

TRANSITIONAL JUSTICE, JUDICIAL ACCOUNTABILITY AND THE RULE OF LAW

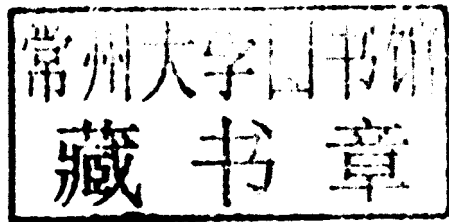
HAKEEM O. YUSUF

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Transitional Justice, Judicial Accountability and the Rule of Law

Hakeem O. Yusuf



First published 2010
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
270 Madison Avenue, New York, NY 10016

A GlassHouse book

Routledge is an imprint of the Taylor & Francis Group, an informa business

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Typeset in Times New Roman by
Taylor & Francis Books
Printed and bound in Great Britain by
CPI Antony Rowe, Chippenham, Wiltshire

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British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloguing in Publication Data

Yusuf, Hakeem.

Transitional justice, judicial accountability and the rule
of law / Hakeem Yusuf.

p. cm.

ISBN 978-0-415-57535-5

1. Law reform–Nigeria. 2. Justice, Administration of–Nigeria.
3. Rule of law–Nigeria. 4. Transitional justice–Nigeria. I. Title.

KTA470.Y87 2010

347.669–dc22

2009045985

ISBN10: 0-415-57535-4 (hbk)

ISBN13: 978-0-415-57535-5 (hbk)

ISBN10: 0-203-85175-7 (ebk)

ISBN13: 978-0-203-85175-3 (ebk)

Transitional Justice, Judicial Accountability and the Rule of Law

Transitional Justice, Judicial Accountability and the Rule of Law addresses the importance of judicial accountability in transitional justice processes. Despite a general consensus that the judiciary plays an important role in contemporary governance, accountability for the judicial role in formerly authoritarian societies remains largely elided and under-researched. Hakeem O. Yusuf argues that the purview of transitional justice mechanisms should, as a matter of policy, be extended to scrutiny of the judicial role in the past. Through a critical comparative approach that cuts through the transitioning experiences of post-authoritarian and post-conflict polities in Latin America, Asia, Europe and Africa, the book focuses specifically on Nigeria. It demonstrates that public accountability of the judiciary through the mechanism of a truth-seeking process is a necessary component in securing comprehensive accountability for the judicial role in the past. *Transitional Justice, Judicial Accountability and the Rule of Law* further shows that an across-the-board transformation of state institutions – an important aspiration of transitional processes – is virtually impossible without incorporating the third branch of government, the judiciary, into the accountability process.

Hakeem O. Yusuf is a lecturer in Law at Queen's University Belfast.

Transitional Justice

Series Editor: Kieran McEvoy

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Acknowledgments

I incurred many debts in the course of writing this book principally from its origins in my doctoral research work. It is virtually impossible to pay tribute to all those who have in one way or the other assisted me in that research effort. But I am obliged to offer a few words to acknowledge the contributions of some of those who easily come to mind. My special gratitude goes to Professor Scott Veitch, my first PhD supervisor. My indebtedness remains profound. He is simply the best. His research guidance was not only thorough, but delivered in a most inspiring and gentle manner. I benefited and continue to benefit immensely from his pastoral support. In this regard also, I must remain indebted for the supervisory and pastoral support of my second supervisor, Professor Jim Murdoch. In a similar vein, I must express my appreciation to Dr. Francois du Bois (Nottingham, Law School) and Dr. Gavin Anderson (Glasgow Law School), who examined my PhD. I benefitted from their comments in reworking the doctoral thesis that constitutes the backbone of this book.

I was very lucky to be at Glasgow Law School simultaneously with a post-graduate research team commendably led by Professor Emiliios Christodoulidis. I remain obliged for his support and role as my 'shadow' supervisor and friend. It is equally important to express my gratitude to all the administrative and support staff of the Glasgow Law School. Dr. Kay Munro, Mrs Lorna Brown, Susan Holmes, Kirsty Davidson, Claire Manning and Alison Craig deserve special mention. I am especially grateful for the untiring patience and prompt assistance of Rona Cameron.

I received invaluable financial support through the good offices of my former boss, Professor Yemi Osinbajo (SAN) and Ade Ipaye Esq. Don Ferencz of the Planethood Foundation (New York) also came to my aid when financial challenges threatened the actualisation of the research that accounts in part for this book. The School of Law, University of Glasgow Research Scholarship gracefully came in as a final relief from financial worries affording me the opportunity to devote full attention to my doctoral.

I treasure the moral support of Uthman and Mutiat Adeyemi, Dr. Kamil Omotesho, Professor Mashood Baderin (Head of Law School, SOAS UK),

Dr. Ismail Ibrahim, Dr. Abdulhakeem Mobolaji, Shafi Elegebede, Michael Glesson and Yasir Uthman. Their friendship has been invaluable in the course of my academic career in the United Kingdom and Northern Ireland.

I thank Khadijah, Aisha and Maryam for their forbearance. To my dear wife Karimah, I remain ever grateful for her constant engagement with me on the theme of this book and her patience and understanding for my long periods of study and sometimes withdrawal from all the little things she treasures. Her support has been unstinting all these years. Others too numerous to mention are not forgotten. Mrs Amudat Oyelola, Chief Librarian, Rotimi Williams Legal Resource Centre, Lagos State Ministry of Justice (Lagos, Nigeria), ensured I got all the Nigerian cases adverted to and timely too. I remain much indebted. Special thanks are due to Professor Abimbola Olowofoyeku, former Head, School of Law, University of Brunel, Uxbridge for agreeing to write the foreword to this book.

Lastly, I must put on record the editorial support of the Routledge Transitional Justice Series Editor, Professor Kieran McEvoy (School of Law, Queen's Belfast). Similar thanks go to the Editorial Team at Routledge; Dr. Colin Perrin, Holly Davis, Emily Canvin and all others who have worked wonderfully behind the scenes to get this book out in such a short time.

Foreword

Professor Abimbola Olowofoyeku

Transitional Justice, Judicial Accountability and the Rule of Law, by Hakeem Yusuf, is a much welcome addition to the literature on judicialism in general, and on the judiciary and transitional justice in particular. The judiciary, as an institution, and the activities of individual judges have come under increasing scrutiny in Western societies in recent times. Much scholarly and journalistic effort has been bestowed on these by judiciary watchers in the USA, Canada, the United Kingdom, Australia, and South Africa, for example. Detailed scholarly scrutiny of the judiciary's accountability for its role in former authoritarian societies now in democratic transition has been long overdue. Yusuf's book fills this gap.

The rule of law is an important developmental instrument in any society. Its role in transitional societies is even more crucial since it is usually an early casualty in authoritarian and conflict environments. The judiciary – that bastion of freedom and last defence of the citizen against the tyranny of the state – is inevitably the custodian of the rule of law. It is therefore remarkable that, as an institution, it often escapes the scrutiny and (sometimes) the retribution that other former state actors in post-conflict and post-authoritarian societies attract for their pre-transitional roles. This benevolent gift of providence rightly deserves to be challenged. It is very difficult for authoritarianism to prevail without some judicial complicity. Despots have a need for legitimisation of their rule. This cannot come solely from the barrel of a gun, since the acquiescence of the majority of the populace is required for any government to function. The best form of legitimacy is that conferred by the courts, and despots are always extremely grateful and generous with their rewards for any judicial endorsement of their authority. Despots also need a functional judicial system, even if it is one that is totally subjugated. After all, someone has to interpret and adjudicate on their “legislation”, in whatever way manifested.

The courts have a formidable arsenal of engagements that would amount to culpable complicity if done by any other state actor. There is always the doctrine of necessity, or the revolution theory, or Kelsen's *grund norm*. After all, someone has to govern, and whoever it is that manages to overthrow an existing legal order in a manner not contemplated by that legal order would

logically be the one who has to govern. Their success in overthrowing the old order begets its own legality. The rule of law (at least, as it is understood in Western democracies) is often sacrificed on this altar of convenience. This is what one of my former PhD students has described as the “unholy alliance” (between the nation’s judiciary and military juntas). The judiciary thereby legitimises the authority of the despot.

A significant amount of soul-searching normally follows the end of authoritarian rule or ugly and genocidal conflicts. The “truth and reconciliation” commissions or “war crimes” tribunals that sometimes ensue are normally obsessed with the past activities of the fallen dictators, their police, armed forces, security services, and their thugs. Rarely does the spotlight fall on the judiciary, without whose cooperation or support hardly any despotic regime could survive. This is a serious (and perhaps fatal) flaw in the healthy development of transitional societies. Yusuf argues in this book that transitional justice mechanisms should extend as a matter of course to scrutiny of the judicial role. He has a good point, and presents his case convincingly. His arguments speak clearly for themselves and need no embellishment. But I would add this. Without a clear understanding of the part played by the judiciary (institutionally and individually) during a dictatorship, the society’s healing would not be complete, valuable lessons would not be learned, and the past may well repeat itself. If it is the same judges who sacrificed the rule of law to prop up a despot that are now to be converted without question into the custodians of the rule of law in the post-authoritarian period, the transitional society is missing a trick. Is this institution clean? Can these judges make the required transformation? How did they perform in the previous regime? Were they “collaborators”? Were they intimidated into silence and compliance? Were the “troublesome” (i.e., forthright) judges removed (by dismissal, assassination, etc.) and replaced with those who could be trusted to support the regime? What should now become of those dismissed by the previous regime? And those appointed to replace them?

Traditional notions of judicial independence militate against these kinds of inquiry. Should these judges not be faced with the kinds of judicial accountability systems that they are familiar with and signed up to, rather than some unexpected and unpredictable scrutiny? Yet Yusuf contends that those conventional mechanisms for judicial accountability clearly fail to achieve their intended purpose during periods of authoritarian rule, therefore necessitating alternative mechanisms in the post-authoritarian transition. This is controversial, and harbours a potential risk of unwelcome witch-hunts if care is not taken. But it is a thesis that is well worth serious consideration. There are no easy answers here, and the reader is guaranteed a thoroughly enjoyable journey through this erudite and thought-provoking analysis, which makes a substantial contribution to the debates on transitional justice.

Abimbola A Olowofoyeku
Brunel University

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Introduction

Transitional justice, judicial accountability and the rule of law

Judicial accountability is an oft-neglected theme in transitional societies. This book is an attempt to generate scholarly interest in what has been a relatively neglected aspect of transitional justice theory and state practice. In the field of transitional justice, not much attention has been directed at institutional accounting for judicial governance in the period of social upheaval. Yet, it is recognized that the judicial function plays a central role in reinstitution of the rule of law. Despite a general consensus that the judiciary plays an important role in contemporary governance, accountability for the judicial role in formerly authoritarian societies remains largely elided and under-researched. I argue that the role of the judiciary in transitional societies is of a nature that cannot and should not be ignored. My book contends that the purview of transitional justice mechanisms should, as a matter of policy, be extended to scrutiny of the judicial role in the past. I analyze the relevance of incorporating accountability for the judicial role in governance during an authoritarian period into transitional justice processes.

I examine the judicial role in the transition experiences of post-authoritarian and post-conflict polities in Latin America, Asia, Central and East Europe, and Africa (with an extensive focus on Nigeria). The comparative analysis demonstrates the significance of the judicial role in past, current and future governance. I argue that the nature of that role commends the need for judicial accountability in the process of transition as a necessary measure for securing comprehensive accountability for the past, facilitating institutional reform and transformation as part of the process of political change.

There are currently various approaches to achieving institutional reform of the judiciary in post-authoritarian and post-conflict states. However, the judicial reform agenda, as currently configured, remains incapable of delivering on the expectations of institutional reconstruction due to the neglect of a backward-focused mechanism to address what went wrong in the past. There is the need to incorporate a publicly accessible backwards-looking mechanism like a truth-seeking process offers an opportunity for identification and institutional acknowledgement of the judicial role in governance at the important *transition moment*. I argue a case for incorporating accounts

of what I refer to as judicial governance in the remit of truth commissions to facilitate a complete account of the past as well as provide for a robust market of ideas for institutional transformation of the judiciary much as is done through such processes for the other branches of government. Across-the-board transformation of state institutions, an important aspiration of transitional processes, is virtually impossible without incorporating the third branch of government, the judiciary, into the accountability process.

Method and approach

The focus in this book is not on transitional justice in the abstract. I am specifically concerned with evaluating what it means to engage with the judiciary as the third and vital branch of government in societies experiencing political change. Thus, this book explores the nature of transitions through concrete and time-bound analysis of specific institutional dynamics and social expectations with particular reference to the judiciary. The relevance of traditional mechanisms for accountability of the judiciary (including congressional hearings, parliamentary sovereignty, appellate jurisdiction, removal of judges, etc.) are important to foster the proper functioning of the judiciary. But they are not the route explored in this book. Rather, my book proposes a fundamental departure from the institutionalized forms of judicial accountability principally on the argument that transitional societies are not normal societies. A major premise of the study is that these conventional mechanisms for accountability of the judiciary (for any of a myriad of reasons) did not, at the time of authoritarian rule, do what they were designed to do. There is thus a need to resort to an alternative, and hopefully, effective accountability mechanism(s) in the post-authoritarian transitions.

Adopting a comparative approach, I evaluate the judicial role in Nigeria's transition to democracy after nearly three decades of military authoritarian rule. This account of the Nigerian transition explores the issues that the judicial role raises with regard to the past and the transition to democracy. I analyze why it is necessary that the judiciary, as the third arm of government should be called to account for its role in an authoritarian past. The analysis in turn raises the problem of holding judges to account at periods of political change.

I argue that scrutiny of the judicial function for its previous exercise of power, specifically in an authoritarian context, is made all the more important by the critical role the judiciary plays in post-authoritarian societies all over the world. This is especially the case with the growing incidence of judicialization of politics and the increasing visibility of the judicial function in governance. I argue that institutional transformation of the judiciary following a period of authoritarian rule is critical to the survival of democracy and the rule of law. The mechanism of choice identified in this book for scrutiny of the judicial function in transitional societies is the truth commission which has become an

important feature of most transitional justice processes in post-conflict and post-authoritarian societies.

At this point, it is relevant to offer some background for what could be regarded as considerable advertence to American jurisprudence and theoretical literature with regard to the discussion of judicial accountability in the first part of this book. Historically, Nigeria started out its post-independence existence as a Westminster-type political arrangement but subsequently translated into an American-styled federation. The course of governance (including the judicial) in the country has been shaped not only by its current political leanings, but also historical antecedents. In view of these contextual factors, comparative insights from both the British and American legal and political experiences are germane to a discussion of Nigeria's judicial institution. Thus, I draw substantially on Anglo-American judicial traditions and experiences in articulating the case for accountability of the judiciary for the past in the context of the country's transition.

However, it goes without saying that the post-authoritarian experience which drives the major arguments made on the need for scrutiny of judicial governance is glaringly absent in the contemporary political experience of these two jurisdictions. They thus provide limited, if any, value in that crucial respect. Happily, I have found, on this score, substantial symmetries with the Nigerian experience in the post-authoritarian transitions in Latin America, and Central and Eastern Europe (CEE) and some parts of Africa and Asia. Thus, the second part of this book in particular benefits from substantial comparative insights, especially from Central and Eastern Europe given the prominent judicial constitutionalism witnessed in the course of the 'velvet' revolution that took place there in the post-Soviet period.

Structure and chapter outline of this book

The book is broadly divided into two parts. Each part sets out the two strands of the arguments on the relevance of judicial accountability for the past. The first four chapters generally lay out the proposition that the judicial role in the past justifies the call for accountability of the judiciary for its past role in governance. The last three chapters analyze how the strategic nature of the judicial function in post-authoritarianism necessitates a transformed and accounted judiciary.

In the first chapter, I introduce normative and theoretical consideration of the central theme of the book. I examine the accountability gap stemming from the lack of focus on the role of the judiciary in the past. I then outline a theoretical basis for such accountability in the context of post-authoritarian transition. I argue that at times of momentous political change, it is necessary to address the role of the judiciary in a troubled society. Doctrinal notions of judicial independence and allied principles (designed for the proper conduct of the judicial function) clearly stand in the way of the case for accountability

of the judiciary for the past. However, recognition of the dynamics of the transitional status of the society offers substantive grounds for challenging the strong intuitive objections to the third estate of the realm.

I address the challenges to including judicial accounts for the past in the remit of a truth commission in the next chapter. Nigeria constitutes the specific case study in this book and provides contextual basis for key arguments with regard to the relevance of accountability of the judiciary for the past. Based on this, I examine the post-authoritarian transitional justice arrangements in the country as they relate to the theme of this book. I trace the circumstances that led to the truth-seeking process, the Human Rights Violations Investigation Commission (the Oputa Panel) established by the government of President Olusegun Obasanjo in 1999 as part of the transition from military to civil democratic rule in the country. It did not focus on the judiciary despite its extensive institutional hearings which supplemented its investigations of gross violations of human rights through individual petitions.

Evaluation of the work of the Oputa Panel in the context of the post-authoritarian transition in Nigeria is important in view of the fact that it constituted the central mechanism for addressing transitional justice concerns following almost three decades of military authoritarianism in Africa's most populous country. There is also reference to the *Oputa Panel* case which played a significant part in the eventual refusal of the initiating administration not to implement the Panel's recommendations, but more importantly symbolizes the significance of the need for judicial accountability in transitional justice processes.

Nigeria is not alone in the neglect of judicial accountability for the past in transitional contexts. This informs the discussion in Chapter 3. I analyze the normative conception and practical application of the judicial reform agenda at the international and comparative levels. The need for judicial reform, which has institutional independence and integrity or accountability as one of its main objectives is a major concern in the practice of transitional states' institutional reconstruction. A major premise for the discussion of judicial accountability in transitional societies is recognition of the significance of the judicial institution in restituting rule of law. I assess the current regime of judicial reform in transitional contexts. In this chapter, I examine the international approach to and comparative experiences of judicial reform. I interrogate the prevalent judicial reform agenda in the context of transitional states given its objective of institutional legitimacy, transformation, accountability and effectiveness. Critical analysis of the current reform mechanisms deployed in transitional societies in Central and Eastern Europe, Latin America, Nigeria and elsewhere, provides useful insights to the deficiencies of the current regime. Considerable resources have been devoted to the judicial reform agenda by international, regional and national stakeholders, yet the empirical evidence generally discloses a dismal picture of the results achieved particularly with