it could exercise must be gauged by the provisions of the constitution It could not be seen to exercise powers otherwise than the constitution allowed in emergency situations. It is submitted that there could not have been a more activist stance than this, because their Lordships only stopped shot of declaring the regime unconstitutional. Yet, the court's refusal to recognize as amounting to a revolution, the circumstances antecedent to Ironsi's assumption of power, has been described as naive. It has, indeed been forcefully argued that all the characteristic features of a revolution were present, and therefore the events amounted to a revolution[31]. It is further submitted, however, that whatever name the court chose to describe those events should be seen as a matter of semantics. The most important outcome of the case was the impact of the decision on the military government of General Yakubu Gowon, which immediately perceived the decision as a frontal attack on its legitimacy. To allow the decision to stand, therefore, meant an erosion of its power and authority over the whole federation. This could be discerned from its swift reaction when' only eight days thereafter, it promulgated Decree No. 28 of 1970 - *The Federal Military Government (Supremacy & Enforcement of Powers) Decree.* This decree 'overruled the Supreme Court's decision on the issue when, in its preamble it clearly declared that it was installed by revolutionary change and that its exercise of. Power could not be circumscribed or inhibited by any instrument. Indeed it went ahead to prohibit the courts from entertaining any questions respecting the validity of any Decree, Edict or Regulations made pursuant thereto.

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29 **Most of the modem constitutions of the nations of the world protect this aspect of judicial power. But it would be recalled that it was not so in the constitution of the U.S. from where it all began. Indeed it is to the ingenious credit of Chief Justice who in *Malbury v. Madison (1803) 1 Cranch 137* claimed and retained it for the Supreme Court of the United States, as a heritage for the universal community.**

30 **(1971) U.I.L. (Coram: Sir Adetokunbo Ademola, CJF, Sir Udo Udoma Sir Ian Lewis, Hon. Justice G.B.A. Coker and Hon. Justice Charles Olusoji Madarikan, FJJ.**

31 **See Abiola Ojo, Constitutional Law and Military Rule in Nigeria; (1987) Evans Bros. (Nig.) Publishers Ltd. P. 90.**

The impact of this Decree on the attitude of the judiciary towards acts of the military as from then onwards vacillated between activism and passive restraint. But it appears there was more of the latter. On isolated occasions one could here dicta such as that by J.I.C. Taylor, C.J. of Lagos State in *Re Mohammed Olayori & Ors.*[32] when he stated that:

> *"I am, as I know is every member of the Bench and every right thinking and honest member of our society, against prevailing conditions of corruption and embezzlement of public funds existing in the country... rocky, but if we are to live by the rule of law.. if we are to have our actions guided and restrained in certain ways for the benefit of the society in general, individual members in particular, then whatever status whatever post we hold, we must succumb to the rule of law. The alternative is anarchy and chaos.*
> (Underlining for emphasis)

The learned C.J. was reacting to an instance of violation of personal liberty by military personnel, in the guise of fighting corruption. In many cases, the Supreme Court condemned instances of abuse of the rule of law by the military[33] but regrettably, it appeared helpless in dealing with the problem of ouster clauses. In a number of cases, it accepted as a way of life the reign of this monstrous devise which impeded access to justice by the individual to ventilate his grievances against military tyranny[34]. Indeed, in *Nwosu v. I.S.E.S.A.*[35] the court stated that where a decree ousts the jurisdiction of the 'there was no dancing around the Furthermore, in *Obaba v. Mil. Gov. of Kwara State*[36], the court openly recognize that the constitution was subordinate to military decrees. Perhaps the only narrow corridor of hope was the policy the court had laid down that every court had the jurisdiction to determine whether its jurisdiction had been ousted in any given situation[37]. Additionally, that where a statute seems to take away the court's jurisdiction it should be interpreted restrictively, in order to preserve that jurisdiction. Short of these te court could not get around an ouster clause[38].

In the case of *Labiyi v. Moberuagba*[39], the Supreme Court gave that can be regarded as a hierarchy of statutes in a military administration. The Court held that from December 31, 1983 when the military terminated the civilian rule that was put in place on October 1, 1979, the position of the amts in Nigeria were as follows:

> *"(i) Constitution (Suspension and Modification) Decree 1984*
> *(ii) Decrees of the Federal Military Government;*
> *(iii) Unsuspended Provisions of the 1979 Constitution;*

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32 (1969) 2 All N.L.R. 298

33 **See for example the case of** Ojukwu v. Governor of Lagos State (1986) 2 S.C 277.

34 **See** Att-Gen. of the Mid-West v. Essi (1997) 4 S.C. 77; Osadebey v. Att-Gen of Bendel State (1991) 1 N.W.L.R. (Pt. 169) 525; Mustapha v. Gov. of Lagos State (1987) 2 N.W.L.R. (Pt.58) 536.

35 (1990) 2 N.W.L.R. (Pt. 135) 688.

36 (1994) 4 N.W.L.R. (Pt.266) 39

37 **See:** Barclays Bank v. C.B.N. (1975) 5 S.C. 175

38 **See:** Madubuike v. I.G.P. (1992) 3 N.W.L.R (Pt. 227) 70.

39 (1992) 10 S.C.N.J. 1. **See also** Military Gov., Ondo State v. Adewunmi (1988) 3 N.W.L.R. (Pt. 82) 280.

(iv) Laws made by the National Assembly before 31st December, having effect as if so made;

(v) Edicts of the Military Governor or Administrator of a State, and

(vi) Laws enacted before 31st December, 1983 by the House of Assembly of a State, or having effect as if so enacted".

The effect of this hierarchical arrangement of the statutes is that the Courts were bound to interpret any Decree as being superior to the unsuspended provisions of the 1979 Constitution. Therefore, no matter how fie judiciary wished to be liberal in their interpretative jurisdiction, they Dust so interpret the statutes. Ouster clauses in the Decrees were bound to be interpreted as derogating from the Constitutional provisions conferring jurisdiction on the Courts[40].

However, in *Okoroafor v. Misc. Offences Tribunal & Ors.*[41] Court of Appeal made an open declaration of war and frontally challenged the military to an intellectual battle at the gate of their own fortress- the ouster clause. The court, per Pats-Acholonu, WA (as he then was) delivering the lead judgment, intoned:

> *"Courts are not frightened of an ouster clause. They respect it but when an ouster clause seeks to make it impossible for the courts to protect the common man and make laws which cannot stand the test of reason or that affront to decency and intelligence, then a court should be careful not to lend its -weight to a law that would make it an enemy of the common man and not the last hope of the common man*[42]".

The same judge stated ex curia elsewhere but to the same extent that:

> *"However strong the language of a decree ousting the power of the court may be, it is the duly of the court to equally use its vast interpretative powers to thoroughly explore the horizon of the clause and the decree with a view, if need be, to blunt the razor-edge provision that would produce negativism*[43]".

His Lordship was guided by this attitude of mind in the later case of *Guardian, Newspapers Ltd. v. The Att. Gen. of the Federation*[44], where the Court refused to endorse the closure of Rutam House, Isolo, Lagos because of the alleged wrong-doing of the Guardian Newspaper even though the premises was shown to house other businesses. Government Attorney had argued that since the enabling decree ousted the court's jurisdiction, it could not inquire into the propriety of the closure, the interest of other businesses the premises not withstanding. Their Lordships did not only reject this submission, but went ahead to even question the logic and correctness of the law itself. Again, Pats-Acholonu, JCA (as he then was) had this to say:

> *"It is well known that even we mortals have sometimes in our weaknesses questioned some divine laws like the injunction that we should love our*

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40 *Gov. of Lagos State v. Dosumu (1989) 3 NW.L.R. (Pt. 111) 552.*

41 *(1995) 4 N.W.L.R. (Pt. 387) 57.*

42 *Supra at Page 78.*

43 **Pats-Acholonu I.C.K : "Threats to the Jurisdiction of Courts and the Rule of Law in Nigeria" in All Nigerian Judges Conference Papers 1995, P. 122.**

44 *(1995) 5 N.W.L.R. (Pt. 398) 703.*

enemies and do good to those who culminate against us. If in an unlikely case...of a Decree that states that every citizen should commence the act of destroying his own house as it is for the efficacy and stability of government, then the apologists of legal positivism enthusing in Austinian theory of legal formalism shall shout alleluia....should the court fold its hands when a law offends the grund norm set up by the military is violated by the very regime that sets it up?. .... a law that is inherently irrational an assault on the psyche of the citizen when it is extra-ordinarily in conflict with reason, is offensive and utterly hostile to rationality and so emptied of substance that it should be rejected by the people to whom it is directed ...such a law should not and ought not be enforced by the courts. To hide under the Austinian theory to enforce such a law is sheer timidity and an abdication by the courts of its responsibility".

Faced with ouster clauses in various decrees, the courts resorted to a rule of interpretation that enabled aggrieved citizens to seek redress under African Charter on Human and Peoples Rights (Ratification and Enforcement) Act. In the case of *Fawehinmi v. Abacha*[45], the Court of Appea1 held that the Act was superior to a Decree and that the ouster clauses contained in Decree No. 107 of 1993 or No. 12 of 1994 cannot affect its operation in Nigeria. This view was confirmed by the Supreme Court in *Abacha v. Fawehinmi*[46] where Ogundare, 3.5 .C. held *inter alia*

"Be it noted that while Chapter IV of the constitution was suspended for the purposes of the Act, no mention was made of Cap. 10 which was then merely in existence. I would think that Cap. 10 remained unaffected by the provisions of Section 4(1). A treaty is not deemed abrogated or mod Wed by later statute unless such purpose has been clearly expressed in the later statute".

The above and similar dicta characterized the attitude of our superior courts, especially in the twilight of military rule in Nigeria. Thus it could be concluded that the courts did not altogether scamper to safety with its tail in-between its limbs like a panic stricken dog, when faced with ouster clauses. Its reaction, albeit in measured doses, was methodical, adroit and steady. To have done otherwise, in the circumstance would have been like one running against a moving train. The consequences are better imagined This is especially so having regard to the fact that it was only by special grace that the courts were allowed to function in the first place. The military had clearly demonstrated that they could do without the courts by setting up special tribunals to try even simple and ridiculous offences or wrong-doing, such as the violation of sanitation bye laws. In many instances there was no right of appeal from those tribunals. Where any such right was conferred, the appeal lay to yet another special appeal tribunal[47]. At the level of the individual judge, his independence was constantly threatened with instant dismissal or other forms of indignity. In a society where life expectancy is very short, with limited opportunities fir sustenance outside the formal sectors of the economy, the dismissal of judge could have a grave impact.

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45 *(1996) 9 N.W.L.R. (Pt. 475) 710 at 746 - 747.*

46 *(2000) 6 N.W.L.R. (Pt. 660) 228 at 292.*

47 **See for example the Failed Banks (Recovery of Debts) and Financial Malpractices Decree No. 18 of 1994 (as amended) where appeals from the Failed Banks Tribunal were made to the Special Appeal Tribunal.**

Apart from its effect on himself as at individual there would be a rippling effect on his dependants. The extended family system is a socio-economic reality. For all the above reasons and much more, the judges had no choice but to be cautious in their approach to containing military onslaught on their independence and power.

THE SECOND REPUBLIC ERA

In the second Republic, unlike the first Republic, the courts appeared to be more bold and assertive in terms of their recognition of the important role of the constitution in democratic governance[48]. An attitude of a broad and liberal policy in the interpretation of the constitution was adopted by the Supreme Court[49]. However, it appears that it failed to relax its attitude to *locus standi* in human rights cases generally, and in election cases in particular. A few examples will be appropriate in order to bear out the points being made here. In *Adesanya v. The President*[50], the court took a particularly restrictive stance on the question of who possessed the requisite standing to challenge the violation of the constitution. It held as it had done in the first Republic that only a person whose civil right was infringed or threatened with violation could sue to protect it. It was not until 1987[51], the second edition of military rule that the court saw the need to relax its policy. The change in attitude, no doubt, must have been in response to criticisms by academic lawyers on the courts decision in the case of *Adesanya v. President*. Thus, *Fawehinmi v. Akilu*[52], the distinguished between standing to sue to protect a private right and standing to sue in the arena of public law. For the former, the requisite standing should be whether there exists a cause of action in favour of the litigant. But in the latter situation, the appropriate test would be whether the civil rights and obligation of the litigant is particularly affected thereby.

In the case of *Fawehinm v. Akilu*, the Appellant, a Legal Practitioner and friend to late Dele Giwa a Nigerian Journalist who was killed by a letter bomb in his residence at No. 25, Talabi Street, Ikeja on 19th October, 1986 applied to the Attorney-General of Lagos State for consent to prosecute the Respondents for murder.

When the Attorney-General of Lagos State was delaying in granting the consent, the Appellant applied to the High Court of Lagos State pursuant to Section 342(a) of the Criminal Procedure Law for leave to apply for a Writ of Mandamus to compel the Attorney-General to give the requisite consent. The application was refused on the ground that the Applicant had no *locus standi*. The appeal to the Court of Appeal was dismissed.

The further appeal to the Supreme Court was allowed. The Court adopted a liberal approach to deciding the *locus standi* of a person.

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48 **For example in** *Att.-Gen. of Bendel State v. Att.-Gen of the Fed. & Ors. (1980) 9 S.C 1* **the Supreme Court boldly checkmated the capricious exercise of Federal Legislative Power. See also** *Igbe v. Gov. of Bendel State (1981) 1 N.C.L.R 183; Jideowo v. Gov. of Bendel State (1981) N.C.L.R.; Obayuwana v. Gov. of Bendel State (1981) N.C.L.R. 174.*

49 *Att-Gen of Bendel State v. Att.-Gen of the Fed. (Supra)*

50 *(1981) 2 N.C.L.R. 358*

51 **See** *Fawehinmi v. Akilu (1987) 4 NWLR (Pt. 67) 794*

52 **Supra**

According to Obaseki, J.S.C.:

> *"The peace of the society is the responsibility of all persons in the country and as far as the protection against crime is concerned, every person in the society is each other's keeper. Since we are all brothers in the society, we are our brother's keeper. If we pause a little and cast our minds to the happening in the world, the rationale for this rule will become apparent".*

The Court had also held that:

> *"The narrow confines to which Section 6(6)(b) restricts the class of persons entitled to locus standi in civil matters have been broadened by the Criminal Procedure Law and the Constitution of she Federal Republic of Nigeria".*

This decision was a great departure from the strict approach to the issue of locus standi adopted in *Adesanya's case* and was a moment of triumph for the judiciary. This distinction was reaffirmed in *Owodunni v. The Registered Trustees of Cele & Ors.*[53]

In *Att. Gen. of Ondo State v. The Att. Gen. of the Fed. & CW*[54] and *The Att.-Gen of the Fed. v. Att-Gen of Imo State*[55] the court again applied restrictive rules of interpretation to deny the litigants standing to challenge election cases. More over the court of Appeal's decision in *Ovie-Wisky & Ors. v. Olawoyin & Ors.*[56] appears to be equally restrictive on the question of *locus standi*. In that case some political parties and other persons sought to question perceived irregularities contained in the voters' register and the registration exercise. The majority view was that a political party has no locus to question the revision of voters' register. Again, in *Onuoha v. Okafor*[57], the Supreme Court held that the selection of a candidate to stand an election was a 'political question', within the exclusive internal domain of the party. To that extent, a person should not be heard to complain that he was by-passed in the selection process in his party.

THE PRESENT ERA OF DEMOCRACY

It could be said that the greatest challenge facing our courts today is how to manage the euphoria of freedom occasioned by the new constitutional democracy. The wanton abuse of discretionary power to issue of interim orders which affect the political life of the public is an issue of concern to the entire populace. This is particularly noticeable in trial courts. Because of its notoriety, we shall here dispense with elaboration[58]. But suffice it to point out

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53 **(2000) 6 S.C. (Pt. 111) 60 at 84 - 85.**

54 **54 (1983) 2 S.C.N.L.R. 269.**

55 *(1982) 12 S.C. 274*. **See also** *Ovie-Wisky & Ors. v. Olawoyin (1985) 6 N.C.L.R. 156*

56 *(Supra)*

57 *(1983) 1 FNLR 217*

58 **Of particular note was the scuttling of the ANPP National Convention by an Abuja High Court in 2001 the injunction made against the Governor of Anambra State by Hon. Justice Egbo-Egbo of the Federal High Court in March 2004, and the abuse of territorial jurisdiction by the High Court of Enugu State in the same 'Dr. Ngige Saga. See, however, the recent Supreme Court decision** *Ngige v. Achumwu (2005) 2 N.W.L.R (Pt. 909) 123,* **where the Order was set aside as one given without jurisdiction aid the crafted resignation by the Governor declared a ruse.**

that the superior courts have not condoned this attitude. One wonders why a High court Judge should consciously abuse his power under the constitution in circumstances that he could not have ventured to do the same under military rule.

Another problem which the courts have to deal decisively with is the delay in disposing of election cases, on the one hand and the rather arbitrary termination of others on purely technical grounds, on the other. These are extreme sides of the same coin. It is desirable that disputes generally should be disposed of expeditiously Election disputes in particular require the earliest attention because the citizen's hope and aspiration in exercising his civic responsibility through the vote he cast is tied to the court's decision. The principal means by which the citizen participates in the democratic process is through the vote. It could be frustrating if the result of the exercise is weighed down unduly by delays in the judicial process.

On the other hand undue adherence to technical rules, especially in threshold issues in election cases is tantamount to a denial of justice all the same. The courts should deal more with substance rather than form, in order to assuage the feelings of a cross section of the populace, who now perceive that the courts could be used to scuttle genuine electoral victory by the rich and powerful.

By the various judgments delivered by the Supreme Court under the present dispensation, one can say that the judiciary has played its role well in enthroning good governance. Land mark judgments such as the eases of *A.G. Abia State v. A.G. Federation*[59], *I.N.E. C. v. Musa*[60] *A.G. Ondo State v. A.G. Federation*[61]; *A. G. Federation v. A.G. Abia*[62], dealing with the power of the National Assembly to legislate on tenure of Local Governments, Constitutionality of electoral guidelines by INEC, the Corrupt Practices and other Related Offences Act, 2000; allocation of revenue and Resource Control respectively. These judgments had re-emphasized the judiciary as the most important arm and stabilizing force in the sustenance of this democracy. It should be pointed out that there was due obedience by the other arms of these judgments.

On the other hand, the federal Government failed to obey the judgment of the Supreme Court in the case of *A.G Lagos State v. A.G. Federation*[63] in which the court held expressly that the President has no power to suspend or withhold the statutory allocation due to Local Government Councils Lagos State.

Uwais, C.J.N. at pages 91 - 92 stated expressly:

> *Next is the question whether the President of the Federal Republic of Nigeria was right to direct the Minister to Finance not to release statutory allocations from the Federation account to the States which created new local government areas or held elections into the new local government councils or failed to special account called "State Joint Local Government Account" as provided by Section 162 subsection (6) of the Constitution. It has been*

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59 (2002) 6 N.W.L.R. (Pt. 763) 264; (2002) F.W.L.R (Pt.10ℓ) 1419

60 (2003) 3 N.W.L.R. (Pt. 806) 72

61 (2002) 9 N.W.L.R. (Pt. 772) 222.

62 (2002) 6 N.W.L.R (Pt. 764) 542

63 (2004) 18 N.W.L.R. (Pt. 904) 1.

argued that the president by virtue of the "Oath of Office", which he took in assumption of the office, he is bound "to protect and defend the Constitution". In addition, the executive powers of the Federation, is vested in the President by Section 5 subsection (1)(a) of the Constitution such powers extend to the execution and maintenance of the Constitution. This is certainly so, hut question is does such power extend to the President committing an illegality? Certainly the Constitution does not and could not have intended that. As I have already shown, the creation of new local government areas or councils is supported by the provisions of the Constitution. In other words the taking of such a step or act by Lagos State is not unconstitutional as thought by the President. The Constitution fully recognised the step taken except that there is still one more step or hurdle to be taken or crossed by the National Assembly for the plaintiff to actualize the creation of the new local government areas. Our attention has not been drawn to any other provision of the Constitution which empowers to President power of withholding or suspending any payment of allocation from the Federation Account to Local government Councils or to State Government on behalf of the Local Government Councils as provided by Section 162 subsections (3) and (5) of the Constitution".

It is our contention that, it is not the duty of the executive to interpret the Supreme Court judgment and to insist that the allocation due to the Local government councils will only be released if the State Government reverse to the 20 Local government Areas recognized by the Constitution as listed in the schedule to the Constitution. In the judgment of the court, there is a positive order directing immediate payment, and injunction restraining the President from withholding the monies. It is unfortunate that the President failed to disobey the Court Order until recently when he very reluctantly did, following the intervention of some prominent, well-meaning citizens. This is a dent on the image of a supposedly democratic government that is supposed to be guided by the rule of law. It is even worse for the image of Nigeria as a country, in the community of democratic countries of the world.

There can be no good governance where the rule of law does not prevail. It is the duty of both the executive and the legislature to abide by decisions of the judiciary.

CONCLUSION

The judiciary has an important role to play in ensuring good governance especially in a democracy. From the Republic through the military era and under the present democratic dispensation, the judiciary has been a stabilizing factor in ensuring good governance. It may not have performed excellently, but it did deliver quality service on many occasions, taking into account the political climate in which it acted in some of those times. It has through its decisions at various levels checked the excesses of both the executive and the legislature. It had its own share of trials especially under military dictatorship with ouster clauses in various edicts and Decrees, as well as wanton disobedience to court orders. It is to the credit of the judiciary that in the face of the ouster clauses, it had with great ingenuity in interpretation, sometimes circumvented them. On the average, it could be said that it has been tried and tested and can easily overcome similar difficulties in the future.

Under the present dispensation one can say that the judiciary has succeeded in promoting good governance; as the decisions of the courts attest. It is hoped that the other arms of government will obey the decisions of the Courts as this is the only way the role of the judiciary can be adequately felt.